

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Thailand should be maintained on the Priority Watch List.¹

Executive Summary: The copyright community continues to experience difficulties associated with piracy and other barriers to market access in Thailand, exacerbated in recent years by the inability to put into place needed legal norms to address these problems. Industry maintains strong relationships with the Department of Intellectual Property (DIP) (and appreciates the Director General's decision to devote resources to a liaison system); the Department of Special Investigation (DSI); the Economic Crimes Division (ECD) of the Royal Thai Police;² the Technological Crime Suppression Division (TCSD) of the Royal Thai Police;³ and the Office of the State Attorney. We have also obtained favorable results at the IP and IT Courts. Despite these good working relationships, piracy in Thailand remains serious.⁴ There are reports of new damaging digital hard drives at malls selling at very low prices and filled with hundreds of movies. Internet and mobile device piracy are proliferating, and only modest progress has been made against enterprise end-user piracy of software. Despite our previous suggestions, DIP remains without enforcement authority and TCSD remains under-resourced.

Thailand will continue to fall behind its regional neighbors if it continues to delay passage of amendments to its Copyright Act, including provisions prohibiting camcording in a cinema and imposing landlord liability. The Council of State's decision to outlaw camcording as part of the Copyright Act could be workable as long as illegal camcording is a possession violation separate from infringement, and subjects the perpetrator to cinema owner and police interdiction and immediate seizure of equipment. The Royal Thai Government's decision that the current criminal laws adequately address landlord liability is unfortunate, as right holders and the Government need a civil, administrative, and criminal remedy to combat those who benefit from, control, or contribute to, the infringement of others. We are mindful that the new Royal Thai Government faces many challenges, including most immediately providing relief and recovery efforts from the devastating flooding that hit the Chao Phraya and Mekong River basin, including Bangkok and surrounding neighborhoods. We nevertheless hope that, under the leadership of the new Prime Minister,⁵ the Deputy Minister of Commerce, and the leadership of DIP, our concerns may be addressed in the coming year.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Investigate and prosecute greater numbers of significant piracy cases, with deterrent fines and custodial sentences.

¹For more details on Thailand's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²See www.ecdpolice.com.

³See www.tcscd.in.th.

⁴For example, IIPA and industry has noted Panthip Plaza, the Klong Thom, Saphan Lek, Baan Mor Shopping Area, Patpon and Silom Shopping Areas, Mah Boon Krong Center, and the Sukhumvit Road Area Bangkok as "notorious markets" in a recent Out-of-Cycle Review submission with USTR, and USTR in turn named the "Red Zones" (including "Panthip Plaza, Klong Thom, Saphan Lek, and Baan Mor shopping areas, among others." See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 20, 2011, at http://www.ustr.gov/webfm_send/3215; International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 Fed. Reg. 58854 (September 22, 2011), Docket No. USTR-2011-0012, October 26, 2011, at http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF.

⁵The Royal Thai Government indicates in a recent report that the Prime Minister will continue to chair the "National Committee on the IPR Policy" and that its subsidiary body, the "Sub-Committee on the Prevention and Suppression of IPR Violation" will also continue to function. See IP Promotion Office, Embassy of the Government of the Kingdom of Thailand, *Fact Sheet on Thailand's IPR Situation*, November 2011 (on file with IIPA).



- 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. Ensure effective enforcement against online infringements.
- Ensure active cooperation of Internet service providers (ISPs) to prevent online infringement, including effective and fair policies to deal with non-hosted infringements and repeat infringers and measures to address Thai nationals using servers outside of Thailand.
- 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.
- Expand enforcement authority to DIP.
- Effectively interdict counterfeit/pirated books bound for export, in addition to the existing book and photocopy piracy issues.
- Increase government support and collaboration on public awareness campaigns focused on enterprise end-user software piracy to help businesses use licensed software to improve their competitiveness and reduce operational and security risks, including promoting adoption of software asset management best practices.
- 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. Ensure illegal camcording is a separate violation of law, subject to interdiction by cinema employees and the police and immediate seizure of the machinery used in violating the law.
- Enact copyright amendments to fully implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) (and join those treaties), including amendments to address Internet piracy and promote ISP responsibility, and protection against the circumvention of technological protection measures, among other changes.
- Enact landlord liability provision, such that there will be adequate civil, administrative, and criminal measures associated with those who lend their premises to those who engage in commercial infringement of copyright.
- Fully implement the Cabinet Resolution on legal software use, procurement, and installation in the public sector.
- 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.
- Amend the Evidence Law to allow the admission of digital evidence before the court.
- 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

- Fix (or withdraw) the problematic Film Act, which has not yet been implemented, and which imposes screen quota and uncertain censorship and ratings system.
- Relax the ban on investment/ownership in terrestrial broadcast networks.
- Reduce the film import tax from 5 Baht to 0 Baht.
- Reduce the hard goods import tax which is currently a staggering 30%.
- Relax television advertising restrictions.

