

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Thailand should be lowered to the Watch List.¹ An Out-Of-Cycle Review (OCR) should be conducted by USTR to:

- determine whether the Royal Thai government has put into place measures to ban the unauthorized camcording of movies in theaters and provide for landlord liability; and
- review progress in adopting legislation that would be WCT- and WPPT-consistent, including, *inter alia*, adequate protection for technological protection measures, and address Internet piracy and promote service provider responsibility (including statutory notice and takedown), and delete the copyright owner code from the OD law.

USTR should also review whether the Royal Thai government has taken necessary action to ensure the operation and performance of adequate and dedicated enforcement units, best achieved by vesting enforcement authority in DIP to conduct raids, make arrests, investigate, and commence anti-piracy litigation, by increasing resources in the newly created Division of Technology Crime which will oversee Internet piracy issues, and by making progress in increasing the number of criminal prosecutions with deterrent sentencing.

Executive Summary: IIPA congratulates His Majesty the King of Thailand for launching with his Ministries the “Creative Thailand” initiative along with the twelve “Creative Thailand Commitments” in February 2009.² The laudable goals of the initiative include promoting Thailand as a “hub of creative industries in South East Asia” and boosting the economic contribution of Thailand’s “creative industries” to 20% (from its current 12%). IIPA believes adequate protection and enforcement of the existing intellectual property framework will lead to reductions in piracy, which in turn will spur the kinds of investments in local Thai IP industries necessary to achieve the “Creative Thailand” goals. Studies such as that done by the Business Software Alliance and IDC (discussed below) and a just-released study by the Fiscal Policy Research Institute (FPRI) and the Kenan Institute Asia conclude that better protection of copyright could generate additional income. The FPRI/Kenan study, for example, concludes that better copyright protection will generate an additional BT3.7 billion (US\$111 million) for the movie sector and BT1.7 billion (US\$51 million) for the music industry in Thailand.³

Unfortunately, losses due to copyright piracy in Thailand grew worse in 2009, and piracy levels remained well above average for the Asia region. For example, losses due to piracy of business software grew to US\$367.8 million in 2009, up from US\$335 million in 2008, while the piracy level for business software grew to 77% in 2009, up from 76% in 2008, many points higher than the regional median.⁴ Pirate product remains widespread in Thailand, with some evidence of decreasing optical disc factory production but higher levels of burning and other forms of piracy such as mobile device and online piracy, piracy of published materials in the form of pirate photocopying, and some evidence of counterfeit print piracy at least some of which is destined for export. In conjunction with the global

¹ For more details on Thailand’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

² In conjunction with the launch of Creative Thailand, the Royal Thai government reported establishing a National Committee on Prevention and Protection of Intellectual Property Rights in January 2009 (now called the National Committee on Intellectual Property Policy), Chaired by the Prime Minister, and a Sub-Committee on Prevention and Suppression of Intellectual Property Rights Violation chaired by the Minister of Commerce, comprising senior officials from major enforcement agencies in Thailand.

³ *IP Rights Vital to Creative Economy*, Bangkok Post, January 28, 2010, at <http://www.bangkokpost.com/business/economics/31876/ip-rights-vital-to-creative-economy>.

⁴ The record industry suffered at least US\$15.1 million in losses with a 50% piracy rate in 2009. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2010 Special 301 submission at www.iipa.com/pdf/2010spec301methodology.pdf. BSA’s 2009 statistics are preliminary, representing U.S. software publishers’ share of software piracy losses in Thailand. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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.



economic downturn, piracy has devastated the local creative economy in Thailand. 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. In 2009, physical sales of legitimate music products decreased an additional 17%.

The Royal Thai Police, specifically, the Economic and Cyber Crime Division (ECD) of the Central Investigation Bureau (CIB) and the Department of Special Investigations (DSI) continued assisting copyright owners seeking targeted enforcement. Raiding activity ensued, including against business software end-user piracy targets and many retail targets. However, enforcement actions continued to focus mainly on smaller targets, thus having only a minimal effect on overall piracy rates or losses. Increases in manpower in ECD, expansion of the authority of DIP, and expanding resources and training of the newly created Division of Technology Crime and are needed to achieve maximum deterrent effect. In 2009, the government proposed some initiatives that would aid in efforts to thwart piracy. Proposals like imposing liability on landlords who benefit from piracy and either know or should know that infringement is occurring on their premises will be helpful and appear poised for passage into law. IIPA commends the government for its decision to propose a bill outlawing camcording movies in a movie theater, and urges the government to act on long-awaited copyright legislation to modernize protection and, among other things, join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Conversely, IIPA is concerned by the proposed preference policy of the Prime Minister mandating government agencies to buy open source software, which is inconsistent with APEC policy guidance on technology choice.

Priority Actions Requested In 2010: 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

- Expand enforcement authority to DIP, and increase manpower in enforcement authorities such as ECD and the newly created Division of Technology Crime.
- New CIB Police Task Force should be activated, made permanent, and made proactive in developing and implementing an effective anti-piracy strategy.
- Continue to improve search warrant issuance, facilitating a right holder's ability to obtain a search warrant from the IP & IT Court when there is evidence of a suspected infringement.
- Close notorious piracy markets ("Red Zones" and "Yellow Zones"), hold mall owners accountable, and conduct progress surveys to demonstrate overall decrease in numbers of vendors throughout the country.
- Continue investigating business of counterfeit book production for export, as well as other key book and photocopy piracy issues.
- Investigate and prosecute greater numbers of key piracy cases, including those involving business software end-user piracy, Internet piracy, mobile device stores or services, burner labs, pirate plants, warehouses, retailers, and pirate book producers, with deterrent results actually imposed and publicized.
- Through meetings between agencies, copyright owners and Internet service providers (ISPs) and appropriate legislation, ensure active cooperation of ISPs with right holders to prevent the use of networks for the commission of infringing acts, including but not limited to effective and fair policies to deal with repeat infringers.

Legislative

- Introduce (and enact) landlord liability bill.
- Introduce (and enact) planned legislation to ban unauthorized camcording of movies in theaters.
- Introduce (and enact) planned amendments to fully implement the WCT and WPPT, including amendments to address Internet piracy and promote service provider responsibility, e.g., statutory notice and takedown and mechanisms to address hosted piracy, P2P file sharing, web bulletin board services and torrent sites, advertising sites, and Internet-based mobile device piracy.
- Join the WCT and WPPT.
- Address organized crime by adopting measures to make copyright piracy a predicate offense that triggers 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 rights holders acquire a “copyright owner’s code” before any replication of legitimate CDs.
- Issue clarification that copy exceptions in the copyright law comply with TRIPS Article 13 and do not allow whole copying of books without permission and payment.

