

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Thailand should be maintained on the Priority Watch List.<sup>1</sup>

Executive Summary: IIPA appreciates the Royal Thai Government's high-level commitment to grow its economy through increased creative output, and its increased transparency with industry, including its timetable for legislative enactments, its increasingly detailed explanations of legislative developments, and its plan to establish more readily available enforcement and case statistics. Based on the proposed timetable of legislative enactments and other expected progress on addressing key copyright industry concerns, we recommended last year that Thailand be lowered to the Watch List. Unfortunately, we have not seen sufficient progress over the past year on key concerns to support a similar recommendation this year.

Keys to our decision include the failure to pass: 1) anti-camcording legislation, 2) legislation to establish landlord liability, and 3) legislation to fully modernize the Thai copyright system, including, *inter alia*: full implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT); adequate protection for technological protection measures; measures to curb Internet piracy and promote service provider responsibility (including statutory notice and takedown); and deletion of the copyright owner code from the OD law (among other changes to that law). IIPA is also unaware of any progress made in: 1) vesting enforcement authority in the Department of Intellectual Property (DIP) to conduct raids, make arrests, investigate, and commence anti-piracy litigation, 2) increasing resources in the newly created Technology Crime Suppression Division (TCSD) of the Royal Thai Police which will oversee Internet piracy issues, and 3) increasing the number of criminal prosecutions with deterrent sentencing. The above deliverables were understood by the Royal Thai Government as urgent goals of industry to deal with an equally urgent situation on the ground. The industries report continued good relations with the authorities, primarily at DIP, the Economic Crime Investigation Division (ECID) of the Royal Thai Police, and the Department of Special Investigation (DSI). In addition, raids are being run and some criminal cases have been moving forward. Nevertheless, the nature and scope of piracy in Thailand has not improved and may have even worsened compared to last year. Certainly this is the case with illicit camcording in Thailand which increased by 48% in 2010. Further, the Internet poses new threats, including most recently infringing services catered to Thailand on servers located outside Thailand.

Priority Actions Requested In 2011:

### Enforcement

- Significantly increase resources for anti-piracy by developing a National Enforcement Plan with specific piracy reduction targets to meet on an annual basis and accountability by enforcement authorities.
- Expand enforcement authority to DIP, increase manpower in enforcement authorities such as the Royal Thai Police's Economic and Cybercrime Division (ECD) of the Royal Thai Police and the newly created Division of Technology Crime, and activate and make permanent the new Central Investigation Bureau (CIB) Police Task Force.
- Investigate and prosecute greater numbers of key piracy cases, with deterrent fines and custodial sentences.

<sup>1</sup> For more details on Thailand, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>. On December 10, 2010, IIPA filed in the out-of-cycle review regarding Thailand. See International Intellectual Property Alliance, *Submission of the IIPA in Docket No. USTR-2010-0035 2010: Special 301 Out-of-Cycle Reviews of the Philippines and Thailand: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment, 75 Fed. Reg. 69519 (November 12, 2010)*, December 10, 2010, at <http://www.iipa.com/pdf/IIPAThailandandthePhilippinesOCRfinal121010.pdf>. In that filing, IIPA noted that while we had "recommended that Thailand be moved to the Watch List in its 2010 Special 301 report earlier this year in the belief that several key actions would be taken," we had "not seen sufficient progress on most of these," and indicated, "[i]f progress is not made over the next few months, IIPA will re-evaluate its recommendation during the 2011 Special 301 cycle."



- Continue improved 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.
- Address counterfeit book production for export in addition to existing book and photocopy piracy issues.
- Ensure active cooperation of ISPs to prevent online infringement, including effective and fair policies to deal with repeat infringers and measures to address infringements using servers outside of Thailand.
- Increase government support and collaboration on public awareness campaigns focused on corporate end-user software piracy.
- Implement public sector software asset management policies to set an example for the private-sector to follow.

#### Legislative

- Enact legislation to ban unauthorized camcording of movies in theaters.
- Enact copyright amendments to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), including amendments to address Internet piracy and promote service provider responsibility and protection against the circumvention of technological protection measures.
- Joint the WCT and WPPT.
- Enact landlord liability provision.
- Issue sentencing guidelines and adopt minimum sentencing that provides a real deterrent to infringement.
- Make copyright piracy a predicate offense in organized crime statute 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

- Avoid mandates and preferences in government procurement for specific technologies, allowing government agencies to choose the technology that best meets their needs for particular tasks.
- Reduce film import tax from 5 Baht to 0 Baht.
- Reduce Hard Goods Import tax which is currently a staggering 30%.

## PIRACY AND ENFORCEMENT UPDATES IN THAILAND

IIPA's previous reports describe in detail various piracy and enforcement issues and the harm caused to the U.S. content industries. The following provides updates on ongoing or newly emerged issues (failure to mention an issue below does not signify that it has been resolved).