PIRACY AND ENFORCEMENT UPDATES IN THAILAND

IIPA's previous reports document in detail various piracy and enforcement issues in Thailand and the harm caused to the U.S. content industries. For most of those issues, there has been no significant change (that some of these issues are not mentioned below does not signify that they have been resolved). The following provides updates on ongoing or newly emerging issues. Significantly, we note the damaging effect piracy has had on local Thai creators and creative industry. For example, virtually all of the 57 Thai movies released in 2010 were pirated, and such pirated goods were made available only a day or two after the release date and while the trend in 2011 was down, 33 illegal copies of Motion Picture Association of America (MPAA) member company movies were sourced to

illegal camcords in Thailand. Two giant local music companies, RS and GMM Grammy, have indicated they will shift resources away from the music business and adjust expected revenues as a result. Anecdotally, IIPA reports fewer music releases each year in Thailand, and flat revenues in 2010 and 2011, in part due to physical and online piracy.

The Royal Thai Government continues to provide aggregate statistics of enforcement activities for which we are grateful, but we note that these statistics do not differentiate between types of IP infringements so it is impossible to begin to gauge these actions' effect on piracy, nor do they provide any insights into judicial (including criminal) enforcement or any level of deterrence achieved as a result of these enforcement activities.⁶ DIP (under the leadership of the Director General) has reportedly infused a budget of Bt8.3 million (US\$266,000) for the establishment of a 'piracy suppression information system' linked between related enforcement authorities, i.e., the Police, Customs, DSI, the Office of the State Attorney and the IP and IT Court, in order to serve as a connection between all related agencies in analyzing piracy information in the country. This would be a positive step.

Lack of Deterrent Criminal Remedies: In order to more effectively address the endemic piracy problem in Thailand, a credible, deterrent criminal remedy must be available. While a significant number of raids continues to occur, very few of them achieve meaningful results which would, when publicized, have a deterrent effect on piracy activities in the country. The Royal Thai Government noted 4,499 IP raids and 457 Customs raids, but indicates nothing about criminal remedies imposed against those raided, investigations up the organized crime chain, or deterrent outcomes. The industries' own numbers are telling as anecdotal evidence of the problem of lack of deterrence. The music industry reported that as of November 2011, 218 music copyright piracy actions had occurred, including 141 retail raids, 7 warehouse raids, and 13 actions involving websites available for file sharing/downloading.⁷ There were also 3 cases involving mobile device piracy. The 148 retail and warehouse raids led to 126 arrests and some seizures.⁸ There were also 57 raids involving website sales of physical pirated CDs, including 47 notices and 10 raids, resulting in a further 10 arrests. Of the 126 criminal cases commenced, there were reportedly 36 convictions including guilty pleas, 2 of which resulted in a fine and imprisonment (both suspended sentences), 26 of which resulted in fines, and 7 of which failed to result in any sentence due to the defendants fleeing. Ninety cases remain pending. The fines are generally non-deterrent, ranging from Bt26,000 (US\$870) to Bt320,000 (US\$10,700), with an average fine of Bt84,900 (US\$2,830). Overall, the record of criminal raids and cases brought in 2010 and 2011 is not particularly heartening, and the penalties being imposed in Thailand do not indicate there has been any deterrent effect on pirates or that recidivism has been curtailed.

Camcorder Piracy Traced to Thailand Continues to Harm Film Market: The problem of camcording of full-length films in movie theaters in Thailand soared in 2010 and remained a major concern of the industry in 2011.⁹ Illegal copying of a film in a movie theater is already an infringement under the current Copyright Law, but an effective standalone remedy is needed to address this concern. While the trend of illegal camcording somewhat moderated in 2011, illegal copies of 33 of MPAA members' films were sourced to Thailand. Most of these were audio recordings, in high demand by criminal syndicates replicating infringing, Thai-dubbed optical discs. Passage of an anti-camcording law is sorely needed. This need was recognized by Minister Ponlaboot in April 2011 when he stated that the government will take action against criminals engaged in camcording to ensure that the Thai film community continues to expand, and was again recognized by the former Deputy Minister of Commerce in December 2011. In the meantime, the lack of specific *sui generis* legislation should not halt Royal Thai Government authorities from

⁶See *Fact Sheet on Thailand's IPR Situation*, *supra* note 5, indicating that during January to September 2011, the Royal Thai Police and the DSI conducted 4,499 raids resulting in seizure of more than 2.2 million infringing items, while Customs carried out 457 raids seizing more than 240,000 infringing items. These are not broken down by type of IP infringed.