Market Access and Related Issues

- Among other market access restrictions to be addressed, reverse proposed policy mandating use of open source software, and, e.g., requiring bundling of government funded computers and computers for schools with open source software; maintain neutral policies with respect to technology choice.
- Fix the Motion Pictures and Video Act B.E. 2550 to address potential quantitative and screen time quotas on foreign films that undermine market access for legitimate content.

PIRACY AND ENFORCEMENT CHALLENGES IN THAILAND

End-User Piracy of Business Software and Other Software-Specific Issues: 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 77% in 2009, higher than 2008 and well above the Asia regional median (which was 61% in 2008). Other piracy phenomena harming the business software industry include hard disk loading of illegal software onto computers at the point of sale. The Business Software Alliance (BSA) also reports illegal software programs being used for the purpose of circumvention of technological protection measures (TPMs) on legitimate business software. This last problem highlights the urgent need for copyright amendments to provide protection against products being used to circumvent TPMs, which is also an important part of WCT and WPPT implementation. Reducing piracy would have a net positive effect on Thailand’s economy. A January 2008 study done by the International Data Corporation (IDC) with BSA concluded that decreasing Thailand’s software piracy rate by ten percent over a four year period would add US\$1 billion to Thailand’s economy, create 2,100 new high-wage high tech jobs and generate an additional \$55 million in tax revenue.

The business software industry reported that they received good support from ECD for end-user software piracy actions and also the support of DIP and ECD in building awareness and promoting the use of legal software in the workplace.⁵ As a result, business owners and IT managers appear to have become more aware of the risks of using pirate or unlicensed software in the workplace. While insufficient in terms of manpower, BSA finds ECD officials to be competent and dedicated to their work. BSA also received good cooperation from the state prosecutor’s office. ECD has indicated that in 2008, the division arrested individuals and businesses who were later charged in 85 illegal software cases involving BT300 million (US\$9 million), and that it expected the number of arrests in 2009 to reach about 120, in cases involving about BT433 million (US\$13 million). In October 2009, ECD announced it would begin investigations into about 1,000 companies for possible infringement of software copyright, which is also a welcome sign.⁶

There were also improvements in 2009 regarding fines in a few IP & IT Court verdicts in 2009 (following on one case in 2008) for end-user raid actions. The fines in these cases are equivalent to the requested amount for actual damages. For example, the maker of design and engineering software was awarded BT1.8 million (US\$54,000) in damages for the infringement of its copyright by a Bangkok-based manufacturing company. In one case in 2008, a software company was awarded civil damages of BT3.5 million (approximately US\$105,000), which included the retail value of the software at legitimate prices (BT2.5 million or US\$75,400) found on the computers,

⁵ Unfortunately, the authorities refuse to name targets of end-user raids, for fear of defamation claims, but the failure to fully publicize raids makes them much less effective as a deterrent. This reluctance arises out of a feature of Thailand’s criminal law that 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.

⁶ Jirapan Boonnoon, *Police Probe Corporate Software Violators*, The Nation, October 8, 2009, at <http://www.nationmultimedia.com>. The article also indicates that ECD has sent 30,000 letters to companies around the country to encourage their use of legal and properly licensed software.

plus legal fees, interest, and damage to the software copyright holder's reputation. This civil judgment marks a welcome improvement over the norm. Court verdicts for sale of counterfeit products over the Internet have also been higher as software representatives have been able to demonstrate that the offenders also duplicated the infringing material themselves, which carries a higher penalty than distribution alone.

The chief problems with the IP & IT Court for the software industry remain non-transparency in the granting of search warrants (and the requirement for continuous evidence submission to obtain warrants) and the imposition of non-deterrent sentences in many cases (with the above-noted cases being the exception to this rule). In particular, judges often side with or express sympathy toward small offenders and on occasion sentence them to probation only. These attitudes can be found within key agencies as well, and extend specifically to end-user software piracy such that due to a lack of understanding, some officials have indicated disinterest in enforcing the law with respect to such piracy activities.

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. However, this positive request may be made much less valuable by the Prime Minister's apparent policy that government agencies acquire open source software, thus restricting their technology choice.

Internet Piracy Grew Worse in 2009 with Greater Connectivity: Internet-based piracy affects nearly all industries and is unfortunately on the rise. Internet connectivity continued to grow in Thailand in 2009. Thailand boasted 16.1 million users, or 24.4% penetration as of September 2009, and well over 900,000 broadband connections, or almost 1.5% penetration as of November 2008.⁷ Broadband connections are mainly found in big cities, while rural villages continue to rely mainly on dial-up connections, thus, Internet piracy in its most virulent forms is primarily prevalent in major hubs. The local music and record industry group, the Thai Entertainment Content Trade Association (TECA), estimates that there are as many as 4,000 websites dealing in recorded music piracy that are hosted in Thailand (this number excludes overseas sites that cater to the Thai market and excludes other industry-specific sites). Bit torrent index sites and tracker sites are also increasingly being used in Thailand to facilitate the unlawful distribution of copyrighted files.⁸ Public and private web bulletin boards (some of which are supported by advertising), free social networking sites, web blogs and cyberlockers are just a few of the additional ways Internet piracy is spreading in Thailand. Traditional P2P file sharing sites, both commercial and non-commercial, download services, deep linking, and websites advertising pirate product remain ever present.⁹ Many consumers have replaced the purchase of copyright materials in hard copies with ripping such content from the Internet to use on their computers or store on mobile devices. IIPA is encouraged by a raid in early 2009 involving a man advertising pirate movies and TV series' over the Internet through a website based in Thailand.¹⁰

To effectively deal with Internet piracy, the government should enact an appropriate legal framework and put in place an enforcement infrastructure that includes a group of competent officials to deal with Internet-based infringements. These officials should also oversee how the private market – meaning mainly ISPs in cooperation with copyright owners – respond to the challenge. Unfortunately, neither the Computer Act nor the Copyright Act of

⁷ These statistics are according to the International Telecommunications Union.

⁸ In Thailand, tracker sites consist of general trackers which are open to any user, and exclusive trackers which accept only a particular group of users (i.e., based on the amount of torrent files uploaded), which are by invitation only or referral and involve membership fees. The contents available in these tracker sites are mostly unauthorized files as well as pornography files.

⁹ For example, in April 2008, following an in depth investigation, the Business Software Alliance (BSA) 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.

¹⁰ The Motion Picture Association reports that on February 6, 2009, MPA Thailand representatives teamed up with ECD officers to conduct the first ever raid in the country specifically targeting Internet piracy. It was the second significant operation in 2009 for MPA Thailand following a January 2009 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\$12,000 (BT400,000) over a two-month period. The police completed their investigation and passed the matter over to the public prosecutor.

