

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Thailand should remain on the Priority Watch List.

Executive Summary: Losses due to piracy in Thailand remained quite high in 2008, and piracy levels were generally above average for the Asia region, for example, 76% for software (10 points higher than the 66% regional median). Pirate product remains widespread in Thailand. As a result of piracy over the years, recent political turmoil in Thailand, and the global economic recession, the local creative economy has been devastated. The number of Thai films produced decreased from 55 titles in 2007 to 35 titles in 2008. Physical sales of legitimate music products decreased 40%, causing record companies to lay off employees, cut costs, freeze salaries, or close down their businesses.

Enforcement efforts to combat piracy have been mixed in Thailand over the years, and remained so in 2008. Police *ex officio* raiding and Department of Special Investigations (DSI) assistance in high-level piracy investigations involving music and recording piracy improved in 2008. IIPA hopes that DSI's involvement signals a shift to "upstream" investigations into organized piracy targets, including effectively addressing the production and export of pirate books. The Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC) continued providing good support in fighting the particular issue of end-user software piracy. Unfortunately, these efforts have not yet made a significant impact on continuing high piracy rates for these industries. All the industries are hopeful that the new government under Mr. Abhisit Vejjajiva will adopt a serious attitude to the piracy problem that prejudices Thailand's economic, social and cultural interests. IIPA welcomes the fact that some industry sectors have already had the chance in January 2009 to sit down with the new Deputy Minister of Commerce, Mr. Alongkorn Ponlaboot. Finally, these new leaders' challenges will be exacerbated if the courts in Thailand continue creating further problems by arbitrary refusals of search warrants and by refusing to consider copyright piracy as a serious crime.

On January 14, 2009, His Majesty the King received the WIPO Global Leaders Award from WIPO Director General Dr. Francis Gurry. IIPA congratulates His Majesty and hopes that this award will spur the Royal Thai government to take much more effective action to significantly reduce piracy in Thailand and improve its law to better protect the rights of Thai and foreign authors and right holders. Greater bilateral engagement through a U.S.-Thailand Free Trade Agreement once seemed within reach, but lost momentum with suspension of talks in late 2006. Dialogue on IPR issues continued in October 2008, but commitments by the Royal Thai government remain elusive.

Priority Actions Requested In 2009: IIPA requests that the Royal Thai government take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Close notorious piracy markets ("Red Zones" and "Yellow Zones") and hold accountable mall owners, those who control the malls, and those who otherwise facilitate infringement.
- Investigate key book pirates, including exporters, by: acknowledging the need to investigate, and then commencing such investigation against, the book production-for-export business in Thailand; and addressing rampant illegal photocopying of academic materials.
- Fix the search warrant problem, by ceasing arbitrary refusals of warrants, and facilitating a right holder's ability to obtain a search warrant from the IP&IT Court when there is suspected infringement.
- Prosecute key piracy cases against high-level organized piracy targets, including plant owners, burner labs, warehouses, retailers, mobile device stores or services, and pirate book producers, with deterrent results actually imposed and publicized.
- Address corrupt practices which hamper the rule of law in Thailand and detrimentally affect the copyright industries.
- Encourage active cooperation of Internet service providers with right holders to prevent the use of networks for the commission of infringing acts, including but not limited to requiring the termination of accounts of repeat infringers. As an immediate first step to achieve this objective, meetings between agencies and affected sectors should be convened to discuss ways to work cooperatively to halt Internet transmissions of pirate materials.



Legislative

- Modernize the copyright law and join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- Seek passage of draft amendments to the Customs Act to empower customs officers with the authority to inspect and confiscate goods entering the country for transit and transshipment.
- Support legislation that will ban unauthorized camcording of movies in theaters.
- Create a sound legislative structure to address Internet piracy and promote service provider responsibility, holding ISPs accountable for any direct infringement on their services, and employing mechanisms, including statutory notice and takedown, to address hosted piracy, P2P file sharing, advertising sites, and Internet-based mobile device piracy.
- Fix the Motion Pictures and Video Act B.E. 2550 to address potential quantitative and screen time quotas on foreign films that could undermine market access for legitimate content.
- Address organized crime, by adopting measures to make copyright piracy a predicate offense to trigger remedies to deal with organized crime, including freezing of all assets related to piracy.
- Fix the Optical Disc Manufacturing Act to remove the onerous and unprecedented obligation that right holders acquire a "copyright owner's code" before any replication of legitimate CDs.
- Clarify that copy exceptions in the copyright law comply with TRIPS Article 13 by confirming that, contrary to some interpretations by the Royal Thai courts, the exceptions do not allow whole copying of books without payment.

THAILAND										
Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars)										
and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	17.8	65%	21.7	50%	20.7	50%	21.9	45%	24.9	45%
Business Software	295.0	76%	257.0	78%	253.0	80%	155.0	80%	100.0	78%
Entertainment Software	NA	NA	91.4	77%	NA	82%	NA	75%	NA	76%
Books	NA	NA	37.0	NA	35.0	NA	30.0	NA	30.0	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	149.0	62%	30.0	60%
TOTALS	312.8		407.1		308.7 ²		355.9		184.9	

PIRACY CHALLENGES IN THAILAND

Physical Piracy in Retail Hotspots in 2008: Street piracy still pervades the markets in Thailand due to irregular enforcement and non-deterrent sentences. Piracy decreased somewhat during key points of the year, for example, during President Bush's visit in August 2008 and during a Bangkok Metropolitan Police Bureau crackdown, but part of the reason for any decrease in piracy can be attributed to economic malaise. The "Red Zones" and "Yellow Zones" designated by the Royal Thai government denote specific areas or even whole provinces targeted for enforcement activity, and indicate the continued scope and severity of the piracy problem.³ Some targeted enforcement in such "Zones" notwithstanding, piracy otherwise dominated the markets in Bangkok, Phuket, Samui, Pattaya, Chiangmai, and Krabi. The global economic crisis hardly made a difference to pirates, although anecdotally, pirate prices decreased (pressed music pirate discs decreased from 99 Baht-US\$2.90, to 70 Baht-US\$2.05, while burned discs decreased from 50 Baht-US\$1.47 to 35 Baht-US\$1.03, or 3 for 100 Baht-US\$2.93), and the quality of product decreased, e.g., pirates moved from factory discs to burned discs, and off-set printing for labels to sticker labels. Pirates operating in the physical market also made changes to accommodate

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Thailand. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² Without factoring in the motion picture losses for 2005, the piracy losses actually went up in 2006, from \$206.9 million to \$219.7 million.

³ Red Zones include: in Bangkok – Klong Thom, Sapan Lek and Baan Mor shopping areas, Patpong and Silom shopping areas, Mah Boon Krong (MBK) Center, Sukhumvit area (Soi 3 – 19), Panthip Plaza; Chiangmai Province; Phuket Province: Koh Samui District in Surattani Province; Pattaya in Chonburi Province; Haad Yai District in Songkla Province; Ao Nang area in Krabi Province; Hua-Hin in Prajaukirkkan Province. Yellow Zones include: in Bangkok – Nom Chit shopping area, Lad Prao, Pata Pin Klao shopping area, Fortune shopping area, Taladmai Don Muang shopping area, Tawanna shopping area, Pratumnam shopping area, Jae Leng shopping area, Kao San Road shopping area, Sapan Bhud shopping area; Patumtani Province; Nonthaburi Province; Nakhonratchasima Province; Konkan Province; and Ratchaburi Province.

technology and better compete with Internet piracy, e.g., by offering thousands of songs in MP3 format on one disc. The availability of pirated discs containing music has declined as consumers of pirated music product increasingly are accessing their content in digital formats.