⁷Of the 13 Internet piracy cases, 4 cases were settled, 2 cases are in the hands of the Public Prosecutor's office, and 7 cases are in the litigation process of the Police Bureau.

⁸The industry notes seizures of 25,480 discs seized (CDs, CDRs, VCDs, VCD- Rs, Mp3discs, Mp3-Rs, DVDs ,DVD-Rs) worth Bt52.6 million (US\$1.6 million). Here it should be noted there is a disconnect between these industry numbers and the numbers reported by the Royal Thai Government, which may be in part due to the fact that the Government's statistics address other forms of IP.

⁹Camcording 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 all films including major and independent film producers. Camcording also threatens the continued growth of the Thai theatrical box office marketplace.

taking immediate action to address this problem. DSI has enlisted industry's support to help identify the primary camcorder syndicate groups responsible for the majority of illegal camcording, but unfortunately, the Royal Thai Police have not consistently cooperated in investigations into illegal camcording, and there are reports of investigations and/or raid schedules being leaked in 2011. There is an intricate connection between camcording piracy and Internet piracy in Thailand, as increasing broadband Internet and 3G connections mean faster uploads of illegally camcordered movies to the Internet which are then available to the world through peer-to-peer (P2P) and linking sites, becoming pirated hard goods within a matter of days.

Internet Piracy Problem Worsens in Thailand, Despite Some Good Cooperation From TCSD: The problem of Internet piracy has become increasingly complex and alarming in Thailand as broadband and mobile 3G services (in large cities mainly) become more widely available.¹⁰ Faster speeds, growing infrastructure, and lower Internet subscription fees,¹¹ mean roughly 18.3 million Thai had access to the Internet as of early 2011, or 27.4% penetration, with (fixed line) broadband penetration of at least one million as of June 2010,¹² and Thailand ranking second in the world (according to Point-Topic) in overall growth of broadband subscribers between Q1 of 2010 and Q1 of 2011.

Internet piracy takes on many forms in Thailand. BitTorrent indexes and tracker sites (acting as an intermediary for BitTorrent distributors and downloaders) have become more pervasive in Thailand, facilitating increasing levels of unlawful distribution of copyrighted files.¹³ There are more than 100 BitTorrent tracker sites operating in Thailand, from sites offering hundreds or thousands of illegal files, to sites offering hundreds of thousands of illegal files.¹⁴ Public and private web bulletin boards ("Webboards"/forums which can be free or paid membership services), some of which are supported by advertising, and illicit use of social networking sites, blogs and one-click hosting sites (sometimes referred to as cyberlockers) are just a few of the additional ways Internet piracy is spreading in Thailand. Industry also reports that ISPs have colocation facilities which are now being used to store massive amounts of pirated content. Rental fees for colocation are low, leading people to choose this option to download data files more efficiently, and since users often do not identify their true identities when renting colocation services, enforcement becomes more challenging. Online piracy of software occurs mainly through online stores selling hard goods pirated software accompanies by the online availability of "key generators" for circumvention which are offered for free download. Online piracy levels for music are now estimated at around 90% for many industries. Some of the most notorious piracy websites in the world are servicing the Thai market.¹⁵ In a demonstration of present inter-connectedness and the need for the global community to respond to rampant theft, a site based in the British Virgin Islands (*4Shared*)¹⁶ erodes the market in Thailand by providing access to infringing Thai and U.S. (and other international) music to the estimated 50 million Thai that visit the site.

IIPA appreciates the cooperation of the TCSD in 2011, which supported the preparation and execution of enforcement against 13 unauthorized websites making available illegal content for file sharing. TCSD has also begun sending takedown notices to targeted unauthorized websites targeted to Thai people (even if servers are located

¹⁰Statistic reveals that there are active 20 internet service providers (ISPs) in Thailand.