Thailand provide for statutory notice and takedown, nor for service providers to assist right holders in investigations. As a consequence, there is no mechanism for rights holders to learn the identities of suspected infringers. The Royal Thai government should ensure that ISPs are aware of their responsibility to deal with infringements, by enacting statutory notice and takedown and otherwise fostering cooperation to defeat online infringements including P2P file sharing. We urge DIP to call together copyright owners and ISPs to forge an MOU on anti-piracy cooperation in the online space.

In 2008 and again in 2009, industry reported good relationships with DIP and the Royal Thai Police on Internet piracy issues, and reported fairly high takedown rates. For example, in 2009, the local music and record industry association was able to achieve 645 takedowns based on 749 cease and desist letters to webmasters and ISPs, a takedown rate at 86% (compared with 155 takedowns out of 163 notices to service providers in 2008, a 95% takedown rate).¹¹ BSA also has had some success in the past seeking takedowns. Unfortunately, service providers, while fully aware of copyright piracy on illegal sites and services, have become reluctant to divulge IP addresses or names, refusing even to name the webmaster. The Royal Thai Police used to obtain such information on an informal basis, but in 2009, the information flow and cooperation have slowed considerably. The Royal Thai Police have also been slow to establish a procedure for requesting court orders for ISPs to release this information and wait for rights holders to obtain a warrant from the court. The Communication Authority of Thailand (CAT) provides space for ISPs to set up a server to operate their business but has not to date helped rights holders monitor the operation of ISPs. In one positive development, TECA was able to obtain agreement from some cyberlocker sites not to accept MP3 files, but this does not guarantee the absence of such files since file names can be easily changed.

IIPA is pleased that the Royal Thai Police established a new Technology Crime Suppression Division on September 7, 2009. While the Division is not up and running in full force yet, IIPA commends the government for recognizing the need for a separate unit to deal specifically with Internet-based infringements. However, the unit has only 20 police officers working in the new Royal Thai Police building, and is short on tools and supplies, with only 10 standalone computers and no high-speed Internet connections. Some personnel lack Internet access, some even lack the requisite computer knowledge, so training is urgently needed.

Judicial Reforms Still Desirable to Ensure Consistent Issuance of Search Warrants, and Deterrent Results: IIPA heralded the establishment of the IP & IT Court in Thailand more than a decade ago as a necessary step to achieve deterrence in regard to copyright piracy cases. Having this specialized court has meant speedier dockets and dedicated judges who are better aware of the needs of a copyright case adjudication practice. The court's expertise has also led to some more significant civil judgments in piracy, as noted was the case in a couple of end-user software cases decided recently.

Unfortunately, some problems remain with court adjudication, some of which are fundamental to the overall effectiveness of judicial enforcement in Thailand against copyright piracy. One example involves the issuance of search warrants. Copyright cases are unique in that evidence of infringement can be easily discarded or erased, especially in the age of digital or online content. Thus, quick and consistent issuance of search warrants, on an *ex parte* basis, is vital to ensure preservation of the element of surprise and the preservation of evidence which might otherwise be easily lost or discarded. Unfortunately, in recent years, copyright owners have faced inconsistencies in the process of obtaining a warrant and a lack of transparency in decision-making in certain instances, especially

¹¹ 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.

when warrant requests are rejected. The arbitrary nature of the review process makes it impossible for right holders to anticipate what any particular judge may request in terms of evidence of to support a warrant. In 2008, such arbitrary decision-making led to a terrible drop in success rate for issuance of warrants for the business software industry, down to 3% for all of 2008. While the issuance rate improved in 2009, IIPA members report that the same judges continue denying search warrants or set truly onerous proof standards, e.g., requiring pictures of the distributor selling the product or of the plant operator actually producing discs. IIPA recommends that in 2010, a series of discussions ensue between affected rights holders and the court to sort out the standards for issuing search warrants. Unreasonable proof burdens such as those described above should be disfavored and a more reasonable approach, based on reasonably obtainable evidence and a reasonable suspicion of illegal activity, should be adopted.

IIPA also strongly urges the Royal Thai government and the courts to consider sentencing guidelines and adopting minimum sentencing that provides a real deterrent to infringement, as well as applying maximum sentences allowable under the law where warranted. While IIPA also notes that criminal enforcement would be improved by bringing more high profile cases involving source piracy, it still remains the case that, especially in recent years, most cases involving pirate distribution result in non-deterrent fines. Of the cases concluded in 2009, over 90% of them resulted in a fine from US\$1,000 to \$5,000. For example, in a few cases where the defendant was shown to have reproduced and distributed the product, a slightly more significant penalty was imposed (e.g., in a recent Internet piracy case, a fine of US\$3,000 and a suspended six month sentence were imposed). The Court has also been applying discounting factors to first-time offenders or those who plead guilty, further limiting the deterrent effect.

Physical Piracy in Retail Hotspots in 2009; Some Indication of Drop-Off: Street piracy still pervades the markets in Thailand (in places like Bangkok, Phuket, Samui, Pattaya, Chiangmai, and Krabi), although there was some drop-off in physical piracy in 2009, attributable to the economic downturn, sporadic enforcement campaigns, and the rise of other forms of piracy.¹² 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 in Thailand.¹³ Industry reports indicate the Royal Thai Police applied pressure through raids and investigations in the Red and Yellow Zone areas, forcing the pirates (especially music pirates) to change their strategy, opting for sales in open street markets scattered around villages and narrow streets and roads. These street hawkers erect small stalls and move around from day to day selling their wares, for example, compilation discs with the top 50 to 100 songs, sometimes selling for only a couple hours a day. Street hawkers in general have also changed their selling habits by displaying only the sleeves and inlay cards without the discs inside, and in many cases, by leaving their stalls entirely unmanned, often only appearing when a buyer wants the product. Such hawkers then burn-to-order the product or pick it up from a nearby storage facility or warehouse.

IIPA members continued to note a decrease in the quality of the physical product, as pirates move from factory discs to burned discs, and from off-set printing for labels to sticker labels or no labels at all. However, there remain a few cases in Thailand of politically “untouchable” factory plants producing higher-quality pressed discs, and many of the more sophisticated counterfeits are imported from places like China and Malaysia. Pirates operating in the physical market have also made changes to accommodate technology and better compete, for example, offering thousands of songs in MP3 format on one pirate disc.

¹² Regarding the pricing of pirated versus legitimate discs, industry reports that Factory-pressed pirate CDs and DVDs (movies, music, or software) are not surprisingly more expensive than burned discs in Thailand, running at about BT100 per disc (US\$3), while pirate burned discs are around BT80 (US\$2.40) and Chinese imported discs are from BT120 to BT150 (US\$3.60 to 4.50) and pirate Bluray discs from China (mostly normal discs being “passed off” as Bluray) are BT150 (US\$4.50). By contrast, legitimate local Thai music discs start at BT99 (about US\$3) while imported content can range from BT149 (US\$4.50) to BT1,499 (US\$45.00), depending on the kind of music, whether the product is a special edition, box or “bonus” set.

