

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

THAILAND

EXECUTIVE SUMMARY

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

Priority Actions Requested in 2006

- **Appoint Independent Commission to Combat Corruption:** The copyright enforcement system in Thailand is so riddled with raid leaks, evidence of payoffs and undue influence that effective enforcement against large-scale pirate production facilities in Thailand is stymied. IIPA recommends the formation of an independent commission to collect instances of irregular practices, followed by recommendations to prosecute individuals who have been found to have illegally tampered with legal or enforcement processes.
- **Tackle Optical Disc Pirate Production:** Optical disc piracy in Thailand continues to devastate the domestic market and Thai-produced pirate product continues to be destined for export. Thailand's Optical Disc Act went into effect on August 29, 2005 to regulate the 42 known plants (155 lines, 542.5 million disc production capacity) and to smoke out underground plants. In addition to requiring the use of internationally-recognized SID code, Thai authorities must adopt a plant visit and exemplar collection strategy in 2006. After plant visits, follow-up enforcement efforts should aim at dismantling pirate production capabilities, investigating pirate production, and prosecuting those responsible. Nothing short of substantial reductions in the amount of pirate product produced in and exported from Thailand in 2006 will be viewed as a success by the copyright industries.
- **Effectively Curtail Pirate Imports and Exports:** The industries report increasing imports from Malaysia and China, among others, and continue to note pirate exports from and transshipments through Thailand. Royal Thai Customs officials must seize more pirate copyright product in 2006 and must work with express mail carriers to establish mechanisms to inspect express shipments as other countries have done effectively in recent years.
- **Legitimize Usage of Published Materials:** Book piracy (mostly in the form of illegal photocopying) in Thailand continues to thrive, as neither the Royal Thai Government nor the universities will take a stand and ensure use of legitimate textbooks. The courts continue to recognize exceptions in the law that place Thailand out of the mainstream of international norms; the law must be amended.
- **Establish Continuous Enforcement Against Retail Piracy:** Enforcement against retail piracy in Thailand is impressive at times but depends on who is in charge and is rarely sustained. Enforcement against retail optical disc piracy was very effective during the first nine months of 2005, but then fell off precipitously. Thai authorities must establish predictable mechanisms so that pirates do not return full scale to the retail markets once major enforcement campaigns cease.
- **Effectively Deal with End-User Piracy:** Unauthorized use of business software in commercial settings causes the greatest losses to the business software industry in Thailand. While all requests made by the business software industry to the police for end-user and retail actions in 2005 were actively supported, the high rate of software piracy (77%) suggests that more needs to be done to get the message across.

- **Modernize Copyright Law and Join WCT and WPPT:** The draft Copyright Law amendments contain some positive elements, but should be further revised before passage to fully implement the WIPO Internet Treaties, the WCT and WPPT, and to include modern and effective enforcement provisions to eradicate all forms of piracy, including in the digital environment.

For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

THAILAND										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level								
Motion Pictures ²	149.0	62%	30.0	60%	28.0	60%	26.0	70%	24.0	65%
Records & Music	21.9	45%	24.9	45%	26.8	41%	30.0	42%	16.6	45%
Business Software ³	107.9	77%	100.0	78%	84.0	80%	57.3	77%	32.6	77%
Entertainment Software ⁴	NA	75%	NA	76%	NA	82%	47.3	86%	29.1	93%
Books	30.0	NA	30.0	NA	28.0	NA	28.0	NA	28.0	NA
TOTALS	308.8		184.9		166.8		188.6		130.3	

PIRACY AND ENFORCEMENT UPDATES IN THAILAND

Irregularities in Thai Enforcement System: The issue of copyright piracy will never be adequately addressed until irregularities affecting the enforcement system are addressed. It has long been suspected that high-ranking influences have been involved in the piracy business. Piracy, as compared with drug trafficking, for example (which was subject to a massive crackdown by the Royal Thai Government in 2004), is a relatively high-profit, low-risk activity (very few people have been convicted for copyright piracy and even fewer have ever served jail time for it).⁵ There is evidence of tampering directly with specific enforcement actions, including

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

² MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Thailand, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁵ In 2005, 356 motion picture industry cases adjudicated by the IP Court (CIPIT) resulted in criminal convictions. However, only one case resulted in the accused (a factory manager) actually serving a custodial sentence. Another defendant in an unrelated factory case was given a custodial sentence but remains out on bail pending his appeal to the Supreme Court.