¹¹Many ISPs and telecommunication operators offer a variety of payment plans to meet the needs of their customers, e.g., pay per data retrieved, pay per real-time usage, and monthly or yearly subscriptions.

¹²Point-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>.

¹³In Thailand, tracker sites consist of general trackers which are open to any user, and exclusive trackers which accept members for a fee or are based on the amount of torrent files uploaded. The content available in these tracker sites consists of mostly unauthorized files as well as pornography files.

¹⁴Those sites offering memberships often allow their members to download significant amounts of pirated content by paying a membership fee from Bt200 (US\$6.50) up to Bt3,000 (US\$97) per month depending on the type of membership. Payments are made through the site, for example, through pre-paid cards or "TRUE Money" cards sold at convenience stores.

¹⁵For example, *Sohu.com*, ranked 9th in China and 44th globally in terms of Internet traffic, and *Sogou.com*, ranked 25th in China and 123rd globally, provide search functionality for infringing music files to the Chinese-speaking community in various countries in Asia, including Hong Kong, Taiwan, Singapore, Malaysia, Macau, Thailand and Indonesia, causing substantial damage to the music markets there.

¹⁶*4Shared.com* is a popular one-click hosting site (cyberlocker), with a current Alexa ranking of 73. It is operated by a company based in the British Virgin Islands and its service incorporates search functionality – a complete contradiction to any claims that the service is designed for private "locker" use. The site includes a dedicated "music" section and has featured messaging encouraging users to upload their favorite songs and share them with friends.

outside Thailand), and that harm local Thai creators as well as disrupt the market for U.S. (and other foreign) right holders. We ask for the same from the ECD whose personnel by comparison lack knowledge on digital piracy and thus have been reluctant to date to focus on Internet piracy. Some IIPA members note that some larger and more established ISPs are responsive to member notices about online infringement, and voluntary takedown rates remain fairly good.¹⁷ For example, some ISPs blocked access to targeted websites almost immediately upon receiving a cease and desist letter from the industry. Some ISPs have assisted in searching for illegal files kept on their rented (colocation) servers. However, since there is no law related to ISPs specifically in the copyright context, some ISPs that provide colocation services ignore notices and fail to cooperate, requiring the involvement of TCSD (which obtains an Order).

Based on requests from industry (including IIPA suggestions in previous submissions), it appears the Royal Thai Government has facilitated discussions between right holders and ISPs. While these ended up being mostly listening sessions, it is hoped that these meetings will lead the Royal Thai Government to foster cooperation by ISPs, including notice and takedown, and an appropriate legal framework, including effective and fair measures to deal with repeat infringers in the hosted and non-hosted environments.

Mobile Device Piracy Worsening: Mobile penetration surpassed 100% during 2011, to 72 million subscribers as of early 2011. Right holders report that mobile and mobile device piracy have grown more serious in 2011 in Thailand. Many shops engage in the illegal business of providing unauthorized copies of content onto mobile devices, MP3 players, and the like. Mobile device piracy can be found in any department store or open market. Thai music is among the more popular content people embed or download onto their mobile devices. 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 services provided by the stores can be considered copyright infringement. To date, they have refused to go after stores that illegally download content from the Internet and then distribute it to customers. Such copying and file-transferring clearly constitutes copyright infringement, and must be dealt with severely or the problem of mobile device piracy will grow more damaging.

Lack of Deterrence, Evidenced by “Red Zone” Piracy, OD Piracy, and Street Stalls: The “Red Zone” malls remain in full operation. These include Panthip Plaza, the Klong Thom, Saphan Lek, Baan Mor Shopping Area, Patpon and Silom Shopping Areas, Mah Boon Krong Center, and the Sukhumvit Road Area Bangkok, which remain notorious markets for openly selling pirated and counterfeit goods. The situation in the malls largely failed to improve in 2011, with many vendors openly selling infringing copies of copyright content, including films (pirated DVDs are still easily available, especially local dubbed versions which are sourced back to illegal camcording),¹⁸ music, software, games,¹⁹ published materials. Vendors engage in other crimes as well, e.g., selling child pornography. USTR has listed the “Red Zones” as “notorious” piracy markets.²⁰ Pirated goods are also available in other cities such as Chiangmai and Pattaya.

¹⁷In 2010, the local entertainment industry group TECA reported 717 takedowns out of 896 notices, an 80% takedown rate.

¹⁸Piracy 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.

¹⁹Piracy 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 others carrying pirated discs in bags around a mall or on the street.