Update on Out-of-Cycle Review Enforcement Issues: To our knowledge, no progress has been made to 1) vest enforcement authority in DIP to conduct raids, make arrests, investigate, and commence anti-piracy litigation, 2) increase resources in the newly created Division of Technology Crime which will oversee Internet piracy issues, and 3) increase the number of criminal prosecutions with deterrent sentencing. On the latter point, the Royal Thai Government provided, in its Out-of-Cycle Review submission, aggregate statistics showing 3,551 "arrest cases" by the Royal Thai Police, DSI, Metropolitan Police Bureau, and Provincial Police Region 1-9, with seizures of almost 3.3 million goods.<sup>2</sup> The Customs Department, Ministry of Finance reported 428 "arrest cases" with over 116,000 seized items. As with previous statistics provided, there is no breakout of copyright materials (e.g., from counterfeits), breakout by industry sector, or results from the "arrest cases" to determine whether there is any deterrence other than the actual seizure of the suspected infringing products. No other conclusions can usefully be drawn from these seizures, except we note anecdotally that the number of "cases" is significantly reduced from 2009 levels. In the

<sup>2</sup> Kingdom of Thailand, Ministry of Commerce, Department of Intellectual Property, *Thailand's Implementation on Intellectual Property Rights (January – December 2010)*, December 17, 2010 (retrieved from regulations.gov).

annex to the OCR submission, "Intellectual Property Plan (September to December 2010)," the government indicated that by "October [2010] a dedicated session" would be held between DIP and law enforcement to provide "Increased Flow of Information" in the form of a "joint database on IPR violation which will incorporate information from all agencies concerned, including final judicial decisions and penalties on IPR violations," and recent communications indicate that this meeting has taken place. This level of transparency, again with breakout by copyright and industry sector, would be useful. The Plan also called for "Suppression of IPR violations at all levels, particularly the major infringers and those in the Red-Zone areas," but unfortunately, industry reports that the situation has in fact gotten worse.<sup>3</sup>

Camcorder Piracy Significantly Worsened in 2010: The problem of camcording of full-length films in movie theaters in Thailand soared in 2010.<sup>4</sup> Illegal copying of a film in a movie theater is already an infringement under the current Copyright Law, yet the government has done nothing about the problem. The number of incidences detected of illegal camcording of full-length U.S. motion pictures shot up to 34 in 2010,<sup>5</sup> compared with 23 in 2009. This is a 48% increase in the number of camcords sourced from Thailand. While passage of an anti-camcording bill could have proved the difference, and is still sorely needed, the lack of specific *sui generis* legislation may not be used as an excuse for inaction in the face of a deteriorating problem. Although DSI has enlisted industry's support to help identify the primary camcorders syndicate groups responsible for the majority of illegal camcording, the Royal Thai Police do not always cooperate and in some instances, investigations and/or raid schedules have been leaked.

Internet and Mobile Piracy Exploded in 2010 with Greater Connectivity and Damaging and Evasive Tactics by Online Pirates: The rapid increase in size and scope of Internet piracy and mobile piracy (through 3G networks) is of alarm to IIPA. Industry reports more than 4,000 websites hosted in Thailand offering illegal music downloads, while the latest trend is for Thai nationals to develop pirate sites on foreign servers that specifically cater to the Thai market. Faster speeds, growing infrastructure, and lower Internet subscription fees (e.g., BHT599, or US\$19.45, per month for 6 Mbps speed) mean roughly 17.5 million Thai had access to the Internet as of June 2010 (according to ITU), or 26.3% penetration, with (fixed line) broadband penetration of at least one million as of June 2010.<sup>6</sup> The online piracy levels for music are estimated at 90%. Broadband and growing 3G mobile access (switching soon to 3.9G) have made it easier for infringers to upload movies to the Internet for widespread distribution through P2P and deeplinking sites and can easily transform those digital downloads to hard goods. Bit torrent index sites and tracker sites are also increasingly being used in Thailand to facilitate the unlawful distribution of copyrighted files.<sup>7</sup> Public and private web bulletin boards (some of which are supported by advertising), and illicit use of free social networking sites, blogs and cyberlockers are just a few of the additional ways Internet piracy is spreading in Thailand.

The relationships between IIPA members and the various policy (e.g., DIP and MICT) and enforcement authorities remain strong, although enforcement is far from effective in driving down online piracy at this critical stage. IIPA members request a significant increase in enforcement activity, which could be encouraged by providing greater resources and training to the various authorities. In particular, the TCSD remains understaffed and needs training.<sup>8</sup>

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<sup>3</sup> The Plan indicated big cases like the "pirate DVD plant in Pathumtani Province" and "DVD/CD sellers, distributors at Kamnanluk Market in Ratchaburi Province," resulting in seizures of "about 800,000 pirate discs." These actions are certainly helpful and noteworthy but indicate the continuing scope of the piracy problem.