Internet Piracy Grew Worse in 2008 with Greater Connectivity: Internet connectivity has exploded in Thailand, which boasted more than 13.4 million users, or 20.5% penetration, and 600,000 broadband connections, or roughly 1% penetration, as of March 2008 (according to the International Telecommunications Union). Internet piracy in Thailand takes four forms: websites advertising pirate product,⁴ illegal downloads directly from websites or through deep linking, websites supporting commercial and non-commercial P2P and download services (for example, over 90% of software piracy cases on the Internet in Thailand in 2008 involved P2P downloads), and cyber lockers. Many consumers have replaced the purchase of hard goods with ripping content from the Internet to use on their computers or store on mobile devices. Of the illegal P2P services, those employing the swarming technology of Bit Torrent grew more prevalent in the past year. Free cyber lockers have grown in popularity. IIPA is encouraged by a recent raid involving a man advertising pirate movies and TV series' over the Internet through a website based in Thailand.⁵

Camcorder Piracy: Illegal camcording⁶ grew in frequency and severity in Thailand in 2008 – over 35 cases of illegal camcording of U.S. major motion pictures were detected. This is an 800% increase in illegal camcords over 2007. Many films, such as *Speed Racer*, *10,000 B.C.*, and *Wanted*, were stolen one day after their local theatrical release. Many films shown in Thailand are in the original English (with Thai subtitles). This combined with an almost 50% early or day-and-date release schedule, makes Thailand an extremely high-risk country for the motion picture industry, since illegally camcordered movies could easily serve as the source for global piracy. Of the top 25 grossing films worldwide between January 1, 2008 and December 31, 2008, approximately 36% were illegally copied on camcorders in the theaters at least once in Thailand, and of those, 100% were early or day-and-date release titles. Camcording piracy hit local Thai films as hard or harder than it hit foreign films, as we are informed that nearly every major Thai movie release in 2008 was illegally recorded by a camcorder during the first week of its theatrical release.

Mobile Device Piracy: Illegally “ripping” copyright content and storing such content on mobile devices, on thumb drives, or on MP3 players, became a dominant piracy phenomenon in Thailand in 2008. Fewer consumers purchased physical product, instead choosing to rip their content from the Internet. In addition, former retailers of pirate optical discs have set up brick-and-mortar shops offering digital download services to consumers onto these devices, some maintaining an in-store hard drive containing literally thousands of files to purchase and load onto mobile devices. In a recent investigative survey conducted in Thailand, investigators were able to purchase players with infringing pre-loaded tracks, or received offers from shop staff to load extra tracks upon purchase of the devices. Book and journal publishers report occurrences of downloading reference books and dictionaries in a similar manner. Unfortunately, the problem is only set to grow worse, as recent estimates had mobile penetration in Thailand at 53 million users by early 2008.⁷ Thai law enforcement officials are well behind the curve on mobile piracy, incorrectly questioning whether the mobile download (or upload) services provided by the stores can be considered copyright infringement, arguing, again incorrectly, that it is customers, not the stores themselves, that are ordering the content. The file transfers, done as a service by sellers, clearly constitute copyright infringement, and must be dealt with severely or this problem of mobile device piracy will spiral out of control. Industry's surveys reveal that mobile shops in the Red and Yellow Zone areas, i.e. Pantip Plaza, Klongtom and

⁴ For example, in April 2008, following an in depth investigation, the Business Software Alliance supplied details to the police who raided and arrested the operator of idsoft.org, a website offering counterfeit software to be sent by mail, which was directed at the local Thai market.

⁵ The Motion Picture Association reports that on February 6, MPA Thailand representatives teamed up with ECOTEC officers to conduct the first ever raid in the country specifically targeting Internet piracy. It was the second significant operation since the start of the year following the January raid on a burner lab where 500 burners were seized. The suspect arrested confessed to running a web-based pirate operation from his home using pirated DVD copies as masters, and admitted to selling pirated movies as well as local and international TV series' for less than US\$1 each through courier delivery. Among the products seized were over 150 MPA member company titles such as "*Wanted*," "*The Kingdom*" and "*Enchanted*". Also seized were 14 packages of pirated DVDs from the nearby post office which the suspect had sent for shipment to buyers outside Bangkok. Initial investigations revealed that the suspect's bank account showed an inflow of approximately US\$11,550 (THB400,000) over a two-month period.

⁶ Illegal camcording occurs when professional camcorder pirates who use video cameras to illicitly copy a movie during its theatrical exhibition in a movie theater, usually very early in its run. The pirates sell the master recordings to illicit source labs where they are illegally duplicated, packaged and prepared for sale on the pirate market.

⁷ *Thailand's Mobile Market Reached 53 Million Subscribers by End-2007*, Reuters, May 23, 2008, at <http://www.reuters.com/article/pressRelease/idUS99589+23-May-2008+BW20080523>.

Saphan Lek, Koa Sarn Road, Fortune Center and Sear Department Store, all offer “pre-downloaded” music files to customers on such devices as a service.

Book Piracy, Including Production for Export and Unauthorized Photocopying: Publishers continue to alert Thai authorities to concerns about pirated books in Thai and English, some of which have been destined for export. Reports indicate that there are multiple printing factories in Thailand located in various provinces. Yet, the Royal Thai government, specifically, the Department of Intellectual Property, Department of Special Investigation, and Royal Thai Customs, often make statements indicating that they do not accept that printing factories in Thailand can actually print and distribute or export pirate books, claiming such companies in Thailand do not have the technical capability to carry out such an operation. Further proof of the pirate production-for-export model emerged in March 2008, when the Royal Thai Police’s Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC) seized approximately 30,000 copies of Thai language primary school textbooks in the provinces of Mahasarakarm, Roi-ed and Udornthani, in a raid carried out on behalf of the local Thai Kurusapha Organization. The textbooks, produced in Thailand, were initially seized on the grounds that they had dangerous ink, not on the basis that they infringed copyright. Adding to the irony, after they were seized, it was determined that “those [pirate editions] with acceptable quality” would be donated to libraries and schools!⁸ Evidence has also emerged from U.S. and South Korean Customs authorities regarding recent exports from Thailand of pirate books in varying quantities, including English language technical and professional books, and English language textbooks. These production operations are highly sophisticated, networked, and difficult to detect.

Another form of piracy harming Thai and foreign publishers is unauthorized photocopying of educational materials, especially near schools and universities. Shops continue to copy books for students, often on a “made to order” basis to avoid keeping infringing stock. Lecturers are culpable too, compiling “course packs” of works without permission from publishers and even translating works and marketing them as their own publications. Other pirated materials include foreign language newspapers, an eclectic range of novels, travel guides, and history books. Various private institutes in Thailand provide illegally reprinted Test of English as a Foreign Language (TOEFL) materials to their students. Another problem involves unauthorized translations into Thai, still common among teachers and professors.

Optical Disc Pirate Production, Factory and Burned, Including “Mobile” Burning Labs: Optical disc pirate production (CDs, VCDs, DVDs, CD-ROMs, CD-Rs, DVD-Rs) remains widespread in Thailand, with a sharp increase in 2008 of burning onto recordable discs, and even the advent of mobile CD-R burning operations, including a small truck loaded with a computer and a CD-R burner ready to write tailor-made compilations onto blank CD-Rs. Regarding factory production, there remain dozens of factories. The plant visit and “exemplar” programs (by which sample discs are collected from each of the plants in order to assist in forensic matching) are ongoing, and have been accompanied by the establishment of a forensics lab (donated by the U.S.), however, industry is not permitted to participate in these plant visits. IIPA’s understanding is that the DIP and the Forensics Division of the Royal Thai Police undertook random plant visits during three periods during 2008 (January to February, June to July, and November to December) and obtained exemplars from 20 plants. Anecdotal evidence indicates disc exports continue from Thailand to Malaysia,⁹ and to Australia (through an operation run by a Thai student community in Australia, operating a website in Thailand that shipped discs to Australia). Evidence also exists of imports into Thailand of discs from Malaysia, China, Cambodia, and Laos, so pirate trade appears to be two-way.