²⁰The Royal Thai Government also maintains “yellow zones,” which are targets to be aware of for possible piracy activities.

There remain a significant number of “burning” operations, as well as sales of imported DVDs and CDs,²¹ and locally pressed discs available in Thailand. Burning of MP3 compilation CDs with music remains popular, but more recently, such discs are either burned to order (i.e., hawkers show only inlay cards and sleeves on shelves without product inside), use children as “mules” selling pirated CDs, set up self-service sales with a money box, or opening virtual stores on Internet websites in place of physical stalls. Burning CDs is quite popular among vendors due to the low cost of production, the ease of manufacture, and the lack of legal controls over CD-R writers. It would be important to add CD-R burners to the Optical Disc regulation, so that this problem can be brought under control. There are many fewer locally pressed CDs than in the past, due to enactment of the Optical Disc regulation; such discs are double the price of burned discs and are generally back catalog music titles. Street stalls sell a mix of products ranging from movies, TV series, music and games. Physical sales in street stalls can be found in many remote areas as well as some tourist attraction areas like Pattaya, Hua Hin, Chiangmai, Samui Island, Haad Yai and Phuket Island where tourists buy physical burnt CDs, use them, and then throw them away.

Enterprise End-User Software Piracy Level Remains High, and Industry is Harmed by Hard Disk Loading and Circumvention of TPMs: The primary concern of the business software industry is the use of unlicensed or pirate software by enterprises.²² Reducing PC software piracy would have a net positive effect on Thailand’s economy. A 2010 study done by research firm IDC for the Business Software Alliance (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 10 points over 2 years, which would yield US\$1.7 billion in GDP and \$96 million in tax revenues. Other piracy phenomena harming the business software industry include hard disk loading of illegal software onto computers at the point of sale, the use of illegal software programs to circumvent technological protection measures (TPMs) used to protect legitimate business software, and the failure to fully implement the existing Cabinet Resolution on legal software use, procurement, and installation in the public sector.

The business software industry continued to receive positive support from the Royal Thai Government including ECD for end-user software piracy actions. ECD has good knowledge and understanding of software piracy and not only enforces IP laws but also conducts educational programs on the use of legal software. Unfortunately, the number of raids decreased significantly in 2011, with only 33 raids run against software piracy by enterprise end-users, compared with 152 raids in 2010. There have been a couple of criminal cases in recent years, with some positive outcomes.²³

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, increasingly 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 the publisher, with some producing unauthorized translations of works, inserting the translated material into the

²¹Imported CDs are generally more expensive and most come from China. Imported CDs make up around 15-20% of the pirate music market.

²²BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Thailand was 73%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$427 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/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 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

²³In one end-user criminal case that went to trial there was a conviction in 2010. In this particular case, the value of the infringement was BHT2,689,400 (US\$90,000) and the sentence was a fine of BHT75,000 (US\$2,500) levied against both the managing director and the company, with a 3 month prison term against the manager, suspended for 1 year. A civil case was then filed in November 2010, and the court rendered its judgment on February 16, 2011. The court ordered that the two defendants (company and director) were jointly liable to pay Bt1,000,000 (US\$32,300) plus interest and must pay a court fee of Bt82,780 (US\$2,700).

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,²⁴ which were of considerable concern as the counterfeit books were finding their way into the U.S. market. In 2010, some progress was made with the Royal Thai Government forming a Committee to specifically address the export of counterfeit books. Unfortunately, that effort did not lead to a successful outcome, despite law enforcement members of the Committee interviewing several individuals suspected of involvement. With Bangkok slated as the “World Book Capital 2013,” it behooves the Royal Thai Government to undertake measures not only to promote literacy among its youth population but also respect for copyright as the foundation for literary creation. It can only do so effectively by undertaking increased enforcement efforts to curtail rampant unauthorized commercial photocopying occurring on and around university campuses.

Signal Piracy (Cable and Satellite), Public Performance Piracy: 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. 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. The industry group Cable and Satellite Broadcasters Association of Asia (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.²⁵ In addition to signal theft, public performance piracy continues to be a problem with many hotels 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 motion pictures illegally.

Disturbing New Trend – Hard Disk and External Device Piracy: A new form of piracy has emerged in Thailand by which pirate vendors are selling hard disk equipment containing approximately 200 high definition movies. These hard disks sell for roughly US\$100 and an after-service provides the ability to update the hard disk with the latest movies for US\$30. These boxes are available in many of the notorious malls like Panthip Plaza. Similarly, vendors will sell USB drives with significant memory capacity filled with pirated content.