payments. Leaks of raid targets are common and uniformly experienced by all the copyright industries in Thailand.⁶

Optical Disc Pirate Production Remains Severe: Pirate production of optical discs in major plants (CDs, VCDs, DVDs, CD-ROMs) remains a major hurdle to the growth of legitimate copyright industries in Thailand. There are 42 known plants in Thailand, with 155 optical disc production lines. A very conservative estimated capacity for production in Thailand stands at 542.5 million discs per year in the plants alone, greatly exceeding any rational legitimate domestic demand (estimated legitimate domestic demand stands at roughly 60 million discs).⁷ Most of the known plants (35) are in Bangkok or the provinces surrounding Bangkok, while the others (7) are in neighboring provinces to the East and Southeast of Bangkok closer to the Cambodia border (see Figure 1). Press has reported that there may also be plants near the borders of Laos and Burma; product sourced from Laos was seized in Thailand in 2005.⁸ The plants can generally produce any format, including audio CD, VCD, or DVD, employing kits to change formats (even from a blank CD-R or DVD-R line). Pirate optical discs manufactured in Thailand have shown up in 2005 in the United Kingdom, Belgium, South Africa, Taiwan, Sweden, and other parts in the EU, the U.S., and countries in Latin America. In 2004, the EU reported that 21% of all IP cases arising from pirate imports of copyright products involved imports from Thailand.⁹

In addition to plant production, there is increasing “burning” of all kinds of copyright content onto recordable discs (CD-R, DVD-R, etc.).¹⁰ In addition to Thai-produced product, piratical imports from Malaysia and China (as well as Laos, as noted above) are becoming an increasing concern.¹¹ Pirate product is being consumed domestically or exported for international consumption.

Retail Piracy (Optical Discs) in Thailand: As noted, pirate optical discs, whether factory produced or burned onto recordable discs, devastate the local market for copyright

⁶ The flow of information within the Economic Crime Investigation Division (ECID) is apparently the cause of many leaks. For example, on the day that authorities were preparing to raid retail shops in the Fortune IT Mall, all the targets had stopped selling and would only accept orders for CDs to be sent to customers by mail, explaining that ‘the police would be coming that day.’ The raids were cancelled. About two weeks later, another attempt was made; industry informed the police at 10 a.m. (at which time it was confirmed that product was still being sold in the shops), but by 1 p.m., the stores had ceased selling product and indicated the police would be coming that day.

⁷ See IIPA’s 2004 Special 301 report, at <http://www.iipa.com/countryreports.html>.

⁸ 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. On September 29, 2005, Royal Thai Police intercepted a private van which had just entered Thailand across the Nong Kai Laotian border control point. On being searched the vehicle was found to contain approximately 33,000 infringing discs, including pirate sound recordings. The driver was arrested and charged.

⁹ EU statistics from 2004 show that 20% of IP-related contraband (which includes but is not limited to copyright piracy) seized in EU ports emanated from Thailand, second only to China in terms of country of origin, and 21% of all cases involving pirate “audio CDs, games, software, DVDs etc.” were from Thailand, second only to China’s 26% and well beyond Malaysia (9%), Pakistan (8%), Indonesia (6%), and Hong Kong (5%). *DG TAXUD European Commission*.

¹⁰ Several raids are illustrative of the “burning” problem. For example, in 2005, the Motion Picture Association raided two “burner” facilities and seized a total of 133 CD-R and DVD-R burners. On July 5, 2005, the Metropolitan Police Bureau conducted a raid in Bangkok, resulting in seizure of eight CD-burner towers (40 writers in total), 14,775 burned pirate CDs, 3,650 blank CD-Rs and more than 100,000 inlay cards. The occupant of the premises, a 35-year-old male, was arrested and charged. On October 16, 2005, officers from the Thong-Lor Police Station raided residential units, seizing seven CD-burner towers and 33,400 burned discs, predominantly pornography (but including more than 1,000 pirate music CDs). Both cases are being reviewed by public prosecutors for further action.