<sup>4</sup> Camcording is particularly damaging in Thailand because it fuels rampant online piracy negatively impacting worldwide distribution and prevents the establishment of legitimate online distribution platforms for independent film producers. Camcording also threatens the continued growth of the Thai theatrical box-office marketplace.

<sup>5</sup> It is the case that camcording of local Thai films is also widespread. A recent survey showed that in the first 10 months of 2010 alone, at least 52 Thai films fell victim to camcording.

<sup>6</sup> Point-topic indicates this number is conservative, however, reporting that only Thailand's largest broadband Internet provider, True Corporation Public Company Limited (formerly Telecom Asia), had 1 million subscribers itself as of mid-2010. See Point-Topic, *Thailand Broadband Overview*, November 22, 2010, at <http://point-topic.com/content/operatorSource/profiles2/thailand-broadband-overview.htm>.

<sup>7</sup> 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.

<sup>8</sup> As of early 2010, the unit had only 20 police officers working in the new Royal Thai Police building, and was short on tools and supplies, with only 10 standalone computers and no high-speed Internet connections. Some personnel lack Internet access, while some lack computer knowledge.

An approach must also be taken to deal with increasing instances of Thai nationals registering sites suspected of involvement in infringing activity through P2P filesharing, deeplinking, and cyberlockers in foreign countries.

The Royal Thai Government could greatly assist right holders in obtaining better cooperation, in particular seeking information regarding online infringers, including IP addresses and names of users or webmasters, either through administrative action (as in the past) or in assistance in obtaining court orders for release of this information. Cooperation in this area has slowed considerably. Third, the Royal Thai Government, e.g., DIP and the Minister of Information and Communication Technology (MICT) can be instrumental in fostering greater cooperation from the ISPs. Industry met with the Thai ISP Association twice in 2010 to ask greater proactive voluntary monitoring of their services to detect online infringement, and takedowns or blocking upon notices (including C&D letters). It is hoped this request will be honored, and it is scheduled for consideration soon. It is noteworthy that some ISPs have been cooperative on a voluntary basis, and for example, in 2010, the local entertainment industry group TECA reported 717 takedowns out of 896 notices, an 80% takedown rate. Finally, to effectively deal with Internet piracy, the government should enact an appropriate legal framework, fostering ISP responsibility and cooperation to deal with online infringements, including statutory notice and takedown, and appropriate and fair measures to deal with repeat infringers in the hosted and non-hosted environments.

Physical Piracy in Retail Hotspots Continued to Dominate the Thai Market in 2010; Updates on CD-R “Burning” Labs and Factories:<sup>9</sup> Piracy worsened in 2010 in the street and retail (mall) markets in Thailand, in places like Bangkok,<sup>10</sup> Phuket, Samui, Pattaya, Chiangmai, and Krabi, despite reported “Red Zone” enforcement activity and “arrest cases” reported by the Royal Thai Government.<sup>11</sup> Physical pirated discs can be found in every type, including local factory pressed discs, “burned” CD-Rs, imported discs from China, and in every format, including MP3 discs, audio discs, VCDs, DVDs, and pirate Blu-ray (often falsely labeled). Imported pirate discs from China are popular since they offer various genres of music, higher-quality packaging, and are affordable at BHT120 (US\$3.88) to 150 (US\$4.85) per disc, even including a “quality guarantee” and return policy. The entertainment industry group TECA estimates the physical music piracy rate at 60%.<sup>12</sup>

Relationships between IIPA members and the enforcement agencies (e.g., ECD, Royal Thai Police) remain strong,<sup>13</sup> but to little effect for most industries. While the Royal Thai Government asserted that there were a significant number of “Red Zone” enforcement actions and so-called “arrest cases,” these actions’ primary targets remain retail establishments and storage units rather than mall owners and sources of piracy, and do not seem to make a marked difference in the availability of product. Music and movie/DVD piracy is the exception which has

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<sup>9</sup> Piracy has varying negative effects on different industry sectors. As one example, the independent segment of the film and television industry (IFTA) reports that physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers generally partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and describe the marketplace in Thailand as stagnant due to the heavy instances of piracy. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience that a DVD can provide. The independent production sector is also limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, independents use national distributors who release films on their own schedule, and thus piracy-avoiding strategies like worldwide “day-and-date” release are impossible. Unable to compete with free, legitimate distributors often cannot to commit to distribution agreements or they offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in Thailand.