¹³ 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 Prajuebkriran 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, Pratunam shopping area, Jae Leng shopping area, Kao San Road shopping area, Sapan Bhud shopping area; Patumtani Province; Nonthaburi Province; Nakornrachasima Province; Konkan Province; and Ratchaburi Province.

The Royal Thai government reported over 6,500 raids involving intellectual property violations in 2009, although these are not broken down by type of IP involved.¹⁴ Many of these raids involved retail locations, with few focusing on the source of pirated goods, such as manufacturing facilities or warehouses raids and the raids are almost always run based on copyright owner complaints.¹⁵ IIPA would like to see a comprehensive approach to retail piracy that enables authorities to close notorious piracy markets ("Red Zones" and "Yellow Zones"), hold mall owners accountable, and conduct progress surveys to demonstrate an overall decrease in numbers of vendors who sell pirate product throughout the country. For example, just taking the zones alone, the government could measure how many stalls exist today, and then measure on a monthly basis how many remain and how many have been closed. Reducing the number of stalls will make an impact on retail piracy rates.

Camcorder Piracy: Thailand is a significant source of pirate camcording¹⁶ in the Asia region, with 22 recordings forensically matched to cinemas in Thailand in 2009 (over 35 cases of illegal camcording of U.S. major motion pictures were detected in 2008). Many major U.S. motion pictures, but also local Thai films, fell victim to camcording piracy in Thailand, harming the films' onward distribution since pirate versions taken from such camcorder copies would then appear on pirate DVD or even over the Internet. IIPA urges the Royal Thai government to ensure that the problem of illegal camcording is properly addressed and we are pleased that the government has decided to legislate a ban on camcording in movie theaters (in addition to any protection that currently exists in the copyright law). There has been only one case prosecuted under the copyright law, involving a guilty plea by the defendant resulting in an insignificant and non-deterrent penalty following the arrest of a suspect caught recording *Body of Lies* at the Siam Paragon theater on October 9, 2008.¹⁷

Mobile Device Piracy: Thailand's mobile subscriber penetration grew once again in 2009, as Thailand hosted 66 million mobile subscribers by mid-2009 (compared with 53 million in 2008).¹⁸ As a result of this growth in the market, right holders experienced greater harm in 2009 from businesses in Thailand providing content on mobile devices, thumb drives, MP3 players, and the like. Industry surveys reveal that mobile shops in the Red and Yellow Zone areas, i.e. Pantip Plaza, Klongtom and Saphan Lek, Koa Sarn Road, Fortune Center and Sear Department Store, all offer "pre-downloaded" music files to customers on mobile devices as a service. Fewer consumers purchased legitimate or pirate product in physical format, instead choosing to rip their content onto mobile devices from various sources including from the Internet. In addition, former retailers of pirate optical discs continued to set up brick-and-mortar shops offering digital download services to consumers for mobile devices, some maintaining an in-store hard drive containing literally thousands of files to purchase and load onto mobile devices. The local music and record industry association monitors this type of infringement on a regular basis and continues to find some mobile phone shops in big cities and tourist attraction areas that provide services for illegal pre-loaded tracks to consumers who are buying new mobile phones or are requesting infringing content. In an 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 a device. Book and journal publishers have in the past reported occurrences of downloading reference books and dictionaries in a similar manner.

¹⁴ In Thailand's Department of Intellectual Property (Ministry of Commerce) report, *Thailand's Implementation on Intellectual Property Rights, March 2008 – February 2009*, the government indicated 5,328 raids (2,973 copyright) resulting in seizures of almost 3.2 million pieces (2.3 million copyright) from January to November 2008, and 521 Customs seizures resulting in seizure of almost 1.3 million pieces. The Customs statistics are not broken down by sector. ECD ran 130 copyright raids in 2008 with seizures of over 170,000 pieces.

¹⁵ For example, the record industry group in Thailand, TECA, reported 194 successful raids, with 184 defendants arrested, and over 50,000 discs seized. They report 173 indictments, with 68 convictions or guilty pleas, and 105 cases still pending. Out of the 68 convictions, 7 resulted in jail time although the sentences were all suspended. 43 of the cases resulted in criminal fines, with all but three of the fines ranging from US\$1,000 to \$5,000. Only one fine in 2009 exceeded US\$5,000. For the motion picture industry, there were 47 raids, resulting in over 400,000 seized discs, and out of 121 criminal cases commenced, there were 19 jail sentences imposed, although all but one were suspended. Out of 28 criminal fines imposed, 24 ranges from US\$1,000 to \$5,000, and no fine of over US\$5,000 was imposed in 2009. The business software industry reports 28 end-user raids, with one positive outcome, and 16 cases pending.

¹⁶ 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 and upload illegal copies to the Internet.

¹⁷ *Id.* The Royal Thai Embassy's February 13, 2009 report mentions this case.

¹⁸ *Thailand – Mobile Communications – Overview*, at <http://www.budde.com.au/Research/Thailand-Mobile-Communications-Market-Overview.html>.

Thai law enforcement officials remain behind the curve on mobile piracy, with some even questioning whether the mobile download (or upload) services provided by the stores can be considered copyright infringement, and refusing to go after the stores that are reproducing the content from the Internet and then distributing it to customers. Such copying and file-transferring clearly constitutes copyright infringement, and must be dealt with severely or this problem of mobile device piracy will grow more harmful.

Book Piracy, Including Production for Export and Unauthorized Photocopying: The book and journal publishing industry continues to face the following problems in Thailand: print piracy, illegal photocopying, unauthorized translations, and online piracy, though the latter is not yet a significant threat. Of these, unauthorized photocopying of educational materials, in and around universities, remains the predominant form of book piracy in Thailand. Copy shops continue to copy books for students, often on a “made to order” basis to avoid keeping infringing stock on site. Lecturers are culpable too, compiling “course packs” of works without permission from publishers, with some producing unauthorized translations of works and claiming authorship. Other pirated materials include novels, travel guides, history books and foreign language newspapers. Various private institutes in Thailand provide illegally reprinted Test of English as a Foreign Language (TOEFL) materials to their students.