¹¹ Industry reported that on March 13, 2005, Royal Thai Customs of Songkhla Province intercepted 30,000 pirate discs suspected to have originated in Malaysia.

materials.¹² The Royal Thai Government response has been to run sometimes effective but usually short-lived campaigns to weed out retail piracy from notorious pirate markets. Reasons for the mixed results include changing personnel, but more important is the failure to sustain such campaigns.¹³ For example, under the leadership of General Pol. Noppadol Soomboonsupt, significant progress was made in 2004 and well into 2005, until his retirement in October 2005. Progress was also seen from March through September 2005 in reducing retail piracy in Bangkok and vicinity, as General Jarumporn Suramani of the Bangkok Metropolitan Police Bureau was very active in carrying out *ex officio* raids against street retailers, particularly in the so-called "red zones" and "yellow zones" in the Bangkok area.¹⁴ The efforts of these committed men significantly reduced the availability of piracy, and for example, led some stalls (e.g., on Silom Road and Suan Lum Night Bazaar) to go out of business.¹⁵ Unfortunately, General Jarumporn was transferred to a new assignment in October 2005, and many street retailers immediately reopened their businesses, driving legitimate sales for U.S. copyright materials down almost immediately. The successor to General Jarumporn, General Chachawal Sooksoomjittr, has established nine "Centers," one for each police station in the Bangkok area, where right holders can file complaints, after which a raid would be carried out without the need for filing another complaint with the local police station.

In mid-November 2005, a new Special Task Force from the Criminal Investigation Bureau (CIB), under the command of Police Lieutenant General Ek-karat Meepreecha, Deputy Commissioner of CIB, was appointed, and by early December 2005, raiding activity of this Task Force had commenced. However, again, this Task Force is only scheduled to undertake six months of operations, ending April 30, 2006. This fairly illustrates the contrast between temporary measures and long-term, structured, fully financed enforcement. We strongly advocate that this task force's mandate be extended for a much longer period and that the Royal Thai Government provide adequate funding for such campaigns.¹⁶

Camcorder Piracy: The vast majority of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film's release

¹² Piracy affected the legitimate market considerably, leading to loss of jobs; some local Thai record labels went out of business in 2004-5. Larger record labels like GMM Grammy and RS reported revenue losses for the first time.

¹³ Thailand has employed various "campaigns" to address piracy in the past. In 2004, "Operation Eradicate" yielded seizures of pirated discs in the millions, as well as significant amounts of optical disc production equipment. This initiative was maintained through large raids in 2005 as part of "Operation Heat Wave." The largest raid of 2005 occurred on July 11, 2005, when police raided a townhouse in Thon Buri, seizing 102,000 pirated CDs estimated to be worth 35 million Baht (US\$884,696). Seven people were arrested. Also seized in the raid were 400,000 CD covers. The case has yet to proceed to prosecution and is currently being reviewed by the public prosecutor.

¹⁴ 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, Sukhivvit 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). Other Bangkok malls where pirated products are readily available include: Future Randi, Seacon, Seri, Future and Gankee. 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. As of October 2005, there were as many as 136 pirate vendors operating in Bangkok alone (compared with 109 vendors in 2004).

¹⁵ The motion picture industry reports that between January 1 and December 31, 2005, its representatives participated with the authorities in 1,490 raids resulting in the arrest of 1,138 suspected pirates.

¹⁶ The Special Task Force has around 80 policemen assigned to it with full authority to combat anti-piracy enforcement nationwide. The record industry reports that by early December 2005, 16 joint raids had been run with the record industry with over 25,000 audio discs seized. The Motion Picture Association reports that it undertook 866 joint raids with the Task Force in 2005 resulting in the seizure of 244,883 optical discs.

(e.g., at a promotional screening). Camcorder pirates are often sophisticated criminals and typically sell the master recordings to illicit “source labs” where they are illegally duplicated, packaged and prepared for sale on the black market, then distributed to bootleg “dealers” throughout the world. As a result of camcorder piracy, many motion pictures become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and night markets around the world during the U.S. theatrical release and well before their international debuts. An essential element in the fight against camcorder piracy is the enactment of legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. Although in Thailand this may amount to a violation of the copyright law, there is no specific provision on the subject, and the penalties would be extremely limited absent proof of a “commercial purpose.” We urge the Royal Thai Government to take whatever steps are necessary to ensure that adequate protection against camcording piracy is reflected in its national legislation.

Signal Piracy: Piracy of cable and satellite broadcasting signals remains rampant, with over 50% of the pay TV subscribers receiving unauthorized content and revenue losses estimated at US\$160 million.¹⁷ Thailand has yet to establish an effective system to license and regulate broadcast and cablecasting facilities, one that has the authority to take actions that will deter illegal broadcasters. In 2005, establishment of a National Broadcasting Commission to perform this role again stalled, perhaps indefinitely.