End-User Piracy of Business Software/Government Legalization: The greatest source of losses to the business software industry is the use of unlicensed or pirate software in the workplace. The rate of unauthorized uses of business software in business settings remains unacceptably high, at 76% in 2008 (based on preliminary numbers), still well above the Asia regional median of 66%. Nonetheless, it is important to note that the PC software piracy rate declined by two points from 2007 levels. Hard disk loading of illegal software onto computer hard drives also remains a problem in Thailand.

⁸ *It Pays to Tell*, Daily Express, March 28, 2008.

⁹ On September 24, 2008, Royal Thai Police with assistance of the Motion Picture Association, cracked a piracy ring operating from an abandoned warehouse in Yanawa district, Rama 3 Road, Bangkok. The front of the warehouse was disguised as a junk garage, while the air-conditioned back area housed one DVD replicating line, one printing machine, and 2,400 kilograms of polycarbonate, used in the production of optical discs, 16,000 pirate discs and 93 stampers (the key glass part containing the content and used to produce discs). Titles included *The Mummy: Tomb of the Dragon Emperor* and *Batman: The Dark Knight*. The officers also found 14,000 pirated optical discs in the trunk of a car, and arrested one Thai man and two Malaysian suspects, the only people found. It is believed the plant was run by the Malaysian mafia and had been producing pirate product for six months for export back into Malaysia. The investigation is ongoing.

Entertainment Software Piracy: Piracy of entertainment software remains prevalent in Thailand, whether through sales of optical discs (now more than ever believed to be locally “burned” rather than industrially replicated) or cartridge-based games, and use of pirated games in unlicensed Internet game rooms (IGR) or cafés. Malls serve as the primary retail channel for pirated entertainment software products, both pirate video game discs and counterfeit video game cartridges. Vendors typically only have binders of game covers or empty boxes in their stands (unlike their prior practice of hiding a stash of pirated products in a closet or an adjacent store). When a customer, after browsing the shop “catalogues,” requests a specific title, a runner is sent to meet a backpacker (whose function is to roam the mall carrying a number of pirated discs in a bag) to retrieve the requested product.

Signal Piracy (Cable and Satellite): Piracy of cable and satellite broadcasting signals in Thailand, which involves the unauthorized transmission of U.S. programming over systems from original cable or satellite transmissions, remains rampant. Cable piracy and signal theft in Thailand involves not only major channels, but also the feed by many unlicensed cable operators, particularly in provincial areas outside of Bangkok, of continuous, unauthorized motion pictures on dedicated movie channels operating on their systems. Progress on three successful 2006 investigations in Phuket has been slow. However, the Governor of Phuket recently approved the prosecution of these cases and the cases have now been referred back to prosecutors for further investigation. Revenue losses to right holders in the programming and the channels runs in the hundreds of millions of dollars. Illegal decoder boxes and smart cards are widely available in Thailand. The cable industry reports nearly two million unauthorized hookups in Thailand, with only a fraction of that number of legitimate subscribers to the major pay television operators in Thailand. A new problem emerged in Thailand in 2007 and continued in 2008, involving individuals who apply for a legitimate pay television subscription service, and then use the Internet to share the smart card with others, collecting a monthly fee from users of the pirate service. Such Internet card-sharing could have serious repercussions for the legitimate industry as well as direct-to-home pay television services. The Department of Intellectual Property reported in 2007 that ECOTEC arrested one violator and filed a case against him.

Another development is the inclusion in the new Broadcasting Act (Section 70) of a provision that punishes manufacturers, importers, sellers and those who service pirate decoders aimed at decrypting Thai-licensed services. IIPA hopes that this change will stimulate the police to launch additional cases but expresses disappointment that the international industry’s recommendation to the Council of State that the legislation be broadened to encompass pirate decoders of international program providers’ signals was not accepted.

ENFORCEMENT CHALLENGES IN THAILAND

General Notes on Enforcement Taken in 2008: The industries take note of Prime Minister Abhisit Vejjajiva’s reported Government Policy Statement on December 30, 2008 that intellectual property rights is an important part of his policy going forward.¹⁰ IIPA notes that several Royal Thai government agencies continue to work with right holders to improve intellectual property protection in the country. First and foremost is the Royal Thai Police, and its Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC), which is principally responsible for piracy suppression nationwide.¹¹ The Department of Special Investigations (DSI) runs large-scale commercial piracy anti-piracy enforcement actions, and assists the Police with its investigations,¹² while the Customs Department is responsible for border measures, both import and export. The Department of Intellectual Property (DIP) of the Ministry of Commerce acts as a coordinator among enforcement agencies as well as the main policy-making branch.¹³ Industry enjoys generally good and cooperative relationships with these agencies and the agencies all continued, with varying degrees of success,

¹⁰ Indication of the new Prime Minister’s Government Policy Statement appears in the Royal Thai Embassy’s *Thailand’s Recent Developments on Protection and Enforcement of IPRs*, which IIPA just received on February 13, 2009. IIPA appreciates the information as well that Prime Minister Vejjajiva has established a new National Committee on Prevention and Suppression of IPR Violation as of January 2009, comprised of various agencies mentioned herein, and that this committee reportedly met on February 2, 2009.

¹¹ The Metropolitan Police Bureau is in charge of piracy suppression in Bangkok.

¹² For example, the record industry reports that the government’s performance in piracy suppression for that industry was slightly better than in 2007 and that the number of street stalls and pirated shops declined. The record industry noted that Police became more diligent in 2008 in conducting *ex officio* actions than in the past, that the Department of Special Investigations (DSI) helped the Police in anti-piracy actions, and that DSI’s own investigations led to a number of major cases. Even the new Deputy Minister of Commerce, Mr. Alongkorn Ponlaboot, has been involved in a recent raid.

¹³ Other agencies have responsibility over specific aspects of copyright, e.g., the Ministry of Culture is responsible for implementation of the Film Act.

to run raids against piracy operations, including *ex officio* raids,¹⁴ with a majority of raids focused on retail optical disc piracy in the Red Zones and Yellow Zones.

Overview of Some Key Challenges in Enforcement System: Unfortunately, several significant problems continued to curtail the agencies' effectiveness to attack piracy in Thailand. These included a drop off in the number of enforcement actions,¹⁵ the failure to target major players in the piracy network in Thailand,¹⁶ the failure to employ adequate resources to create deterrence (for example, the government did not effectively use forensic equipment donated to them to trace back the origin of optical disc manufacture), the failure to deal with piracy problems other than optical disc, including (but not limited to) Internet piracy, book piracy, illegal camcording piracy, end-user piracy of business software, and cable and satellite signal theft,¹⁷ and the failure to achieve successful and deterrent outcomes in piracy cases heard at the IP&IT Court. In addition, some basic procedural aspects of a good enforcement system, such as obtaining search warrants on the basis of suspected infringing activity, have been made complicated and burdensome by the IP&IT Court in recent years. Evidentiary standards have also hindered enforcement, for example, Police will not arrest pirate vendors based solely on the pirate DVD sleeve (cover), notwithstanding that the sleeve contains copyright and trademark material including art work and the movie title.¹⁸ Of course, pirates, knowing this, keep the discs in a separate location so they can avoid arrest.