<sup>10</sup> Retail piracy can be found at street markets like Klong Tom, Baan Mor, Saphan Lek, and malls like IT Square and Pantip Plaza. Even in the outskirts of Bangkok, Nonthaburi Province, the District of Mean Buri

<sup>11</sup> 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 Prachuabkirikan 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; Nakhonratchasima Province; Konkan Province; and Ratchaburi Province.

<sup>12</sup> The record industry reports that losses in 2010 for international repertoire stood at US\$11.6 million, representing the value of estimated physical piracy sales, while trade losses would represent a much higher number. This also does not include significant Internet piracy losses. TECA reports the breakdown of physical pirate product in the Thai market at 70% movies, 15% music, and 15% game software. In addition to piracy losses, the record industry notes how this illegal supply chain also denies the Royal Thai Government of significant VAT and corporate tax revenues.

<sup>13</sup> The Thai Entertainment Content Trade Association (TECA) reports cooperation with all governmental agencies is going very well, especially with the DIP in 2010. TECA also reported 184 raids resulting in seizure of thousands of discs in 2010.

become more of an underground activity (sellers only show sleeves, and runners actually go to obtain product when ordered). Also, to our knowledge, no mall-owner liability cases have been brought successfully. None of the notorious marketplaces has been closed to piracy and the industry has not witnessed a significant decrease in the number of pirate vendors. Some right holders even report difficulty getting Royal Thai Police to conduct raids. In 2010, the MPAA's Thailand program and its member companies' licensees participated in raids against 56 shops, 49 street stalls, 1 burner lab, 1 replication facility, and 3 cases referred to it by Customs authorities.

In addition to a much more comprehensive approach to retail piracy that enables authorities to close notorious piracy markets ("Red Zones" and "Yellow Zones") and hold mall owners accountable, IIPA would like to see the Royal Thai Government 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 and foster the growth in the legitimate market.

**Mobile Device Piracy:** Right holders report no improvement in addressing the illegal service by businesses (some former retailers of pirate optical discs) of providing content on mobile devices, thumb drives, mp3 players, and the like. Book and journal publishers have in the past reported occurrences of downloading reference books and dictionaries in a similar manner. 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.

**Corporate End-User Software Piracy Level Remains High, and the Industry is Harmed by Hard Disk Loading and Circumvention of TPMs:** The greatest source of losses to the business software industry is the use of unlicensed or pirate software in the workplace. The PC software piracy rate in Thailand in 2010 remained high at 73%, while the preliminary estimated commercial value of unlicensed software was US\$344 million.<sup>14</sup> Other piracy phenomena harming the business software industry include hard disk loading of illegal software onto computers at the point of sale, and the use of illegal software programs to circumvent technological protection measures (TPMs) used to protect 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 2010 study done by research firm IDC for BSA estimated that decreasing Thailand's software piracy rate by ten points over a four year period would add US\$1.3 billion in GDP to Thailand, produce an additional \$73 million in tax revenues and create 2,175 new high-wage IT jobs. The gains would be even greater if the piracy rate was reduced by ten points over two years, which would yield US\$1.7 billion in GDP and \$96 million in tax revenues.

The business software industry reported that it received good support from ECD in 2010 for end-user software piracy actions, including efficient handling of cases and forwarding of those cases to prosecutors for criminal disposition. ECD showed good knowledge and understanding of software piracy and not only enforced IP laws but also conducted educational programs on use of legal software. BSA also received good support from DIP in building awareness and promoting the use of legal software in the workplace. The Intellectual Property & International Trade (IP&IT) Court was also more consistent in 2010 in its issuance of search warrants (and in its application of criteria for

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<sup>14</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Thailand. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

such issuance), even though a certain core group of judges still refuse to issue search warrants.<sup>15</sup> BSA reports 152 raids in 2010. Encouragingly, one end-user criminal case went to trial and resulted in a conviction in 2010. In this particular case, the value of the infringement was BHT2,689,400 (US\$87,500) and the sentence included two fines of BHT75,000 (US\$2,450), levied against both the managing director and the company, with a 3 month prison term against the MD, suspended for 1 year. A civil case was then filed in November 2010 and is pending. There were hearings in December and January 2011, but it is anticipated reaching a verdict will take several months. Based on past decisions in civil cases where there has been a criminal conviction, BSA remains optimistic of a successful outcome.<sup>16</sup>

**Judicial Results Usually Lack Deterrence:** 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 more knowledgeable about copyright cases. The Court's expertise has also led to some more significant civil judgments in recent years. The main problem is non-deterrent criminal sentences of IP infringers. Such sentences are usually very lenient with minimal fines and no custodial sentences, suspension of imprisonment, or the imposition of custodial work orders, even for repeat offenders. One reason is that court officers often seem unsympathetic or hostile to right holders. For example, the entertainment industry association TECA reports that from January to October 2010, there were six suspended sentences,<sup>17</sup> and that in only one case was there an unsuspended prison sentence imposed. That case was tried not against a manager or landlord but against a small distributor.<sup>18</sup> Only 35 of the cases concluded during in the first ten months of 2010 even resulted in a fine, with five being below US\$1,000 and 30 being between US\$1,000 and \$5,000. IIPA believes a comprehensive database of the kind being discussed by DIP and other agencies would be helpful, including concluded and pending cases, their statuses, and the case results obtained. The Court should also issue sentencing guidelines and adopt minimum sentencing guidelines that provide a real deterrent to infringement, as well as applying maximum sentences allowable under the law where warranted.