In recent years, the industry alerted Thai authorities to the problem of counterfeit/pirated books being produced for export – a problem of considerable concern as these pirated books were making their way into the U.S. market.¹⁹ The Thai based-producer and exporter of these pirated books runs a sophisticated operation and network of consignees, using several companies as fronts for the export activities. Though there was little action by the Thai authorities in the past, in 2009, the relevant agencies of the Royal Thai government began to vigorously pursue an investigation into the production and export of pirated/counterfeit books. In October 2009, the Sub-Committee on Investigation and Suppression of export of counterfeit books was formed, and the Association of American Publishers is working closely with the member agencies in pursuing investigations into the problem of counterfeit book exports. The member agencies of the Committee include the Department of Intellectual Property (DIP) and the Department of Special Investigation (DSI), ECD Police and Royal Thai Customs. The industry appreciates the vigor with which the Committee and its member agencies are now pursuing investigations into this problem. Though there has been considerable effort to address the problem of counterfeit book exports, it remains the case that no *ex officio* actions are conducted against unauthorized photocopying that occurs quite openly

A longstanding problem has been the misconception about “fair use” in the educational context. IIPA is appreciative of recent efforts made, such as sending officers to lecture on book copyright to teachers and librarians, and to explain its manual on fair use at universities. IIPA continues to request input into the Royal Thai government’s development and release of “Fair Use Guidelines for Education,” particularly in light of older court decisions which may be easily misinterpreted by the universities regarding the scope of allowable copying (IIPA recommends amending Section 32 to ensure that broad interpretations allowing wholesale copying of textbooks without authorization and payment cannot be upheld). At least, it must be made clear in such activities by DIP that wholesale copying of academic materials without permission and payment is impermissible.

Optical Disc Piracy Mainly Consists of “Burned” Discs, with Some Imported and Factory Pressed Discs: Changing technologies has meant shifts in the kinds of pirate optical discs found in the market. Shops, back rooms, and even private premises are increasingly being turned into pirate recordable disc burning labs, especially in rural areas of Thailand. Imported discs have increased, particularly from China which are generally higher quality sophisticated counterfeits,²⁰ and discs are still detected coming in from Malaysia. There has been an overall decrease in audio discs, since much of the pirate audio market has been replaced by Internet- and mobile-based piracy. There remains some factory production, with some untouchable plants still in operation. Industry indicates the

¹⁹ As reported last year, U.S. Customs authorities seized shipments of pirated books, including English language technical and professional books, and English language textbooks, in varying quantities.

²⁰ The local music and record industry group reports that smuggling CDs and DVDs from China is popular since consumers of piracy believe Chinese pirate compilations have high quality covers and are relatively inexpensive. These are smuggled in through the Thai-Myanmar border in small amounts to avoid detection by Royal Thai Customs, or are sent via postal service or delivery companies to retailers for further distribution.

ratio of burned-to-factory discs now stands at about 80%-20%. While historically industry had not been permitted to participate in investigations of particular plants, one breakthrough in 2009 was the inclusion of industry in the latest plant visits. The Plant Visit Program was conducted in July and August 2009 with 30 (out of 38) plants visited. The local recording industry group, TECA, and the Motion Picture Association's local group were invited and teamed-up with the DIP, Police Bureau and DSI to visit all of these plants. IIPA appreciates the government's willingness to open the process, since it is through this cooperation that the optical disc piracy problem (at least, the factory production problem) will be resolved. The Team was able to collect three sets of exemplars from almost every plant visited. DIP generously gave industry a set of exemplars to be sent to IFPI's lab in London. The plant visits remain important due to some continued evidence of some exports out of Thailand. Recent years' anecdotal evidence indicated that discs were being exported from Thailand to Malaysia²¹ and to Australia (through an operation run by a Thai student community in Australia, operating a website in Thailand that shipped discs to Australia), and in 2009, some exports were detected flowing into Japan.

IIPA previously reported three major optical disc actions.

- **Cyber Planet:** This plant was raided on April 10, 2007, and the managers were charged with violating the Optical Disc Manufacturing Act for failing to inform DIP regarding production. The Cyber Planet case is now in the hands of the State Attorney, and industry reports that it is likely that the State Attorney will bring charges against the plant for violating the Optical Disc Law.
- **The "307 Plant":** Referred to in DIP's February 2009 report as "Million Silver Gold Factory," this plant was raided on June 20, 2007, leading to prosecutions under the copyright law and the Optical Disc Manufacturing Act. On February 24, 2009, the IP & IT Court found all the defendants in the "307" Plant guilty of violating the Copyright Law, the Optical Disc Law, and the Criminal Code. Each of the named defendants, the Managing Director of the plant, and two employees, received unsuspended sentences of two years in jail, and all defendants, including the "307" CD Plant Company, were punished with a BT506,000 (US\$15,300) fine. The judgment also resulted in confiscation of all machinery and equipment seized, including one optical disc factory line, one printing machine, and the pirated discs found in the initial raid. IIPA commends ECD, DSI, DIP and the Office of the Attorney General for carrying through this legal action. IIPA notes that the judgment has not been fulfilled as the defendants all appealed the case to the Supreme Court where the case is under consideration. The defendants are now free on bail. The appeal in the Supreme Court normally takes one to two years before a final judgment is rendered. Notwithstanding the appeal, the plant is closed.
- **Unregistered Plant:** One unregistered plant was raided October 19, 2007, 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. The owner's two employees, nationals of China and Myanmar, were also arrested for copyright infringement. The courts have suspended consideration of the case since the defendants absconded after being let out on bail, but arrest warrants have been issued.

In another case, in September 2009, ECD conducted operations involving an optical disc plant called "LLI Technology Company Limited" in Nonthaburi Province. A lengthy investigation revealed reproduction of pirate discs at night which were delivered to customers/downstream distributors in the early morning. Two drivers delivering thousands of pirate music and movie discs, CD-R burners and thousands of cover sheets for packaging were arrested and pled guilty to dealing in pirated items and the pirate product was seized. On the early morning of September 24, 2009, the plant was searched and six CD/DVD replicating lines were seized, along with a number of

²¹ 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.

stampers, molds and printing machines. The plant operator and management team were charged with copyright infringement. IIPA commends the government for taking this high-profile and important case, and while IIPA understands the case will be sent to the Office of the Attorney-General for litigation very soon, the owner of the plant unfortunately was able to successfully petition the Court for the return of all his machines. Time will tell whether the plant will remain shuttered and justice brought to bear on the owner of the plant, but the government should be commended for following through on this search and arrests given the overwhelming evidence of a highly organized operation.

Since the U.S. government has provided the Royal Thai government with optical disc forensic equipment, IIPA strongly urges the U.S. to ask the Royal Thai government to maximize the use of this equipment by taking (seizing) sample pirate discs from all areas known to be havens for piracy, e.g., in the Bangkok area, and sending such discs for forensic testing to match the discs with optical disc facilities. This will help pinpoint the Thai facilities that are supplying the retail and street markets. To the extent that discs are imported, it may be that industry can help identify the plant, which in turn would help Royal Thai Customs in their identification of pirate shipments and otherwise help cross-border investigations into import piracy.