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,¹⁸ where university presidents, professors, and students exhibit blatant disregard for the law and the rights of copyright owners.¹⁹ Photocopy shops routinely make copies of entire books, or copy chapter-by-chapter. Many of these books have been pre-copied to fulfill demand in accordance with the students’ reading lists, but copying is also done to order. Unauthorized compilations of materials for the university market continue to hurt academic publishers. Despite regular contacts with lecturers and university authorities about the problem, they have taken little action and Government authorities have not stepped in to help. Books are also being reproduced and passed off as originals through professional-style offset printing houses capable of producing large quantities. In addition, unauthorized translations of English books into Thai continue to be a problem.²⁰

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.²¹ If Thai law continues to permit what these judges

¹⁷ 2005 revenue loss estimate taken from The Cable & Satellite Broadcasting Association of Asia’s (CASBAA) October 2005 “Cost of Piracy: Asia-Pacific Cable and Satellite Industry.”

¹⁸ Photocopying and print piracy is rampant in primary and secondary schools as well.

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

²⁰ Amazingly, professors at two universities have used their names on unauthorized translations; no actions have been taken to curtail this clearly illegal practice in Thailand.

²¹ 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,

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. Conservative estimates indicate that in 2005, the industry lost potentially 180,000-270,000 genuine book sales to students in Bangkok alone due to the above-described problems.²² Action is past due.

End-User Piracy Rate of Business Software Remains One of Highest in Asia: The rate of unauthorized uses of business software in business settings remains unacceptably high in Thailand, at 77% in 2005 and revenue losses continue to increase year-on-year. Only Vietnam, China and Indonesia have a higher rate of piracy in the Asia-Pacific region, where the average piracy rate is 53%. Thus, while the business software industry has been able to get full cooperation from enforcement authorities in conducting end-user and retail raids (by the first week of October 2005, the police had conducted six end-user raids based on complaints filed by the Business Software Alliance), these raids do not seem to be having a significant deterrent effect on the overall piracy rate in Thailand.

Customs Enforcement is Key: Everyone involved in the piracy struggle in Thailand recognizes the important role that Royal Thai Customs plays. Concerns over the importation of product manufactured elsewhere in Asia (Malaysia and China, and possibly Laos) must be taken seriously, and proper steps must be taken to stop massive exports from leaving Thailand and infecting other markets. In addition, the Royal Thai Government must recognize the danger that its ports are being used as transshipment points for pirated products produced in other countries. IIPA is pleased that Royal Thai Customs is beginning to take actions *ex officio* and is now administering cases on its own. IIPA also calls upon Royal Thai Customs to work with right holders to help protect their rights, including by providing information regarding importers and exporters of seized goods. Neighboring countries have established mechanisms to inspect goods from the major express mail companies, and Thailand must work hard in 2006 to do the same. This is a matter of a great concern since large quantities of infringing goods are exported from Thailand by express mail and freight forwarding services. These services must be properly regulated to ensure that they do not continue to be used as a means of exporting pirated products.

Internet Piracy Has Grown: Internet piracy is growing steadily in Thailand. In 2004, the business software community reported 1,304 online software infringements traced to Thailand-based ISPs. By the end of 2005, this number grew to 8,915, representing an increase of 583%

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.*

²² There are over 30,000 students in Bangkok. According to survey results, 60% of students copy entire books; if those 60% were to buy the average number of books per year (estimated to be between 10-15), 180,000-270,000 displaced sales to students result. This does not include the copying carried out by teachers or offset print piracy.

from the year before, mainly involving P2P networks. The Royal Thai Police conducted two Internet raids based on information supplied by the business software industry. There was one court verdict in one of these Internet cases, but the result was a non-deterrent 25,000 Baht fine (US\$632) as the initial three month prison sentence was reduced to 45 days in a plea bargain, and then suspended to one year probation. Such a sentence would not serve as a deterrent to those engaged in similar crimes.

Though there is no legislation in Thailand on ISP liability, ISPs are generally cooperating in taking illegal websites down. While it is estimated that 3.5 million Thais use the Internet, the broadband penetration rate remains low.²³ Because of this, much of Thailand's Internet usage is limited to mobile applications and Internet cafés. The Royal Thai Government must ensure that all Internet cafés allow use of only legal copyright materials, including entertainment software products. However, despite the requests of entertainment software companies that the Royal Thai Government include in regulations governing these Internet cafés provisions mandating the use of legitimate licensed video game products, to date, there has been no move to do so.