**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, on and around university campuses, remains the predominant form of book piracy in Thailand. Copyshops 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 publisher, with some producing unauthorized translations of works, inserting the translated material into the compilation, 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,<sup>19</sup> which were of considerable concern as the counterfeit books were finding their way into the U.S. market. While considerable effort was expended by the Royal Thai Government to address this problem,<sup>20</sup> including the formation of special committee to investigate this specific problem, there has

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<sup>15</sup> On September 8, 2010, the IP&IT Court held a meeting to discuss procedures for issuance of search warrants in criminal cases. The statistics show a gradual increase in the percentage of warrants issued, from below 60% in 2008 to 75% in 2010 (January to August) (431 out of 578).

<sup>16</sup> In IIPA's 2010 report, we noted several civil IP&IT Court verdicts in 2009 for end-user raid actions resulting in some significant civil damage awards, including one case awarding the retail value of the software at legitimate prices (BHT2.5 million or US\$81,200) found on the computers, plus legal fees, interest, and damage to the software copyright holder's reputation. In October 2010, ECD announced it would begin investigations into about 2,000 companies for possible infringement of software copyright, which is also a welcome sign. ECD also sent more than 10,000 postcards to promote the use of legal and properly licensed software in the workplace.

<sup>17</sup> Out of 177 criminal raids during the same time-frame, including 1 VCD raid (the case for which is still pending), there were 171 cases commenced, and there were 166 criminal convictions (of the cases commenced during the period and earlier commenced), while 105 cases remain pending.

<sup>18</sup> On June 15, 2010 the IP&IT court rendered a judgment on a copyright infringement case in connection with an arrest on April 28, 2010 of a pirate trader for 88 pirated music discs. The defendant was sentenced to six months imprisonment and a fine of BHT100,000 (US\$3,250), which was reduced to half (but with no suspension) upon the defendant's confession.

<sup>19</sup> The Thai based-producer and exporter of these pirated books has run a sophisticated operation and network of consignees, using several companies as fronts for the export activities.

<sup>20</sup> In October 2009, the 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

been no progress in the investigations despite interviews conducted by law enforcement of several individuals that are believed to have been involved in distribution of the counterfeit books. It remains the case that no *ex officio* actions are conducted against unauthorized photocopying even though this activity occurs quite openly around universities.

**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. Like the music industry's experience, to evade authorities, vendors often store their pirated product in a separate location, and display only game covers or empty boxes in their stands, using runners to liaise with those somewhat inconspicuously carrying pirated discs in bags around the mall.

**Source Raids Continue to Reveal Organized "Burning" Operations as Well as Factory Piracy:** One of the key challenges behind defeating physical retail piracy in Thailand remains being vigilant against source production piracy in the country. While a major shift has occurred to "burning" content onto recordable media, it remains the case that existing factories can easily migrate into pirate production, and imports of pirate discs, mainly from China, continue to require detection and enforcement by Royal Thai Customs and others. In 2010, several major enforcement actions prove this point. In September 2010, ECD and DIP officers, assisted by industry, raided an unregistered factory in Pathumthani Province, seizing one DVD replicating line and one printing machine, one "plastic injecting mould," along with 98 stampers and 7,000 pirated DVDs including MPA member company titles *Avatar*, *Sex and the City 2*, and *Robin Hood*. Preliminary investigations revealed that the factory, located 25 miles north of Bangkok, had been operating since March 2010 and was supplying pirated DVDs to retail outlets in Bangkok.<sup>21</sup> 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.

**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, and the problem slightly worsened in 2010. The Cable and Satellite Broadcasters Association of Asia (CASBAA) estimates the net piracy costs due to Pay TV theft in Thailand were over US\$241 million, second only to India, and representing one-third of all losses in the Asian markets surveyed aside from India; the lost tax revenues alone from signal theft were upwards of \$76 million in 2009 and grew in 2010.<sup>22</sup> The main source of losses is attributable to illegal distribution of signals,<sup>23</sup> under-declaration of numbers of subscribers of existing services, illegal individual connections<sup>24</sup> and satellite overspill.<sup>25</sup>

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include DIP, DSI, ECD and Royal Thai Customs. The industry appreciates the vigor with which the Committee and its member agencies are now pursuing investigations into this problem.