Entertainment Software Piracy: Piracy of entertainment software remains prevalent in Thailand, whether through sales of burned, factory pressed or imported optical discs or cartridge-based games and use of pirated games in unlicensed Internet game rooms or cafés. Malls and street hawkers serve as retail channels for pirated entertainment software products. To evade authorities, vendors often store their pirated product in a separate location, and display only game covers or empty boxes in their stands. When a customer, after browsing the shop “catalogues,” requests a specific title, often times 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 or retransmission of U.S. programming over systems from original cable or satellite transmissions, remains a major problem, especially outside of Bangkok. 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. The cable industry group CASBAA reports losses to industry in the range of US\$211 million due to signal theft in 2009 (the second highest losses in Asia, only surpassed by India), with an estimated \$76 million in lost tax revenues to the Royal Thai government for allowing piracy to continue unabated.²² The main source of losses was illegal distribution of signals, although there remain some losses due to illegal individual connections and satellite overspill. The cable industry reports 1.64 million illegal hookups in the country out of more than 2.5 million total hookups in Thailand, a more than 2-to-1 ratio between illegal and legal hookups.

Illegal decoder boxes and smart cards remain widely available in Thailand and a growing problem. Individual hackers continue to cause undue damage to the legal market by applying for a legitimate pay television subscription service, and then using the Internet to share the smart card with others, collecting a monthly fee from the users of the pirate service. Such Internet card-sharing is starting to have serious repercussions for the legitimate industry as well as direct-to-home pay television services.

The Royal Thai government has been very slow to recognize this form of piracy as a priority, but given the size of the problem and the amount the authorities can expect to reap just in terms of lost tax revenues, they need to take this problem seriously and address it. A welcome development was the inclusion in the Broadcasting Act of a provision (Section 70) that punishes manufacturers, importers, sellers and those who service pirate decoders aimed at decrypting Thai-licensed services. IIPA hopes that this change will stimulate many 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.

²² CASBAA and Standard Chartered, *Digital Deployment: Asia-Pacific Pay-TV Industry Study*, November 2009.

Public Performance Piracy of Motion Pictures: Public performance piracy continues to be a problem with many hotels, especially outside Bangkok, retransmitting unauthorized videos over in-house movie systems and bars in tourist areas openly exhibiting films without authorization. A growing number of bars and restaurants have also added “private” rooms to screen major motion pictures illegally.

Link Between Piracy and Organized Crime: It has long been the case that powerful interests have been attracted to the low-risk, high profit nature of piracy in Thailand, placing copyright industry representatives in danger and creating a dangerous situation for those in law enforcement fighting piracy. 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 are connections between organized criminal piracy and corrupt practices, like influence peddling with politicians to avoid being caught or prosecuted for piracy, or substituting pitiful, undesirable defendants in a criminal trial for the real big fish target, which has happened on many occasions in Thailand. 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. There remain examples of “untouchable” plants, including one reportedly owned by an ex-member of the Royal Thai Parliament.

Fighting Corruption: IIPA congratulates those in the Royal Thai government who have indicated their awareness of corruption issues and their willingness to stand up to such interference with the legal process. In the 2008 Special 301 report, IIPA highlighted a stoppage in enforcement by a local police station, and the courageous acts of the then-head of ECD 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 pirate targets during raids. Some simple but concrete steps, like rotating police officers every year or two, 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 other markets where this technique has been employed), 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.

DIP Enforcement Agency Should Be Established: We recommend that the Royal Thai government establish in DIP an enforcement agency with full power to do all piracy raids. The Royal Thai government should also give full authority to DIP officials to conduct searches, arrests, investigations as well as the authority to initiate litigation against infringers. Establishing such enforcement authority at the DIP has precedents in other markets (e.g., Malaysia and Hong Kong), and will provide needed additional resources (i.e., to the police) to significantly reduce piracy.

TRAINING AND PUBLIC AWARENESS

Industry Participation in Trainings and Government Events in 2009: Copyright owners organized and engaged in numerous anti-piracy trainings and public awareness activities in 2009. These included BSA trainings provided on a continuous basis with the judiciary in Thailand, as well as training provided to ECD officials. TECA, along with their international group, the International Federation of Phonographic Industries, have delivered many trainings and seminars for related government agencies regarding investigation techniques, how to distinguish piracy from real products, enforcement techniques, legal controversies, updates on various copyright issues, scientific laboratory forensic techniques, and Internet piracy issues. In September 2009, the Motion Picture Association's local group organized a training in Bangkok for 100 officials and industry (including theater employees) on anti-camcording training. In addition, industry was invited to various events coordinated by or with the participation of the Royal Thai

government, including two destruction ceremonies and one event co-sponsored by the WIPO at Suvarnabhumi International Airport in Bangkok.²³ The two major destruction ceremonies conducted in Thailand in 2009 occurred on March 27, 2009, involving 1,070,170 pieces of pirated and counterfeited goods, and on September 29, 2009, involving 557,876 pieces of pirated and counterfeited goods. At both ceremonies, the Royal Thai Police, the Ministry of Commerce, the Royal Thai Customs, and the DSI were in attendance, and both were presided over by Deputy Ministry of Commerce Alongkorn Ponlaboot.

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, if properly enforced with the imposition of the statutory maximum sentences (but as discussed above, this is not happening generally in the courts).

Mall Landlord Liability: Legislation has been drafted to incorporate criminal liability for landlords, namely, in a new Section 31/2 of the Criminal Code, the law would provide that criminal liability shall be imposed against the owner or a person in possession of a building or land that knows, or has reason to know, that its lessee is using the

²³ The following is a non-exhaustive list of some of the government organized programs in 2009:

- **January 14, 2009 Ceremony at the Suvarnabhumi International Airport in Bangkok:** DIP and the Airports Authority of Thailand launched an anti-piracy and anti-counterfeiting effort, in a ceremony attended by WIPO Director General Francis Gurry. Posters and leaflets displaying messages in both Thai and English were placed at different areas of the airport and handed out to travelers, warning them, "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."
- **January 22, 2009 "Task Force Released - Fighting Against an Infringement of Intellectual Property" in Bangkok:** DIP and 853 Metropolitan Police Bureau officers ran a one week campaign to stamp out pirated shops and stalls throughout the Bangkok area.
- **February 2, 2009 DIP Seminar entitled "IP Dispute Reconciliation" in Pattaya:** Local record industry representative presented for 200 attendees from the business sector (SMEs, hotels, restaurants, pubs, bars, karaoke) on proper uses of IP.
- **February 14, 2009 DIP campaign roll-out of "Love Thai, Use Copyrighted":** IP right owners, representatives, artists and government officials marched on main shopping areas to persuade Thais to buy and use only legitimate copyright products.
- **March 18, 2009 Seminar "Penetration to World Market by the Intellectual Property: New Choice for Thai Entrepreneurs" in Ubonratchathani:** DIP seminar to encourage Thai entrepreneurs to use intellectual property as a value-added for their existing products. The local record industry representative was a guest speaker on the topic, "Gateway to the value added of Copyright work." There were around 200 attendees.
- **April 30, 2009 Seminar "Penetration to World Market by the Intellectual Property: New Choice for Thai Entrepreneurs" in Krabi:** DIP seminar to encourage Thai entrepreneurs to use intellectual property as a value-added for their existing products. The local record industry representative was a guest speaker on the topic, "Gateway to the value added of Copyright work." There were around 200 attendees.
- **May 13-15, 2009 Seminar "Intensive Course on the Management of Creative Enterprises and the Role of IP":** DIP and World Intellectual Property Organization (WIPO) organized the seminar, at which the Chairman of the local record industry group, TECA, gave a presentation.
- **May 29, 2009 DIP Seminar entitled "IP Dispute Reconciliation" in Chiang Mai:** Local record industry representative presented for 200 attendees from the business sector (SMEs, hotels, restaurants, pubs, bars, karaoke) on proper uses of IP.
- **June 12-14, 2009 Seventh Annual IP Fair in Bangkok:** DIP asked the local record industry to participate in the IP Fair at the Sirikit Convention Center, Bangkok, at which the industry had legitimate products for sale. Crowd of around 100,000 people attended.
- **June 16, 2009 Seminar "Penetration to World Market by the Intellectual Property: New Choice for Thai Entrepreneurs" in Sukhothai:** DIP seminar to encourage Thai entrepreneurs to use intellectual property as value-added for their existing products. The local record industry representative was a guest speaker on the topic, "Gateway to the value added of Copyright work." There were around 200 attendees.
- **August 31, 2009 Inauguration Ceremony of the "Creative Thailand" Project:** DIP coordinated the launch of the "Creative Thailand" project with a BT21 billion (US\$634 million) budget. IIPA members have participated in this launch, and in addition have had ongoing discussions with the government regarding the IP component of the project, specifically, the need to have an adequate legal framework and enforcement infrastructure in place as a prerequisite to seek to achieve the GDP goals set forth by the project.
- **September 16-20, 2009 The Second Thailand Entertainment Expo 2009:** The Export Promotion Department (DEP), Ministry of Commerce, coordinated this Expo at Siam Paragon, Bangkok. The Expo was intended to promote the potential of the Thai entertainment industries and to upgrade Thailand as a market place for entertainment. There were around 200 film, music, animation and TV companies participating in the Expo.

property for the purposes of copyright (or trademark) infringement. Such landlord liability would subject the landlord etc. to jail time from 3 months to 1 year or a fine from BT20,000 (US\$600) to BT100,000 (US\$3,000), or both. IIPA supports swift passage of this bill which we understand sits with the Minister of Commerce.

Enact Statute to Ban Illegal Camcording: IIPA applauds the government for the news that it is drafting legislation to ban illegal camcording. Such standalone legislation has proved to be invaluable in markets where enacted against the fight against illegal camcording, which causes enormous damage to the motion picture industry. As highlighted in this report, not only U.S. films but local Thai and other foreign films get stolen right off the screen, stripping the livelihoods away from filmmakers and all those involved in the creative process, as well as damaging the cinema owners in Thailand who rely on theatrical exhibition receipts for their livelihoods. The draft bill should ban the illegal use of or intent to use an audiovisual recording device in a movie theater to record a film off the screen. 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.

Prospects for Passage of Copyright Law Amendments in 2010: Amendments to the Copyright Act have been in the planning stages for many years. The comprehensive draft amendments dating back to 2005 would have made some important improvements to copyright protection in Thailand.²⁴ 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” as separate exclusive rights, attempt to implement WCT and WPPT requirements to prohibit the circumvention of technological protection measures (TPMs) (although not totally satisfactorily),²⁵ and prohibit the unlawful tampering with rights management information (RMI), strengthen criminal penalties in certain respects, and establish voluntary collective management of copyright. Technological developments make it important for the Royal Thai government to make changes to modernize the statute and make it more effective. IIPA hopes that the latest draft retains the strong criminal penalties structure of the current statute, and fully implements the WCT and WPPT. IIPA further hopes that the government will decide to join the WCT and WPPT.²⁶ IIPA looks forward to having an opportunity to review the latest draft copyright legislation. The draft apparently sits now with the State Council.

ISP Liability Issues: One very important 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, and therefore, whether ISPs have proper incentives in place to assist copyright owners in combating Internet piracy. IIPA understands that rudimentary provisions on ISP liability, fashioned in part on the U.S. approach to this issue, may be included in the latest draft copyright amendment bill. IIPA would welcome the opportunity to review the draft, and reiterates that enacting the appropriate legal framework to deal with Internet-based infringements is vital, including statutory notice and takedown, and other measures to foster cooperation to defeat online infringements and repeat infringers, including P2P file sharing, bit torrent technologies, web bulletin boards, and cyberlockers. Other laws passed to date, such as the Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000),²⁷ and the Computer Crime Act B.E. 2550 (2007), which went into

²⁴ 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>.

²⁵ An additional form of illegal circumvention came to light in 2009. Apparently, those who are producing counterfeit textbooks for export are also providing a pin code which is being used to provide the purchasers of counterfeit with unauthorized access to ancillary and supplementary materials. Thus, once the amendments are in place, there will be three bases for halting the production and export of counterfeit books: copyright infringement (piracy), trademark counterfeiting, and circumvention of a TPM.

²⁶ IIPA notes that the government is obliged to pass legislation to comply with the Japan-Thailand FTA, which went into effect on October 30, 2008. Included in the IP provisions of that FTA is the obligation to provide a WCT and WPPT-compatible “making available” right (according to Japan-Thai FTA Article 133(1)), protection against circumvention of TPMs (Article 133(2)), and protection against violations involving RMI (Article 133(3)).

²⁷ The National Telecommunication Business Commission (NTBC), responsible for implementing the provisions of the Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business, 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

effect on July 18, 2007, have not been that helpful in curtailing online infringements.²⁸ To the contrary, right holders have indicated the Computer Crime Act is now being invoked by ISPs as a shield to protect data from being disclosed to copyright owners – data which right holders need in order for them to obtain a search warrant from court.²⁹

Narrow Exceptions Involving 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 must take steps to narrow the relevant provisions to ensure compliance with international norms.