Cable Piracy and Unauthorized Public Performances of Audiovisual Materials:

Cable piracy – the unauthorized transmission of U.S. programming over cable television systems (from original cable or satellite transmissions) – is widespread in Thailand, especially in rural areas. Illegal decoder boxes and smart cards are widely available. Enactment of cable regulatory controls and broadcast legislation is necessary to afford protection for the broadcast, transmission, and retransmission of copyright programming.²⁴ A regulatory system is needed to control cable piracy by conditioning the issuance and retention of cable licenses on compliance with copyright, as in other countries. Simply, anyone wishing to engage in broadcasting or cable-casting must certify, as a condition to receiving a license, that the facility will not transmit or retransmit signals or content without the authorization of right holders of the content or signal. Deterrent penalties should follow from cases involving false certifications, including, in appropriate cases, revocation or non-renewal of the license. In addition, broadcasting or cable-casting in Thailand without a license should be an offense. Public performance piracy also thrives in Thailand, as many unlicensed cable operators, particularly in provincial areas outside of Bangkok, now transmit continuous, unauthorized motion pictures on dedicated movie channels operating on their systems. Hotels also screen 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.

Entertainment Software Piracy: Piracy of entertainment software products remains prevalent in Thailand, whether optical disc (either imported factory-produced discs or locally produced burned discs) or cartridge-based games. ESA member companies have been conducting “mall sweeps” with local police, which in the last four months of 2005 netted thousands of pirated products. Local police must be encouraged to undertake these “sweeps” or actions on their own initiative as it is only through sustained action that the mall/retail outlets will be cleaned up. Entertainment software publishers also face piracy in the following form: a

²³ Recent reports indicate that in 2004, the number of broadband subscribers suddenly increased six-fold, but that broadband penetration remains low, at fewer than two subscribers per 10,000 people. Research and Markets, *2005 Telecoms, Mobile and Broadband in Asia report Cambodia, Laos, Myanmar, Thailand and Vietnam*, summary at http://www.researchandmarkets.com/reportinfo.asp?report_id=302150&t=e&cat_id=20.

²⁴ 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\$50,553). 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.

console is housed in an arcade-type shell and is operated by depositing tokens or coins into the machine. However, the console housed in the shell is typically modified or has a circumvention device (mod chip) installed, and thus, the console is rendered capable of playing pirated games. These coin-operated consoles can be found all over Thailand.

Cartridge-based entertainment software continues to be heavily pirated in Thailand. In 2005, pirated and counterfeit cartridge-based video game products continued to be imported from China. Local law enforcement actions continue to be weak. In all of 2005, there was only one seizure of counterfeit cartridge games in Thailand, and there were no customs actions. Thailand continues to be a major transshipment point for pirated Nintendo video game products, especially to Europe. In 2005, there were 27 actions worldwide involving the seizure of counterfeit cartridge games from Thailand, with products being seized in Austria, Belgium, France, Germany, Sweden and the United Kingdom.

Organized Crime: Evidence of organized crime involvement in piracy in Thailand continued to mount in 2005. Threats to right holders and their representatives are commonplace, and right holder representatives were physically attacked and injured on several occasions in 2005. Investigative irregularities abound, including substitution of low-level defendants for major ones after raids, delays in post-raid inquiries, and leniency of police officers during raids. To directly confront the problem of organized crime and its relation to copyright piracy in Thailand, the Royal Thai Government must grant authority to the Royal Thai Police and others to thoroughly investigate links between piracy and other serious crimes, and prosecute owners and financiers of pirate operations. One way to stop organized criminals who engage in copyright piracy is to include IP violations in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA).²⁵ Unfortunately, while the government had intended to include copyright piracy as a predicate offense in a draft bill to amend the MLPSA in 2004, the Law Drafting Committee of the Council of State concluded that copyright should be removed as a predicate offense.²⁶ The decision remains up to the Cabinet, and IIPA in the strongest terms urges the Cabinet to add copyright piracy back as a predicate offense for the enforcement of the MLPSA.