<sup>21</sup> Motion Picture Association, *Illegal DVD Factory Uncovered By Royal Thai Police: Clandestine Operation Was Supplying Pirated DVDs To Street Markets In Bangkok*, September 24, 2010 (on file with IIPA). Another case previously reported involved a September 2009 ECD raid on an optical disc plant "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 stampers, molds and printing machines. The plant operator and management team were charged with copyright infringement. The case was sent to the Office of the Attorney-General for litigation, but the owner of the plant successfully petitioned the Court for return of his machines.

<sup>22</sup> CASBAA, *Asia-Pacific Pay TV Industry 2010, 2011* (on file with IIPA); and CASBAA and Standard Chartered, *Digital Deployment: Asia-Pacific Pay-TV Industry Study*, November 2009.

<sup>23</sup> Pay-TV content is freely stolen and re-sold by hundreds of (but not all) provincial cable operators.

<sup>24</sup> Illegal decoder boxes and smart cards remain widely available in Thailand. Individual hackers also apply for legitimate pay television subscription services and use the Internet to share the smart card with others, collecting a monthly fee from the users of the pirate service. 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-

Premium content such as sporting events in whatever language and movies subtitled in Thai language remain key subjects of piracy, while channels also show the latest run or even pre-release motion pictures (i.e., those that have either not yet been released in the movie theaters in Thailand and/or that have just come out in the movie theaters in the U.S.). They report that a rapidly rising number of Thai households are connected to cable and satellite systems, with particular growth in the satellite sector, and there are now at least four completely unlicensed direct-to-home satellite TV companies operating in Thailand.

The lax attitude of successive previous Royal Thai Government administrations has resulted in endemic signal piracy. Efforts to deal with rampant Pay-TV piracy in Thailand have been frustrated by the regulatory vacuum and gaps in NTC's authority. There is no provision for licensing satellite channels, and therefore no effective government supervision of the content they broadcast. There has been no movement on licensing Thai-origin channels either, and thus, the number of such pirate channels is increasing. CASBAA reports that Thailand is the only sizeable jurisdiction in Asia that fails to exert reasonable controls on the satellite and cable TV channels originating within its territory, and these channels are infecting other markets through satellites over Asia.

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.

## COPYRIGHT LAW UPDATES/RELATED ISSUES

Neither anti-camcording legislation, nor landlord liability legislation, nor the copyright amendments, have proceeded to passage by or even been introduced into the Parliament.

Camcording Bill Stalled: The Department of Intellectual Property commissioned a study which "concluded that Thailand should enact a specific law to tackle illegal camcording activities." The draft Bill, prepared in consultation with stakeholders, was "approved in principle" by the Cabinet on September 14, 2010, but has apparently now stalled once again. Unfortunately, this bill is far from passage into law. The Royal Thai Government, in its Out-of-Cycle Review submission, indicated that the State Council is deliberating questions from Cabinet on the bill and that the Council will seek input from government and industry. Then, should the Cabinet endorse the bill, without conditions, the Council must conduct another reading and then submit the Bill to Parliament.<sup>26</sup> As such, the self-imposed December deadline in the Royal Thai Government's "IPR Plan" for submission of the Bill to the Parliament was not met. The lack of progress on this critical piece of legislation is extremely disappointing particularly as we have seen a surge in illicit camcords sourced from Thailand over this past year. Swift passage along with swift implementation is critical to curb highly damaging illegal camcording.

Landlord/Secondary Liability Bill Sent Back to MOC: Legislation was drafted to incorporate liability for someone who "provides physical or digital spaces for infringing activities," according to the Royal Thai Government's Out-of-Cycle Review submission.<sup>27</sup> The legislation was submitted to the Cabinet for approval in March 2010, but was sent back to MOC which has since consulted with the Attorney General, DIP, and the Thailand Trade Representative. While Deputy Minister Alongkorn is supportive, the idea has met with resistance from business owners and other government representatives. IIPA supports swift passage of this Bill, and understands that there are criminal test

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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.

<sup>25</sup> 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.

<sup>26</sup> See *supra* note 2.

<sup>27</sup> *Id.*

cases which, if liability is found, would prove that landlords can be held indirectly liable under current Thai law.<sup>28</sup> Such test cases, even if successful, should not substitute for a strong civil landlord liability, since it is the dual threat of criminal and civil liability that may create deterrence against mall piracy which remains ongoing throughout these legal and legislative processes. Unfortunately, once again, the December deadline in the Royal Thai Government's "IPR Plan" for the landlord liability Bill to be "approved by the Cabinet and forwarded to the State Council" was not met.