The recent establishment of four Mobile Task Forces within the DIP and the Royal Thai Police, heralded with such promise a year ago, has not resulted in a significant increase in copyright enforcement. For example, in one recent month, the Mobile Task Force conducted only two copyright-related matters, compared to twenty-nine trademark cases, and in part this is reportedly due to budgetary and human resources constraints. Further, no steps have been taken by the Royal Thai government to hold mall owners (e.g., in the Red and Yellow Zones) accountable for piracy occurring on their watch. One very useful and easy tool would be for the government to mandate that mall owners include a clause in their lease agreements that their tenants' leases can be abrogated if the tenants use the rented premises for infringing activities.¹⁹ Finally, it has been suggested that the Ministry of Commerce develop an enforcement arm to parallel that of ECOTEC.

¹⁴ For example, the music industry's enforcement group reports that for the year 2008 there were 436 successful raids involving pirate international music with 359 arrests and 207,737 discs seized. All cases were reportedly sent to court without settlement. Some of the raid results included:

- A May 7, 2008 DSI *ex officio* raid on house No. 65, 67 Roong-roj Village, Moo 9, Salathammassop Sub-district, Taweewattana District, Bangkok, and house No.133, Soi Boromratchonnane 119, Boromratchonnane Rd.,Salathammassop Sub-district, Taweewattana, Bangkok and Home No.34/109 Nantawan Village, Bangkhunkong, Bangkruiy, Nonthabur, resulting in the seizure of 564,212 pirate film and music discs and a pick-up car parked inside one of the houses; upon questioning, the housekeeper was charged with copyright infringement, confessing that he was hired by an organized criminal gang to watch the houses.
- A June 15, 2008 Special Operation Unit (Provincial Region 1) *ex officio* raid at Zeer Rangsit, Paholyothin Road, Lam Lookka, Patumthani Province, resulting in 11 arrests and seizure of 130,000 pirate discs.
- The raid took place on August 9, 2008 by the Department of Special Investigation (DSI) at the target house located inside *Army Camp Raid* the Battalion Infantry 11th Regiment King's Guard, situated on Anusaowaree, Bangkaen, Bangkok with 5 people arrested and charged with Copyright Infringement for producing and selling of copyright infringing products. There were a 77,000 illegal discs and 57 CD-R Burners (568 Layers in total) found inside the house.

¹⁵ The Royal Thai government claims to have conducted 2,973 copyright raids in 2008 according to Royal Thai Embassy, *Thailand's Recent Developments on Protection and Enforcement of IPRs*, February 13, 2009, see *supra* note 10, resulting in seizure of 2.3 million pieces of pirate material. We note that this number of raids is significantly down from previous years (from 4,614 in 2007 and 6,459 in 2006). Customs seizures were also down in 2008, with 411 cases of suspect infringing goods stopped at the border, comprising almost 1.2 million pieces (not broken down by counterfeiting or pirated materials). The government claims that in that same time period, 4,979 IP cases were lodged with the IP&IT Court, although only some of those were copyright-related, and it is unknown of the 15 reported prison terms how many were copyright-related (several are mentioned in this report, however).

¹⁶ Most raids focused on smaller targets, but the Royal Thai Embassy claims that at least some actions were taken against "large-scale manufacturers, wholesalers and warehouses including retailers within the red zone, or in areas with historically high levels of violation, such as Pantip Plaza, Silom, Maboonkrong, Klong Thom." See Royal Thai Embassy, *Thailand's Recent Developments on Protection and Enforcement of IPRs*, February 13, 2009, *supra* note 10. Most of the raids reported as "large scale," however, involved between 1,200 and 1,745 discs.

¹⁷ In IIPA's 2008 report, we acknowledged some action regarding unauthorized broadcasting by Thailand's then 77 licensed broadcasters, resulting in some fines imposed at the IP&IT Court, but indicated that no fines or other administrative penalties had been paid, and worse, that no actions had been taken against the some 400 unlicensed broadcasters. We also criticized the Department of Intellectual Property's proposed long-term approach, since it would require a "final adjudication" in order to suspend a license upon a finding by the National Broadcasting and Telecommunication Commission that the broadcaster was engaged in unauthorized theft of signals or programming.

¹⁸ In 2007, the Department of Intellectual Property indicated in an official report that they would like to commence criminal prosecutions against piracy through proof of the mere display of the cover pictures or artwork. Industry agrees, but also asserts that such underground practices should lead authorities to investigate up the chain of distribution to locate the pirate warehouses, distribution hubs, and production sites.

¹⁹ During the third quarter of 2006, the Memorandum of Understanding on "Prevention and Suppression of the Distribution of IPR Infringing Products" was signed between government representatives, industry, and shopping mall owners. However, reportedly, this has led to no positive development to combat mall piracy.

IP&IT Courts Key to Increasing Level of Deterrence: A disturbing trend over recent years is the increasing unwillingness for the IP&IT Court to mete out deterrent sentences in copyright piracy cases. We are unsure of the reasons for this attitudinal shift which has resulted in decreasingly meaningful, deterrent sentences, but do note that public statements made by certain Judges on the Court indicate they do not view copyright piracy as a crime affecting society at large (and, for example, they therefore do not see links between piracy and organized crime). As a result, criminal verdicts result in very lenient sentencing, most often comprising fines of less than US\$400 with no imprisonment imposed in typical retail piracy cases. The Court also applies “discounting factors” to “first time offenders” or who plead guilty, resulting in purely nominal sentences that have rendered the Thai court system dysfunctional in the fight against piracy. One exception to the rule involves some verdicts for sale of products advertised on the Internet, since the offenders in those cases were found to have violated the reproduction right as well as engaging in unlawful distribution. In a recent Internet piracy case, a fine of US\$3,000 and a suspended six month sentence was imposed. Even this sentence, however, reveals the overall lack of deterrence, when compared with similar cases being adjudicated elsewhere in the region.²⁰

Inability to Obtain Search Warrants from the Court an Increasing Problem for Some Right Holders: Another abiding problem is the increasing reluctance of the IP&IT Court to issue criminal search warrants, at least for some industries. Some judges have even rejected search warrant applications from copyright owners without any reason, or worse yet, giving as the reason for rejection that the right holder did not take a civil action against the infringer rather than request the warrant. The success rate for business software piracy-related search warrant applications dropped from 76% in 2006, 60% in 2007, to a woeful 3% in 2008 (despite providing increasing detail in search warrant applications).²¹ The affected industries have tried to address the problem of arbitrarily refusing to issue warrants by engaging in dialogue with the judges through formal meetings and seminars, and seeking out a clear and transparent explanation of the requirements for issuing a search warrant in corporate end-user software piracy cases.

Internet Infringements Enforced Through Non-Statutory Sporadic Cooperation, But Obtaining Records Difficult: Regarding the growing Internet-based piracy phenomena in Thailand in 2008, service providers (ISPs) cooperated with some, not all, right holders, and for those, the takedown rates of infringing materials or activities was quite high. For example, the local music industry association was able to achieve 155 takedowns out of 163 notices to service providers in 2008, a 95% takedown rate.²² This rate demonstrates that service providers, cooperating with right holders, can curtail online infringements at hosted sites even without statutory mandates or incentives. Between January 1 and October 31, 2008, the Business Software Alliance also sent 889 takedown notices to ISPs pointing out the existence of infringing software on their network. Thus far, it appears ISPs have acknowledged the problem of Internet-based and P2P infringement. However, their cooperation to date has been purely voluntary and very sporadic. Neither the Computer Act nor the Copyright Act of Thailand provide for statutory notice and takedown, nor for service providers to divulge the identities of specific users to right holders. Service providers claim an obligation of confidentiality to their customers that precludes them from being able to divulge the IP address or the name of the webmaster, for instance. While Police can obtain such information, some ISPs have even become nervous for the same reasons about sharing such identification information with Police, albeit this was regularly being done on an informal basis.