Courts Fail to Met Out Deterrent Sentences: The Thai Intellectual Property and International Trade (IP&IT) Court has long stood as an 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 have long plagued right holders. Again in 2005, the Court meted out some impressive results. Notwithstanding the Court's relative successes, there remain some serious weaknesses in adjudication of copyright cases, most notably in the failure of the courts in some cases to mete out deterrent sentences. In some recent judgments, no punishment has been imposed beyond community service, while most other cases result in suspended sentences and/or non-deterrent fines. Several other problems include the following:

²⁵ 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\$5,055).

²⁶ 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>. 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.

- **Difficulty Obtaining Anton Pillar Orders and Preliminary Injunctions:** Another major problem experienced by right holders in 2005 is the relative difficulty in obtaining Anton Pillar orders and injunctions in a timely manner from the IP&IT Court. Judges have become increasingly strict when reviewing and granting search warrants, especially for *ex parte* orders. The percentage of rejected orders has increased compared to 2004.
- **Lack of Continuous Hearing Schedule:** Hearings in copyright cases in Thailand are scheduled at lengthy intervals (e.g., one-month intervals or more in some instances), which is causing undue delays even in straightforward piracy cases. These delays and lengthy breaks defeat any deterrence which may result from a successful case outcome.
- **Problems with Non-Acceptance of Forensic Evidence:** Copyright owners face problems in their use of forensic evidence from lab testing conducted on pirated optical disc products from Thailand. For example, while testimony from an independent expert as to the source or origin of a pirate optical disc is accepted as evidence of production by a certain plant, the testimony alone is unlikely to be sufficient to initiate proceedings against the factory owner of that plant. This presents problems for copyright owners whose forensic testing is done outside of the country. It has also been reported that the plant owner may challenge that the tested disc was produced before the Act on the Production of Optical Disc Products (2005) came into force.

One positive development has been that, as of January 1, 2006, the threshold has been lowered for the Ministry of Justice's Department of Special Investigation (DSI) to take criminal investigations. Now when the value of pirated product seized exceeds 500,000 Baht (US\$12,638), down from 5 million Baht (US\$126,380), or involves at least 500 units, the police are required to report the case to DSI, and DSI may decide to take the case for prosecution (or can leave it with the police under DSI supervision). This is a welcomed development, as it is expected to reduce reliance on the ECID for all enforcement actions and allows for more prompt actions.

THAILAND CRIMINAL ACTIONS 2005	SOUND RECORDINGS	MOTION PICTURES
Raids Conducted	427	1,490
CDs Seized	267,633	323,408 (VCDs)
DVDs Seized	24,996	524,356
CD-Rs Seized ("burned")	9,980	54,694
Investigations	-	1,702
VCD Lab/Factory Raids	154	
VCD/DVD Production Lines Seized	-	2
Printing/Package Machines Seized	-	1
Stampers Seized		32
Cases Settled	-	
Cases Commenced	427	356
Number of Indictments	427	356
Number of defendants indicted (including guilty Pleas)	455	
Acquittals and dismissals	-	
Number of cases pending	265	10
Number of Factory cases pending	-	
Total number of cases resulting in jail time	157	
Suspended prison terms	-	
Maximum 6 months	150	
Over 6 months	4	
Over 1 year	-	

THAILAND CRIMINAL ACTIONS 2005	SOUND RECORDINGS	MOTION PICTURES
Total suspended prison terms	154	
Prison terms served (not suspended)	-	
Maximum 6 months	1	
Over 6 months	1	
Over 1 year	1	
Total prison terms served (not suspended)	3	
Number of cases resulting in criminal fines	151	
Up to \$1,000	125	
\$1,000 to \$5,000	26	
Over \$5,000	-	
Total amount of fines levied (in US\$)	-	

TRAINING AND PUBLIC AWARENESS

Copyright owners engaged in many training and public awareness activities in 2005:

- Publishers undertook an educational campaign in August and September 2005, in the form of mailings to and direct educational sessions with university lecturers and related personnel, reminding them about copyright law and the importance of using legal materials.
- In January 2005, the Motion Picture Association and the IP&IT Litigation Department co-organized a seminar in Chiangrai on IP enforcement.
- In March 2005, the MPA organized a seminar on IPR training for the Central Investigation Bureau in Bangkok.
- In April 2005, the MPA co-organized a seminar on IPR training with police officials in Surattani and Songkla provinces, as well as a seminar in Hua Hin with CIPIT officials on IP Judicial Procedure.
- In August 2005, the MPA participated in a workshop on the Act on the Production of OD Products B.E. 2548 organized by the Department of Intellectual Property (DIP) in Bangkok.
- In September 2005, MPA participated in a symposium in Bangkok sponsored by the DIP highlighting cable piracy and associated regulatory issues.
- In October 2005, MPA participated in a seminar on “Copyright Related Issues in Digital Technology” organized by the CIPIT in Bangkok.
- In December 2005, the MPA participated in an EU-ASEAN symposium on “IP Enforcement by Specialized Courts: Challenges and Recent Developments in IPR.”
- Entertainment software publishers participated in a training seminar in November 2005 at the Bangkok International Law Enforcement Academy.
- The Business Software Alliance co-sponsored seminars with the Department of Intellectual Property on Software Asset Management in Bangkok, Chiang Mai and Khon Kaen. The seminars, besides dealing with licensing issues, promote the legal use of software and the need to respect software copyright. The support from the DIP led to a favorable response from the business community.
- The recording industry group in Thailand participated in a five-day conference (organized by the European Union) for Royal Thai Customs personnel in Bangkok in November 2005. The program, which was opened by the Director General of Customs Dr. Sathit Limpongan, included briefings from Thai Customs personnel on Thai legislation and operating procedures. Record industry representatives gave a two-hour presentation on how better to address piracy problems.

- The recording industry group in Thailand coordinated training for 75 Bangkok Metropolitan Police Department officers in a “Music Piracy Investigation Workshop” in January 2005.
- The recording industry group in Thailand participated in the “Thailand Intellectual Property Fair,” a public event organized by DIP in March 2005 in Bangkok.
- The recording industry group in Thailand participated in the “Ministry of Justice Day,” a public event organized by the Ministry of Justice in March 2005 in Bangkok.
- The recording industry group in Thailand participated in two programs in April 2005 on administration of rights (collecting societies), one a session with Royal Thai Government officials, and the other a seminar held for over 200 participants in Bangkok.
- The recording industry group in Thailand held a session with top police officer officers during a visit in September.
- The recording industry group in Thailand participated in “Intellectual Property Capitalization,” a program organized by DIP in September 2005 in Bangkok.
- The recording, motion picture, and business software industries co-sponsored with DIP the “IP Cultivation Program,” a program from September to October 2005, in Bangkok, aiming to educate students of six famous high schools in Bangkok on “copyright awareness.” Overall, 2,400 students participated in this program.
- The recording industry participated in a “Seminar on the IP Culture” in November 2005 in Bangkok. The program was part of “Thai Economic Growth Promotion” and reached over 200 participants.
- The recording industry group in Thailand participated in a “Workshop on Thai IP Strategy,” a program organized by DIP in November 2005 in Bangkok. The program reached 300 participants.
- On January 27, 2006, the local entertainment content industry group (TECA) brought about 30 judges of the IP&IT Court to visit an optical disc factory, MPO (Asia), in Cha-seong-sua Province. Judges had a chance to learn more about how optical discs are produced.

COPYRIGHT LAW AND RELATED ISSUES

Optical Disc Act Comes Into Force: In 2005, a long-awaited Optical Disc Act was passed into law, published in the Royal Gazette on May 31, 2005, and went into effect on August 29, 2005.²⁷ While the Act is by no means ideal legislation (and falls far short of what the U.S. will ask for in the context of a U.S.-Thailand Free Trade Agreement, *see below*), it does provide a basis for enforcement against licensed facilities. The law is missing some essential tools necessary for a first-class law:

- **No License Regime:** The Act requires only “notification,” not approval, for a plant to begin producing optical discs. There is no provision governing the term for which a plant may produce discs, nor for a renewal process. There is no means by which one’s ability to produce can be revoked.
- **Unclear Whether SID Code Will be Adopted:** Industry informs us that the Royal Thai Government has rejected to date use of the IFPI-standard source identification (SID) code, opting to create a *sui generis* Thai code. In virtually every country that has implemented an optical disc law, the government has opted to use SID Code.
- **Unclear Whether Identification Code Must be Applied to Stampers/Masters:** The Act defines “mould code” as the code by which the source of the disc can be determined, which apparently means it need not be attached to the stamper or master but could be on the Laser Beam Recorder (LBR). The definition of “mastering code” is also confusing, defined

²⁷ Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).

as the code “to demonstrate the work has been copyrighted.” We had earlier understood the Department of Intellectual Property had agreed that the stamper and master must include SID Code and we hope this will be clarified in practice and in regulations.