Organized Crime Prevention Legislation: IP violations have still not been included in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA).³⁰ Unfortunately, while the government had intended to include copyright piracy as a predicate offense in draft amendments, the Law Drafting Committee of the Council of State concluded that copyright should be removed as a predicate offense.³¹ IIPA 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.³²

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, 2005.³³ IIPA finds several deficiencies which should be fixed in amendments to the law:

- **“Copyright Owner’s Code” Creates Burden on Rights Holders:** The Act should be amended to remove the onerous and unprecedented obligation in Sections 8 and 12 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.³⁴ Other provisions which refer to the copyright owner’s code should also be subject to corresponding amendments, to delete mentions of “copyright owner’s code.”³⁵

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, as noted above, 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.

²⁸ The Computer Crime Act, 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.

²⁹ 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.

³⁰ 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 BT200,000 (about US\$58,000).

³¹ 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>.

³² 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.

³³ Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).

³⁴ This kind of copyright owners’ code application process is a flaw that could, if it results in interference with the exercise of copyright, call into question compliance with the Berne Convention’s “no formality” principle. The industries find the code burdensome and problematic and call for its deletion from the law.

³⁵ IIPA proposes deletion of all provisions that place burdens on copyright owners to apply for a copyright owner’s code, which includes amendments to Section 3 (Definition of Copyright Owner Code), Section 5, Paragraph 2 and 3 (Duty of the Copyright Owner to inform the DIP official in prior of making optical disc), Section 8 (How to embed Copyright Owner Code on the Disc), Section 12 (Duty of the Copyright Owner to make the Copyright Owner Code), Section 23 (Penalty for copyright owner who fails to inform the DIP official in prior of making the Disc), and Section 27 (Penalty for copyright owner who fails to make the Copyright

- **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 (and the exception to the notification requirement in Section 5 for “production or a commission to produce for an educational purpose, for the public interest, or for the conservation of culture” should be deleted from the current Act).
- **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.

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 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 in February 2009 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. This draft law is intended to enable the authorities to effectively control illegal broadcasting of copyrighted works and prevent copyright violations on cable television. Any such government proposals should empower the commission with the authority to temporarily or permanently suspend or revoke the licenses of the operators involved in unauthorized broadcasting, without requiring a final judicial decision.

Owner Code). The following are the major suggested redline deletions, with other changes being corresponding redlines to remove references to “copyright owner’s code”:

The following should be deleted from Section 3:

~~“Copyright code” means a sign and a code issued by the Director General to identify the copyrighted work produced.~~

The following should be deleted from Section 5 (with corresponding changes):

~~Any copyright owner who intends to operate the production or to commission others to produce optical discs must notify the competent official before starting the production each time unless it is a production or a commission to produce for an educational purpose, for the public interest, or for the conservation of culture.~~

The following should be deleted from Section 12:

~~Section 12. The copyright owner shall have a duty to produce the copyright code in compliance with Section 8 paragraph two.~~

The following should be deleted from Section 23:

~~Section 23. Whoever fails to comply with the provision in Section 5 paragraph two shall be subject to a fine not exceeding two hundred thousand baht.~~

The following should be deleted from Section 27:

~~Section 27. Whoever fails to comply with the provision in Section 12 shall be subject to a fine not exceeding two hundred thousand baht.~~

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,³⁶ 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 rights holders. The Royal Thai government should take steps in 2009 to eliminate or reduce such restrictions, while resisting the urge to impose new restrictions.

Onerous Restrictions on Technology Choice: On December 14, 2009, according to press reports,³⁷ Prime Minister Abhisit Vejjajiva instructed the Ministry of Information and Communications Technology (MICT) to conclude plans for measures focusing on promoting open source software. Indeed, IIPA has become aware that the Software Industry Promotion Association (SIPA) is the government entity under MICT openly promoting open source software to other government agencies and enterprises as a solution to curb piracy. As one example of implementation of this policy, the Ministry of Education reportedly has plans to purchase 1.4 million computers for schools using a budget allocated from the 'Strong Thailand' project and is considering bundling the computers with open source software in order to achieve cost savings. The government says the new policy purports to promote protection of intellectual property as well as achieve cost savings. IIPA has no issue with such policy goals, and fully supports the goal to legalize software usage consistent with APEC economies' agreement that central government agencies should use only legal software and other copyrighted materials. However, the implementation of this goal, e.g., by MOE being pressured to bundle computers with software not of their choosing, clearly flies in the face of the market, and harms companies that rely on software copyright for their livelihoods, since it denies such legitimate companies access to that education market. As such, it fails to build respect for intellectual property rights and limits the ability of government or public-sector customers to choose the best solutions to meet the needs of their organizations and the Thai people. It also amounts to a significant market access barrier for the software industry.

It should be noted that the "Principles for Technology Choice Pathfinder," adopted by APEC in 2006 (furthering the 2002 "Statement to Implement APEC Policies on Trade and the Digital Economy"), recognize that procurement preferences can close markets and stifle innovation and economic development. By implementing this government procurement preference policy, the Royal Thai government is not adopting an effective approach to drive down piracy rates, but rather, is creating an additional trade barrier and denying fair and equitable market access to software companies worldwide, which is inconsistent with the APEC Principles. Rather than start down this path away from innovation, and to further promote respect for copyright, the government should abandon this approach and follow a realistic policy framework that includes adequate education and effective enforcement of IP rights and fosters non-discrimination in business choice, software development, and licensing models. We strongly urge USTR to consider the implications that Thailand's open source preference policy has on IP protection and access to Thailand's market for U.S. goods and services.

³⁶ See the Royal Thai Embassy's February 13, 2009 report, *Thailand's Recent Developments on Protection and Enforcement of IPRs*, supra note 14.

³⁷ Rungthep Turakij, *Abhisit Wants 3G Details Ready in 6 Months*, Thai-language daily, December 15, 2009; Thai Rath, *ICT Backs Opensource Software*, Thai-language daily, October 16, 2009 (both on file with IIPA).

Problematic Film Act Imposes Screen Quota and Uncertain Censorship and Ratings System: The Motion Pictures and Video Act B.E. 2550 (2008) went into force July 1, 2008, imposing quotas and potentially onerous censorship and ratings provisions. 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 rights holders. The Act also imposes onerous rating requirements on films, music videos and live performances, and censorship requirements³⁸ on films, audiovisual products, music used for karaoke, and videogames.³⁹ The concerns over this 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) the 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 that the right holder "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. The government should reevaluate this ill-conceived and outmoded legislation.

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 BT1 million (US\$30,000) 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.

Television Advertising Restrictions: Advertising is now permitted under the Act on Broadcasting and Television Operation Business, enacted in 2008, but is limited to a daily average of five minutes per hour for each channel, or a quota of six per minutes in any single hour.

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 2008, more than \$3.5 billion worth of products came into the United States duty-free from Thailand, or just over 16% of its total imports to the U.S. In 2009, almost \$2.9 billion in goods entered the United States from Thailand duty-free, or 15.2% 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 is to continue enjoying favorable treatment for these imported goods.

³⁸ 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."

³⁹ 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.