²⁰ In one encouraging development in 2008, the IP&IT Court ruled in favor of the copyright holder in an end-user software civil case and awarded damages of Baht 3.5 million (approximately US\$101,000). This amount included the retail value of the infringing software (Baht 2.5 million or approximately US\$72,000) found on the computers, plus legal fees, interest, and damage to the software copyright holder's reputation.

²¹ We believe there is a general misunderstanding of the aims of the BSA in its enforcement effort which may be an irritant leading to fewer warrants. The BSA program aims principally and primarily to legalize businesses which now engage in the unauthorized use of business software, and to do so in the most efficient manner. There are many avenues to achieve this end, including settlements, which can be very effective in legalizing businesses and save the courts valuable resources and time. BSA representatives have sat down with the new Chief Justice of the IP&IT Court to explain the aims of the campaign in Thailand, and would be pleased to do so again. In addition to the recent civil court judgment mentioned *supra* note 20, in January 2009, the Police also were able to obtain two search warrants for an end-user software piracy case.

²² On a positive note, it appears that industry was able to get a takedown of the notorious site BitThailand.com, since the site itself is no longer available. However, we note that it redirects to a site called 2bbit.com, which has a suspicious disclaimer that provides,

None of the files shown here are actually hosted on this server. The links are provided solely by this site's users. These BitTorrent files are meant for the distribution of backup files. By downloading the BitTorrent file, you are claiming that you own the original file. The administrator of this site (<http://www.2bbit.com>) holds NO RESPONSIBILITY if these files are misused in any way and cannot be held responsible for what its users post, or any other actions of its users. For controversial reasons, if you are affiliated with any government, ANTI-Piracy group or any other related group, or were formally a worker of one you CANNOT download any of these BitTorrent files. You may not use this site to distribute or download any material when you do not have the legal rights to do so. It is your own responsibility to adhere to these terms.

The Royal Thai government should optimally ensure that ISPs are aware of their responsibility to deal with infringements, preferably by enacting a statutory notice and takedown and otherwise fostering cooperation to defeat online infringements, including P2P file sharing. If there continues to be no assistance to right holders by a statutory notice and takedown mechanism and a way to obtain identifying information about suspected piracy activity from ISPs, then the sole responsibility would fall on the government and ISPs to ensure copyright interests are protected in the online space.

Drop in Business Software Enforcement in 2008 Until “Countdown to Crackdown”: The business software industry reported that they received good support from the Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC) for end-user software piracy actions and also the support of DIP and ECOTEC in building awareness and promoting the use of legal software in the workplace. Nevertheless, the software industry, like other industries reported difficulties in obtaining criminal search warrants from the courts, with arbitrary refusals occurring more frequently. This inability to obtain search warrants from the IP&IT Court in turn resulted in a decrease in the overall number of enforcement actions against end-user software piracy during the first three quarters of 2008. In addition, raid coordination for software cases became more difficult, since the number of police units authorized to conduct IP raids decreased, meaning right holders had to compete over limited resources. Those who were available from ECOTEC were competent and dedicated but lacked sufficient manpower to respond in a timely manner to complaints filed. As a result of these problems, the total number of end-user software piracy raids for the Business Software Alliance and members in 2008 decreased to 45, a 40% drop compared with 2007 (80 raids). Unfortunately, the authorities refuse to name the targets, for fear of defamation claims, but the failure to fully publicize raids makes them much less effective as a deterrent.²³ The situation changed somewhat in September, when ECOTEC agreed to endorse the BSA “Countdown to Crackdown” campaign, offering businesses 30 days to legalize. Enforcement began on October 15, 2008 with extensive press, including a press conference co-held by BSA and ECOTEC, to publicize the statistics on raids conducted. Following the start of the crackdown, 19 raids were conducted by ECOTEC. In addition, around 30,000 businesses were sent ECOTEC-branded direct mailers and these were followed by another batch of around 20,000 letters. Regarding government legalization of software usage, IIPA is pleased that, according to the Royal Thai government’s latest report, it has requested the cooperation of all government sectors to abide by the decision of the Cabinet in 1999, which stipulates that all government sectors are to strictly use legitimate software.

Book Enforcement Not Forthcoming: Royal Thai authorities have done little in 2008 to further initiatives begun in 2007 (like the “Stop Book Piracy” initiative) and otherwise to reduce illegal photocopying, printing, translations or adaptations. Authorities do not take *ex officio* raids against book piracy. Most disturbingly, while publishers and their representatives have met with Department of Intellectual Property (DIP), Department of Special Investigations (DSI), ECOTEC, and Royal Thai Customs, none of these authorities seems to believe printing companies based in Thailand could print and export pirate books, despite the evidence being amassed.²⁴ The Thai authorities have not conducted any in-depth investigations against suspected counterfeiters, although they have supplied specific information such as immigration records of some suspected offenders. IIPA would like to see the following in the next year with respect to the production-for-export problem in Thailand:

- **Use Investigative Powers to Help Locate Pirate Book Printers in Thailand.** While DSI and Royal Thai Customs have cooperated to a significant extent in these investigations, they now need to use their investigative powers, which far exceed any powers that the publishers have as private parties, to help track down the illicit enterprises.
- **Increase Cooperation with Foreign Bureaus, Including United States Customs:** There is a sense that DSI and Royal Thai Customs do not trust the evidence of infringement being provided by other countries, including the United States on the source of piracy operations.

²³ One feature of Thailand’s criminal law allows a party charged with a criminal offense to bring a defamation action against anyone who publicizes the charge before a final judgment has been issued. In the past, right holders have on occasion gotten cooperation from the police to release the names of infringers to the press, but they have become reluctant to do so.

²⁴ The publishing industry has several investigations pending against suspected print pirates in Thailand. We have information that suggests that the printing is taking place inside Thailand and that there are multiple sources for the pirated books that are making their way into mainstream channels of commerce outside Thailand, including in the U.S.

- **Name a Single Coordinator for Book Piracy Enforcement:** IIPA continues to call upon the Royal Thai government to designate a permanent point of contact, for example, within the Interior Ministry, to instruct other law enforcement agencies regarding enforcement against book piracy.

Other issues hindering enforcement of the rights of publishers in Thailand is attrition among key enforcement officers, creating major obstacles in putting into place a lasting cooperation between publishers and enforcement agencies in Thailand. The Royal Thai government has not done much to address the core misunderstandings about “fair use” in the educational context, and universities still need to take a role in ensuring legitimate uses of textbooks and other published materials in schools and universities.²⁵

Camcorder Piracy Enforcement: We urge the Royal Thai government to ensure that the problem of illegal camcording is properly addressed. Illegal camcording harms local Thai films as well as foreign films. The Royal Thai government has represented to industry that its law already adequately protects against illegal camcording, and that its authorities could take actions against illegal camcording without enactment of a standalone provision outlawing the use of or intent to use audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. There is currently one case under investigation following a police interdiction and arrest of a suspect caught recording *Body of Lies* at the Siam Paragon theater on October 9, 2008. Industry indicated its willingness to review the record of cases brought against illegal camcording in 2008. To our knowledge, other than this case arising in October,²⁶ the Royal Thai government has not come through with such case results.

Entertainment Software Piracy Enforcement: ESA member companies continue to conduct “mall sweeps” in cooperation with local law enforcement. We encourage the authorities to commence *ex officio* raids against such targets. As noted above, criminal cases rarely result in even meager fines (ESA members report that fines are typically only imposed in cases where 100 or more discs are seized, leading pirates to keep very few discs on hand), and no imprisonment, but only community service, if that.