Prospects Dim for Copyright Legislation Anytime Soon: While earlier in 2010 it appeared broad-based copyright legislation was being prepared for movement through the Thai Executive toward introduction in the Parliament, this now seems a distant possibility. It has not been mentioned in recent Royal Thai Government documents such as the Out-of-Cycle Review submission of December 2010. IIPA understands that the draft is still being reviewed by the Ministry of Commerce. The draft contains important elements for effective copyright protection in the country, including 1) definition of "communication to the public" to ensure Thailand provides a WCT- and WPPT-compatible right of "making available to the public of works in such a way that members of the public may access works from a place and at a time individually chosen by them," 2) amendment of the definition of "reproduction" to unambiguously cover reproductions in digital form (although it is unclear whether the amended definition expressly includes "temporary" reproductions), 3) inclusion of provisions concerning technological protection measures (TPMs) and the imposition of penalties against offenders (although it is unclear whether the amendment would define TPM to include both access controls as well as copy controls, and whether the act of circumvention as well as trafficking in circumvention devices, technologies, or components, or providing a circumvention service, would be covered, among other questions), 4) inclusion of provisions concerning ISP liability which we understand would be a DMCA-type notice and takedown procedure (although it is unclear what measures are put into place to deal with the non-hosted environment). There are other provisions in the draft law which need to be tailored to the needs of specific industries, or provisions that need to be clarified that are not currently addressed.<sup>29</sup>

Section 32 and Fair Use Guidelines: IIPA also continues to call for a narrowing or clarification of Article 32(6) and (7) of the Law, which provides an exception to copyright protection which has been interpreted to allow wholesale copying of academic materials. Thailand should take steps to narrow the relevant provisions to ensure compliance with international norms. DIP has 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 is appreciative of recent efforts, such as sending officers to lecture on book copyright to teachers and librarians, and to explain its guidelines to universities. We request the Royal Thai Government to afford affected stakeholders, such as the publishers and software industry, the opportunity to provide input into the development of such guidelines given their experience in helping formulate similar rules in other countries. A Supreme Court decision (No. 5843/2543 [2000]), on appeal of a criminal copyright case brought against a photocopy shop, did provide some clarification of the research or study exception under Section 32. The Court held that the defendant's activities, photocopying books and producing unauthorized compilations of excerpts for commercial purpose, did not qualify as exempt acts under Section 32.

Organized Crime Prevention Legislation: It has long been the case that piracy operations have been connected to organized violent crime, run by those attracted to the low-risk, high profit nature of piracy in Thailand. IIPA has provided many concrete examples in the past of copyright industry representatives or law enforcement

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<sup>28</sup> The Royal Thai Government's Out-of-Cycle Review submission indicates that in October 2010, they requested the Office of the Attorney General to opine on whether the current Penal Code supports landlord liability, in which case, according to them, "the police will be provided with the legal authority to intensify prosecution efforts against [secondary] infringers immediately." They also have indicated that "the Revenue Department and the Department of Business Development will continue to monitor tax records and balance sheets of the allegedly infringing landlords in order to keep them in check."

<sup>29</sup> There is a proposal to amend Section 66 of the Copyright Act, B.E. 2537 (A.D. 1994) (as amended through 1995). If this is done, corporate end-user software piracy should remain as a compoundable offense or be carved out from the category of offenses considered non-compoundable.

being placed in danger due to violent organized criminals. Unfortunately, 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), notwithstanding the Royal Thai Government's stated intention to include it in amendments.<sup>30</sup> IIPA urges the Cabinet to add copyright piracy as a predicate offense for the MLPSA. The Royal Thai Government should also address the issue of organized criminal syndicate involvement in piracy and counterfeiting operations by adopting more generalized anti-organized crime legislation, including copyright infringement as a predicate offense for remedies such as freezing of assets.<sup>31</sup>

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, and specifically offered changes to improve the law.<sup>32</sup> The Act should be amended:<sup>33</sup> 1) 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 commences, which may constitute a Berne-prohibited formality,<sup>34</sup> 2) to require a license for a plant to begin producing optical discs and to provide a license term and renewal process (also, 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), 3) to provide for an automatic permit for export of discs and import/export of machines, stampers/masters and polycarbonate, 4) to provide for seizure, forfeiture, and/or destruction of discs, stampers/masters, or machinery found in violation of the statute infringing copyright or trademark, and 5) to provide for mandatory minimum fines and imprisonment.

## MARKET ACCESS ISSUE UPDATES IN THAILAND

Avoid Mandates and Preferences in Government Procurement for Specific Technologies, Allowing Government Agencies to Choose the Technology That Best Meets Their Needs for Particular Tasks: On December 14, 2009, according to press reports,<sup>35</sup> Prime Minister Abhisit Vejjajiva instructed the Ministry of Information and Communications Technology (MICT) to conclude plans for measures focusing on promoting open source software. IIPA takes no position on any decision freely made by a government agency as to the type of software it wishes to license. However, creating a clear procurement mandate or preference for a particular technology undermines market access for other technologies and limits the ability of government agencies to procure products and services that best meet their needs. 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.