- **No Timely Monitoring of Export of ODs and Imports/Exports of Machines, Stampers/Masters and Raw Materials:** The Act contains after-the-fact “notification” requirements (with lengthy grace periods), and there is no provision for monitoring transfers of stampers/masters.
- **No Inspection Without Notice at Any Time and Possible Forcible Entry:** The Act does not specify whether inspections can take place without notice to the target and at any time day or night, although the language “from the sunrise to the sunset or during the Production hours of such Business Operation Place” could be construed as authorizing an inspection any time the plant is operating, even if after hours or at night. This should be confirmed.
- **No Express Seizure, Forfeiture, and/or Destruction of ODs, Stampers/Masters, and Machinery:** The Act fails 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.
- **Criminal Penalties Strengthened, But Still No Mandatory Minimums:** The Act contains increased criminal penalties over the previous draft IIPA had reviewed, which is a plus, but still includes no mandatory minimum fines and no mandatory imprisonment.
- **“Mastering Code” May Inadvertently Create Burden on Right Holders:** The definition of “Mastering Code” would appear to create burdens on the ability of legitimate copyright owners to do business in Thailand. Under this definition and other provisions, copyright owners must apply for and affix a “mastering code” to all legitimate discs. This requirement creates a formality that may run afoul of Thailand’s international obligations.

Free Trade Agreement and Copyright Act Revisions: Negotiations toward a Free Trade Agreement between the U.S. and Thailand began in June 2004. The talks remain ongoing as of February 2006. IIPA notes that with respect to copyright, it is expected that the FTA will contain obligations to ensure that Thailand’s Copyright Act reaches the level of protection afforded by the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and contains other strengthening measures. As mentioned above, misunderstanding about the nature of illegal photocopying as a form of piracy abounds, largely due to misinterpretations of Article 32(6) of the law, which must be amended as part of the FTA process. The Optical Disc Act discussed above falls short in important respects of what an FTA should aim to achieve. Notwithstanding that the FTA negotiations are not yet completed, and perhaps because of the desire to enact a law that addresses many of the FTA issues, the Thai Government has reportedly been working on a new draft amendment to its Copyright Act. The draft has not been made available for public comment, but we understand it is in many respects similar to the draft released in 2003.²⁸ We note that, to meet the requirements generally called for in FTAs with the United States, Thailand, even if it passed the latest known draft legislation, would still need to make further important revisions in many areas.

ISP Liability: 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,²⁹ and went into force in early 2000, but the National

²⁸ Please see IIPA’s analysis of that draft in IIPA’s 2005 Special 301 report, at <http://www.iipa.com/rbc/2005/2005SPEC301THAILAND.pdf>

²⁹ Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000).

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.

MARKET ACCESS

Investment Bans in Broadcasting: Foreign investment in terrestrial broadcast networks is prohibited. A draft Act on Broadcasting and Television Business operations would allow foreign investment in free and pay television but would limit such investment to a 25% equity share. Advertising is prohibited on pay television systems under the 1992 amendments to the Radio Communications Act of 1955. The draft Act on Broadcasting and Television Business Operations contemplates the establishment of criteria within which business operators may seek advertising income, but would require that a portion of received advertising income be deposited in a national development fund. In October 2005, the Thai government allowed original advertising carried on foreign satellite channels to ‘pass through’ on local pay-TV networks.

Censorship: The Tape and Video Cassette Law puts heavy burdens on the motion picture and recording industries. Since the transfer of authority for administering this law moved from the Police Bureau to the Ministry of Culture, the process to get approved and obtain a Censorship Code for music videos and live performances is lengthy – ranging from 2 to 30 days. In addition, strict enforcement of guidelines prohibiting the depiction of “objectionable” content in home video products has an adverse affect on the importation of DVDs, due to the cost-ineffectiveness of deleting such scenes from the DVD master simply for the Thai market.

GENERALIZED SYSTEM OF PREFERENCES

Thailand currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective protection of intellectual property rights.” In 2004, \$3.1 billion in Thailand’s imports into the United States entered the country duty-free, accounting for 17.9% of its total exports to the U.S. During the first 11 months of 2005, \$3.2 billion worth of Thai goods (or 17.8% of Thailand’s total exports to the U.S. from January to November) entered the U.S. duty-free.

Figure 1: Approximate Locations of Optical Disc Plants in Thailand