Updates on Optical Disc Piracy Cases: IIPA previously reported three major optical disc actions, against Cyber Planet (which was raided on April 10, 2007, and charged with violating the Optical Disc Manufacturing Act for failing to inform DIP regarding production), the “307 Plant” (raided on June 20, 2007, and leading to prosecutions under the copyright law and the Optical Disc Manufacturing Act, with testimony heard by the IP&IT Court on November 20-23, 2008; a verdict is possible as soon as February 2009, but none had been announced as of the date of this filing), and one unregistered plant (raided October 19, 2007, and leading to the arrest of the home owner for not registering the property as an optical disc plant under the Optical Disc Manufacturing Act and for infringing copyright, and the arrest of his two employees, nationals of China and Myanmar, for copyright infringement; the court has temporarily suspended consideration of the case since the defendants absconded after being let out on bail, but arrest warrants have been issued).

Corruption: There have long been instances of corruption in the IP enforcement system in Thailand. In the 2008 Special 301 report, IIPA highlighted a stoppage by a local police station, and the courageous acts of the then head of ECOTEC to re-establish the rule of law. In other instances, corruption is more subtle, for example, substitution of low-level defendants for the major target well after the raid has been run, delays in post-raid inquiries, and leniency of police officers on the pirate targets during raids. Some simple but concrete steps, like rotating police officers every year or two in order to prevent them from making connections with pirates, and securing raid parties (for example, by removing mobile devices from those on a raid party to avoid leaks, which has been highly effective in the territories employing this technique), can ensure that honest government officials are able to do their honest work without worry that corrupt forces around them will nullify their good intentions.

²⁵ IIPA read with interest in the Royal Thai Embassy’s February 13, 2009 report, *Thailand’s Recent Developments on Protection and Enforcement of IPRs*, *supra* note 10, about certain DIP activities during 2008, including sending officers to lecture on book copyrights to teachers and librarians, and to explain its manual on fair use at universities. The U.S. publishers again request to be permitted input in the formulation of “Fair Use Guidelines for Education,” particularly in light of court decisions which may be easily misinterpreted by the universities regarding the scope of allowable copying. At least, it must be made clear in such activities by DIP that wholesale copying of academic materials without permission and payment is impermissible.

²⁶ *Id.* The Royal Thai Embassy’s February 13, 2009 report mentions this case, but it is unfortunate that, thus far, the government response does not indicate support with industry’s strong view that a standalone approach is needed.

Link Between Piracy and Organized Crime: It has long been the case that powerful interests have been attracted to the low-risk, high profit world of piracy in Thailand. In 2006, an industry representative was shot and killed in Nakorn Pratom Province, and a staff person was attacked during a raid in Open Market in Nonthaburi Province. In 2007, at the Tanwanna shopping mall, a scene between two rival gangs involved in pirate optical disc businesses erupted in violence, resulting in one death and another serious injury. There have been some instances in which politicians or ex-politicians have been suspected of close involvement with piracy operations. There are connections between organized criminal piracy and corrupt practices, like substituting pitiful, undesirable defendants in a criminal trial for the real big fish target, which has happened on many occasions in Thailand at the Police and prosecutor's level. To address the involvement of organized crime, the government of Thailand should ensure that copyright infringement is a predicate offense for remedies like freezing assets of organized criminals, and that copyright infringement is a predicate offense in the Money Laundering Act. The government prosecutors should also consider filing charges against pirates on the basis of tax evasion in parallel with copyright offenses whenever this presents itself.

TRAINING AND PUBLIC AWARENESS

Numerous Industry Trainings in 2008: Copyright owners organized and engaged in numerous anti-piracy trainings and public awareness activities in 2008. These included the following:

- On April 10, 2008, the Thai Entertainment Content Trade Association (TECA) and the Prevention and Suppression of Intellectual Property Infringement Committee (which has since been dissolved according to industry reports) presented a seminar, "How to Use Copyrighted Works Properly," for 200 participants in Pattaya City mainly involved in the karaoke business.
- On April 29, 2008, for World Intellectual Property Day, TECA presented a concert at Central World Plaza, to send the message to protect copyright and to demonstrate copyright's role in local economic and cultural development. The event was co-organized with the U.S. Embassy and the Department of Intellectual Property.
- On April 29, 2008, IIPA delivered a "Roundtable Discussion on the Development of International Copyright Protection" for roughly 50 participants from the Department of Intellectual Property and the IP&IT Court, discussing the latest developments in implementation of and ratification/accession to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- In April 2008, the Department of Intellectual Property, ECOTEC, with support from the Association of Thai Software Industry (ATSI), Association of Thai Computer Industry (ATCI) and the Business Software Alliance launched a major educational initiative known as the "National Software IP" (NSIP) Campaign. The campaign utilized mass media to educate corporate end-users of the legal risks in using pirated software in the workplace. Under this campaign, DIP sent out educational letters to 30,000 businesses nationwide. These businesses were also invited to attend software asset management (SAM) seminars to learn how to better manage software.
- On May 8, 2008, TECA and the Prevention and Suppression of Intellectual Property Infringement Committee (which was dissolved according to industry reports) presented a half-day seminar, "How to Use Copyrighted Works Properly," at Rajabhat Hua-Hin University, Prachuabkirkhan. The seminar aimed to educate 300 entrepreneurs in Hua-Hin, particularly pub, bar, and Karaoke operators to properly use (and license) copyright works and recordings.
- On May 20, 2008, TECA and the Prevention and Suppression of Intellectual Property Infringement Committee presented a half-day seminar, "How to Use Copyrighted Works Properly," at the Thavarn Hotel, Phuket Island for 200 Phuket business people.
- Also on May 20, 2008, TECA and the Prevention and Suppression of Intellectual Property Infringement Committee gave a half-day presentation to 200 Police on how to distinguish pirate product from legitimate product.
- From September 24 to 28, 2008, the Export Promotion Department (DEP), Ministry of Commerce, organized the Thailand Entertainment Expo 2008, held at Siam Paragon, Bangkok, to promote potential of Thai entertainment industries and to upgrade Thailand as a marketplace for entertainment. Around 200 film, music, animation, and television companies participated, and an estimated 100,000 people participated in the Expo. TECA and other industry groups participated. The DEP has indicated its intention to conduct another Expo in 2009.
- In September 2008, ECOTEC launched a "Countdown to Crackdown" campaign that offered businesses a 30-day warning before a wide-scale enforcement program would be launched to combat business software piracy in the

workplace. Consequently, enforcement began on October 15 with extensive PR being used to publicize the raids conducted.

- On October 7, 2008, TECA and the government organized a press conference entitled, "Stop! Hurting Artists. Stop! Piracy," to send the right message to consumers that buying pirated product means hurting artists and encouraging corrupt criminals. Through the press conference, TECA also sought cooperation not only from consumers but also governmental agencies and the private sector to help fight piracy. TECA also discussed the "Childnet" Internet charity program which was launched in conjunction with the International Federation of Phonographic Industries to make parents aware of the facts surrounding the use of P2P file sharing software such as inadvertent file sharing.
- In 2008, MPAA participated in 26 separate training exercises in various locations throughout the country for judges, prosecutors, law enforcement and customs officials. In total, there were 3,235 trainees.
- Throughout 2008, the Business Software Alliance provided Software Asset Management (SAM) seminars in 5 cities, Bangkok, Chiangmai, Korat, Ayudhaya, and Cholburi. Over 2,000 people attended these trainings throughout the year.

Government Public Awareness Event: On January 14, 2009, the Department of Intellectual Property and the Airports Authority of Thailand at Suvarnabhumi International Airport in Bangkok launched an anti-piracy and anti-counterfeiting effort, in a ceremony attended by WIPO Director General Francis Gurry, and at which posters and leaflets displaying messages in both Thai and English warning consumers, "Warning, carrying fake goods to some European countries is a crime, France: up to 3 years in Jail/300.000 Euros Fine, Italy: up to 10,000 Euros fine," were placed at different areas of the airport and handed out to travelers. The event was well publicized by several Thai newspapers and TV channels, and the stated objective of the collaboration between DIP and the Airports Authority is to educate and warn Thai residents and tourists not to import into or export out of Thailand pirated or counterfeit goods.