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

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<sup>30</sup> Nont Horayangura and Say Sujintaya, *Committee Rejects IP Offences on Public Interest Grounds*, September 28 2004, at <http://www.worldcopyrightlawreport.com/Article/?r=435&c=3003050>. 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 BHT200,000 (about US\$6,495).

<sup>31</sup> 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.

<sup>32</sup> *Act of the Production of OD Products*, B.E. 2548 (2005, effective August 29, 2005).

<sup>33</sup> DIP has pledged to the industry that the OD Law would be in the queue for Amendment in 2011, but in the interim, has eased right owners' obligations administratively.

<sup>34</sup> 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. 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.

<sup>35</sup> 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).

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 requirements<sup>36</sup> on films, audiovisual products, music used for karaoke, and videogames.<sup>37</sup> 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, 3) the severe consequences for failure to comply with the ratings and censorship system, of criminal liability including both jail time and a fine, and 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 BHT1 million (US\$32,500) 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.

Royal Thai Government Should Reduce The Film Import Tax from 5 Baht to 0 Baht

Royal Thai Government Should Reduce The Current 30% Hard Goods Import Tax

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.

## TRAINING AND PUBLIC AWARENESS

Copyright owners organized and engaged in numerous anti-piracy trainings and public awareness activities in 2010 in Thailand. BSA collaborated on educational programs on software IP protection in cooperation with DIP, ECD, the Software Industry Promotion Authority (SIPA), public and private sector educational institutions and local authorities. BSA also was involved in trainings with the judiciary and ECD officials. The entertainment industry group TECA and IFPI delivered many trainings and seminars (including government-led trainings, and those organized by international organizations like WIP) for related government agencies regarding investigation techniques, how to distinguish pirated from legitimate product, enforcement techniques, legal controversies, updates on various copyright issues, scientific laboratory forensic techniques, and Internet piracy issues.<sup>38</sup> On August 19, 2010, MPA

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<sup>36</sup> 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."

<sup>37</sup> 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.

<sup>38</sup> The following is a non-exhaustive list of some of the programs in 2010:

- "Prevention and Suppression of Intellectual Property Infringement," held in June 2010, in which TECA addressed "Deterrence of IP Infringement in the Digital Age" for around 200 Police officers from five different cities.
- "Difficulties in Piracy Suppression: Solutions, Implication and Cooperation Among Relevant Organizations," held June 4, 2010, in which TECA joined a mostly government discussion panel for 150 participants, mostly from the DSI. The purpose of this seminar was to exchange views and opinions among speakers and attendants, as well as to strengthen cooperation and build-up network between governmental and private sectors in order to improve piracy suppression.
- "Copyright in Digital Age," held July 19, 2010, in which TECA was invited by USPTO in association with DIP to give a presentation on the topic of "ISP Liability, Notice and Take Down of Infringing Materials, Copyright Enforcement in the Digital Age."

and Royal Thai Customs jointly conducted training on recognizing counterfeit optical discs for 30 front-line senior officers from the Department of Investigation and Suppression Bureau of the Royal Thai Customs Department in Bangkok. The training provided practical guidelines for the identification of suspected packaging and shipping information, and the identification of counterfeit DVD and Blu-ray discs. MPA also undertook several "Make a Difference" training sessions for theater employees intended to teach cinema staff the importance of anti-camcording initiatives, investigation techniques, and procedures to follow when confronting camcorders.

## GENERALIZED SYSTEM OF PREFERENCES

The GSP statute expired on December 31, 2010. In the past, Thailand enjoyed preferential trade benefits under the program. One of the criteria of the program is that the country provides "adequate and effective protection for intellectual property rights." In 2010, \$3.6 billion worth of Thai goods entered the U.S. under the duty-free GSP code, accounting for 15.9% of its total imports to the U.S. The Royal Thai Government needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible, once it is reauthorized, to continue to receive favorable treatment under the GSP program.

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- "Do ISPs Contribute to Internet Piracy?" held August 19, 2010, in which TECA was invited to share its view on how injured copyright owners could work together with ISPs to fight against Internet piracy while there remains no law on ISP liability in Thailand. There were around 70 attendees, mostly from ISPs, telecommunications companies, and copyright owner representatives.
  - "The Investigation Suppression of Internet Piracy," held on October 27-28, 2010, in which TECA, MPA, AsiaSoft and the Prevention and Suppression of Intellectual Property Infringement Committee (Private Sector) sponsored a two-day seminar with 70 police officers from ECD.