COPYRIGHT LAW AND RELATED ISSUES

In Thailand, copyright protection is governed chiefly under the Copyright Act, B.E. 2537 (A.D. 1994), which was last revised in 1995. The law created an adequate basis for protection, particularly if properly enforced with the imposition of the statutory maximum sentences, for example.

Need for Modernization to the Copyright Act – Fits and Starts Since 2005 to Present: Technological developments now make it critical for the Royal Thai government to make changes to modernize the statute and make it more effective and user-friendly. The comprehensive amendments dating back to 2005 would have made some important improvements to copyright protection in Thailand.²⁷ Included in those amendments were provisions to strengthen civil remedies by allowing courts to award compensatory and punitive damages and lost profits, make it an offense for a photocopy shop to provide infringing copies of works, 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 to prohibit the circumvention of technological protection measures (TPMs), and prohibit the unlawful tampering with rights management information (RMI), strengthen criminal penalties in certain respects, and establish voluntary collective management of copyright.

In 2007, the Royal Thai government, rather than considering the comprehensive approach in the 2005 draft, decided to divide the drafting process into two baskets, dealing with collective management and criminal penalties as standalone issues. The 2007 amendments would have imposed an unclear mandatory collective management regime in Thailand in a way which could have undermined the ability of right holders to engage in free contractual and licensing/payment relationships, and also would have removed all minimum criminal fines and minimum imprisonments (in cases where infringement was done "by way of trade"), replacing the current penalty structure with only maximum fines – exactly the wrong direction.²⁸ The good news is that the amendments, while passing a first reading, were never enacted prior to the establishment of a new Parliament. The latest report IIPA has received indicates that the collective management issue is back with the Department of Intellectual Property awaiting a new legislative plan, and that the WIPO

²⁷ A fuller description of the improvements and problems with previous drafts has appeared in previous IIPA Special 301 country reports on Thailand, at <http://www.iipa.com/countryreports.html>.

²⁸ A full set of comments on the 2007 draft appears in the 2008 IIPA Special 301 reports on Thailand, at <http://www.iipa.com/countryreports.html>.

treaties issues are under consideration of the Council of State.²⁹ IIPA sincerely hopes that the WIPO treaties elements of the 2005 draft will be incorporated into a new copyright revision draft and that the Royal Thai government will decide to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. IIPA also looks forward to having an opportunity to review the latest draft.

ISP Liability Issues: One very important legal question which should be resolved in the copyright law involves the extent to which Internet service providers can be held liable for infringing activities hosted on their servers, or engaged in by third parties using their services, such as P2P file sharing services. A law dealing with ISPs in Thailand, the Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000), 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 more than eight years after enactment of the Act. 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. Nonetheless, it would be important for both a cooperative mechanism including notice and takedown, and the informational requirement regarding infringers' identities, to be made clear and in writing in the copyright law being revised.³⁰

Of some concern has been reaction to passage of the Computer Crime Act B.E. 2550 (2007), which went into effect on July 18, 2007. The law, while essentially an anti-cybercrime statute, was thought to enable right holders to protect copyright in the online environment in limited circumstances. For example, Section 14 of the Act makes it a crime to use a computer system to disseminate illegal, fraudulent or obscene data. The law also covers limited cases of circumvention, i.e., it makes it illegal to circumvent an access control measure to avail oneself of a specific computer system, or to "uncover" or disclose a circumvention method. The law places potential liability on ISPs for contributing to such computer crimes as well. However, right holders have indicated this law is also apparently being used by ISPs as a shield to protect data from being disclosed to copyright owners – data which right holders need and is indispensable for them to obtain a search warrant from court.³¹

Ban Illegal Camcording: It is time for the Royal Thai government to enact, perhaps as part of the current copyright law revision process, a standalone provision to ban the illegal use or intent to use of an audiovisual recording device in a movie theater to record a film off the screen. At various times of the year, IIPA and the Motion Picture Association have discussed the need for such standalone provisions in order to enforce against rampant and growing instances of illegal camcording in Thailand. A standalone mechanism independent of copyright is needed so that the courts can be alleviated of various procedural hurdles to enforcement (such as subsistence and ownership issues) in order to effectively fight this virulent and fast-spreading form of piracy in Thailand.

Clarify Exceptions as to Copying of Academic Materials: IIPA continues to call for clarification of Article 32 of the copyright law, which provides for certain exceptions to copyright protection. In light of interpretations of this Article, especially paragraphs (6) and (7) that have been interpreted to allow wholesale copying of academic materials, Thailand should take steps to narrow the relevant provisions to ensure compliance with international norms.

²⁹ See the Royal Thai Embassy's February 13, 2009 report, *Thailand's Recent Developments on Protection and Enforcement of IPRs*, *supra* note 10.

³⁰ At least one industry group has reported that the latest draft copyright amendments have an exception clause for ISPs which is arguably too "vague and too board," potentially providing ISPs with an excuse not to cooperate. IIPA has not reviewed such provisions but would look forward to doing so and being given an opportunity to comment.

³¹ Further to the issue of identifying information of suspected infringers, we understand that the Royal Thai Cabinet has approved a draft data protection bill and is under second review by Council of State. IIPA has not reviewed this legislation, so cannot say whether it would have any adverse effect on Internet enforcement of copyright.

Organized Crime Prevention Legislation: IP violations still have not been included in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E. 2542 (MLPSA).³² 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.³³ 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. The Royal Thai government should address the issue of organized criminal syndicate involvement in piracy and counterfeiting operations, by adopting anti-organized crime legislation, and legislation on asset freezing, which would include intellectual property rights violations as predicate offenses.³⁴

Remaining Problems with the Optical Disc Manufacture Act: IIPA has previously discussed and analyzed the Optical Disc Manufacture Act which went into effect on August 29, 2005.³⁵ IIPA learned in 2007 that the Royal Thai government was considering amendments to the Act to make it even more effective, however, little progress appears to have been made in this direction in 2008. In IIPA's view, the law needs the following fixes (discussed in more detail in previous filings):

- **"Copyright Owner's Code" Creates Burden on Right Holders:** The Act should be amended to remove the onerous and unprecedented obligation that right holders acquire a "copyright owner's code" before any replication of legitimate CDs. By requiring an application for and affixation of a code to all legitimate discs, Thailand may have inadvertently created a formality that violates Thailand's international obligations.³⁶
- **No Licensing Regime:** The Act should be amended to require a license for a plant to begin producing optical discs and a license term and renewal process should be established.
- **No Timely Monitoring of Export of ODs and Imports/Exports of Machines, Stampers/Masters and Raw Materials:** The Act should be amended so that there is a before-the-fact automatic permit for export of discs and import/export of machines, stampers/masters and polycarbonate.
- **No Express Seizure, Forfeiture, and/or Destruction of ODs, Stampers/Masters, and Machinery:** The Act should be amended (or regulations issued) to provide for seizure, forfeiture, and/or destruction of discs, stampers/masters, or machinery found in violation of the statute infringing copyright or trademark.
- **No Mandatory Minimum Criminal Penalties:** The Act should be amended to provide for mandatory minimum fines and imprisonment.

UNCTAD/Chulalongkorn University "Working Draft" on "The Interface of Intellectual Property and Competition Law in Thailand: On December 15, 2008, the United Nations Conference on Trade and Development (UNCTAD), without conferring with any sister IP organizations of note (most notably the World Intellectual Property Organization), issued through the Royal Thai government's Department of Intellectual Property website, a working draft entitled "The Interface of Intellectual Property and Competition Law in Thailand: International and Comparative Perspectives." Rather than sticking strictly to competition law, the working draft made some questionable recommendations in the realm of copyright (such as recommending that Thailand adopt a commercial purpose "reverse engineering" exception to the prohibition on circumvention of technological protection measures) and made controversial (and, IIPA believes, misleading or incorrect) statements about copyright exceptions, and hints that compulsory licensing or price fixing may be appropriate responses to textbook needs in the educational context.³⁷ While it is unclear how the report

³² Under the MLPSA, 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\$5,800).

³³ 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>.

³⁴ IIPA has learned from the Royal Thai government that DIP was entrusted in April 2008 to revise the Prime Minister's Office Decree on the Enforcement of IPR Related Laws such as the Revenue Code, Factory Law, Drug Law and Import-Export Law so that more agencies will cooperate in IP investigations. It is unclear how the change in government has affected the DIP mandate to revise the Decree, but such revisions could be helpful in establishing links between piracy and other punishable offenses.

³⁵ Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).

³⁶ This kind of copyright owners' code application process is a flaw that could, if it was used in a way to interfere with the exercise of copyright, might call into question compliance with the Berne Convention's "no formality" clause. At least some industries find the code burdensome and problematic and call for its deletion from the law.

³⁷ The UNCTAD author[s] bring to light Thailand's new obligations (extended to all WTO members) under the Thai-Japan Free Trade Agreement, which was signed in April 2008, and went into force on October 30, 2008. The Thai-Japan FTA requires Thailand to provide, immediately, an exclusive "making available" right, as well as protections for technological protection measures (TPMs) from unlawful circumvention (and trafficking in circumvention devices) and protections

will be used in Thailand, because it was published on the DIP website, and because of previous indications that the government would be considering legislative approaches to IP and competition law, IIPA believes future activity arising from this report should be closely monitored.

Fair Use Guidelines: The DIP issued three guidelines on fair use in recent years, namely, the “Fair Use Guidelines for New Report,” the “Fair Use Guidelines for Education,” and the “Fair Use Guidelines for Software.” The DIP has indicated that these guidelines are intended to serve as manuals for users of copyright works, e.g., the education guidelines are intended “to reduce risk of copyright infringement in books and other copyright works.” IIPA appreciates the good intent of DIP, and only requests that the affected stakeholders, such as the publishers and software industry, be permitted to weigh in the formation of such guidelines, given their experiences in creating similar rules for the road in other countries.

Legislation to Address Cable Piracy: A law dealing with cable piracy would be a welcome addition to the anti-piracy laws. The DIP Report indicates that a Television and Broadcasting Draft law was proposed so as to provide framework for radio and television broadcasting business operations with or without the use of frequencies, as well as the qualifications of licensed operators and the duties and functions of the National Broadcasting and Telecommunication Commission. The DIP Report indicates that this draft law is intended to enable the authorities to effectively control illegal broadcasting of copyrighted works and prevent copyright violations on cable television. As discussed in the report above, government proposals should empower the commission with the authority to temporary or permanently suspend or revoke the licenses of the operators involved in unauthorized broadcasting, without requiring a final judicial decision. The law must also not impose undue restrictions on the ability of legitimate broadcasters and content owners to freely contract, i.e., it must not force them to negotiate with the cable pirates or grant those previously engaged in cable piracy with non-exclusive licenses.

Customs Act Revision Should be Enacted: According to the latest reporting from the Royal Thai government,³⁸ an amendment to the Customs Act that would empower customs officers with the authority to inspect and confiscate goods entering the country for transit and transshipment has been submitted to the Ministry of Finance, and will then proceed to the Cabinet and Council of State for consideration. IIPA fully supports these changes to the Customs Act and hopes they will increase the effectiveness of customs officials in tracking and preventing copyright infringements.

MARKET ACCESS ISSUES IN THAILAND

Thailand currently imposes some restrictions on market entry that, in addition to piracy, form barriers to entry of legitimate business and unduly prejudice foreign right holders. The Royal Thai government should take steps in 2009 to eliminate or reduce such restrictions, while resisting the urge to impose new restrictions.

Problematic Film Act Enters Into Force on July 1, 2008, Imposes Screen Quota and Uncertain Censorship and Ratings System: The most concerning development by far in 2008 was the passage on December 20, 2007, and entry into force on July 1, 2008, the new Motion Pictures and Video Act B.E. 2550 (2008). Reportedly, Section 9(5) allows the Film Board to establish a ratio between the number of local and foreign films, film/screen time quotas, at a time when there are 704 screens in Thailand, more than enough to have free flowing films of all kinds, and at a time when most other countries are removing quotas, not putting them into place. Clearly, the new quotas will harm foreign right holders.

The Act also imposes new and onerous rating requirements on films, music videos and live performances, and censorship requirements³⁹ on films, audiovisual products, music used for karaoke, and videogames.⁴⁰ The concerns over

for rights management information (RMI) from unlawful removal or alteration. This FTA is helpful to the United States and its right holders since essentially the obligations therein will now be made applicable to U.S. by virtue of TRIPS MFN obligations. The competition portion of the working draft refers mainly to recent EU case law on “abuse of dominance” but hints at the possibility of compulsory licensing.

³⁸ See the Royal Thai Embassy’s February 13, 2009 report, *Thailand’s Recent Developments on Protection and Enforcement of IPRs*, *supra* note 10.

³⁹ In previous reports, IIPA has noted that “strict censorship guidelines in home video products have an adverse effect on the importation of DVDs, due to the costly nature of having to delete such scenes from the DVD master simply for the Thai market.”

⁴⁰ The changes in the Film Act come at a time when Thai filmmakers, directors and producers are seeking greater deregulation, i.e., the switch from the strict censorship regime to a more audience- and filmmaker-friendly ratings system, and are seeking to cut import taxes on film stock, cameras and other equipment, which must be imported, and for which the duties are extremely high.

this new ratings and censorship regime include: 1) the time frame for obtaining ratings or censorship approval, which is too long (15 days), allowing pirates (who of course do not adhere to the law's requirements) to gain a head start; 2) the costs associated with rating or censorship, again, giving pirates an additional cost advantage in the market; and 3) the severe consequences for failure to comply with the ratings and censorship system, of criminal liability including both jail time and a fine; 4) fixation requirement, i.e., that the relevant rating or censorship code be "fixed" onto the container of films or audiovisual products as well as on the packages, and "embed" the rating or censorship code into the content of films and audiovisual products so that the rating or censorship code appears on the screen or any media when broadcasted or displayed.

One further part of the Film Act places responsibility on Internet cafés, distributors (shops or stalls) of films and audiovisual products, theaters, as well as Karaoke operators, to acquire a "license to operate the business" in advance, with violators subject to criminal liability of up to one million Baht (US\$28,880) or up to two years in jail. Industry has noted that optimistically that the new law could be able to curb piracy in street stalls, shopping malls and complexes and even in Internet café in parallel with Copyright Law.

Investment Bans in Broadcasting: Foreign investment in terrestrial broadcast networks is prohibited. A draft broadcasting law ("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.

Television Advertising Restrictions: Advertising is currently 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 5% of received advertising income be deposited in a proposed National Broadcasting Business and Television Business Commission. In October 2005, the Royal Thai government allowed original advertising carried on foreign satellite channels to 'pass through' on local pay-TV networks – a very positive sign.

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." Thailand receives among the largest benefits through the GSP program of any nation. During 2007, more than \$3.8 billion worth of products came into the United States duty-free from Thailand, or more than 16.8% of its total imports to the U.S. In 2008, more than \$3.5 billion in goods entered the United States from Thailand duty-free, or just over 15% of its total imports to the U.S. enjoyed duty-free status under the GSP code. Thailand must meet the discretionary criteria in this U.S. law if it expects to enjoy favorable treatment for these imported goods.