COPYRIGHT LAW UPDATES/RELATED ISSUES

IIPA remains deeply disappointed that significant energy spent to try and modernize the Copyright Act, B.E.2537 (1994) and add needed provisions to combat mall piracy and illegal camcording has not resulted in successful passage of any meaningful legislation. Now, with Internet and mobile device piracy proliferating, massive storage devices being made available replete with pirated content at the malls, and activities such as local recordable “burning” of content becoming the norm in the physical piracy space, Thailand’s legal infrastructure has fallen woefully behind. IIPA understands that in December 2011, an official from the Ministry of Commerce announced that his Ministry would advocate to the Cabinet for passage of camcording legislation, amendments to the Copyright Act, and landlord liability provisions, indicating the aspiration to move quickly on 1) draft camcording legislation that would penalize illegal copying in a theater and would empower officers to conduct *ex officio* action; 2) draft amendments to the Copyright Act that would provide more severe penalties against Internet piracy; and 3) provisions on landlord liability, penalizing land owners or lessors renting premises for pirated or counterfeit sales. IIPA is hopeful that the new government can follow through on these aims urgently.

²⁴The 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.

²⁵The cable industry reported 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, as of early 2011.

The following outlines immediate steps which should be taken to remedy the current situation:

- **Passage of Copyright Amendments/Anti-Camcording Legislation:** We understand the copyright amendments were sent back to DIP by the Council of State, requesting that they fold an anti-camcording provision into the draft. DIP has reportedly completed its draft, and the Bill was approved by the Cabinet, but the general election in 2011 halted progress on that bill. The Council of State's decision to have DIP draft and fold a remedy outlawing camcording into the amendments to the Copyright Act could be workable, as long as the provision drafted makes it clear that illegal camcording is a separate possession violation, and makes the perpetrator subject to cinema owner and police interdiction and immediate seizure of equipment.²⁶ The draft must also include: 1) a definition of "communication to the public" to ensure Thailand provides a WCT- and WPPT-compatible right, including the 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) an amendment of the definition of "reproduction" to unambiguously cover temporary reproductions; 3) a prohibition on the circumvention of technological protection measures (TPMs) (defined to include both measures controlling access to works as well as measures controlling the exercise of exclusive rights), or the trafficking in (or providing services in) circumvention technologies, devices, or components; 4) inclusion of provisions concerning ISP liability, including notice and takedown and fair and effective procedures to deal with repeat infringers in 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.²⁷ IIPA hopes for swift passage of an adequate bill and would be interested in reviewing the latest draft.
- **Landlord Liability:** A landlord liability provision outlawing one who "provides physical or digital spaces for infringing activities" was included in the Draft Amendment to the Copyright Law as of March 2010 but unfortunately in 2011, DIP was informed by the Thai Trade Representative that the provision was "redundant with the existing contributory offense of the Criminal Code." This turnabout is highly unfortunate, as right holders and the Royal Thai Government should have civil, administrative, and criminal remedies and procedures at their disposal to combat those who benefit from, control, or contribute to the infringement of others. While IIPA had understood that there were criminal test cases which could have proven that landlords could be held indirectly liable under current Thai law, we are unaware of the results of such cases.²⁸ Such test cases, even if successful, should not substitute for a strong civil landlord liability provision, 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. The original landlord liability provision should be re-added to the copyright law amendment prior to passage. We are pleased to hear that the Ministry of Commerce still has the aspiration of moving a landlord liability provision through.
- **Computer Crime Law:** The Department of Intellectual Property has reportedly proposed that the Ministry of Information, Communication and Technology amend the Computer Crime Act by including intellectual property infringement as an offense under the law. The inclusion of the intellectual property infringement into the Computer Crime Law would be extremely helpful to start the process toward establishing a proper legal framework to protect copyright on the Internet and prevent online and mobile device infringements.

²⁶To the extent necessary, conforming amendments should be made to the Cinema and Video Act, 2008 to outlaw possession of an audiovisual recording device in a theater and to enable theater owners to legally seize devices and detain persons possessing such devices.

²⁷There 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.

²⁸The 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."

- **Customs Law:** The Ministry of Finance has recently approved amendments to the Customs Act to empower Royal Thai Customs to seize transshipments containing pirated goods. The draft Bill has reportedly been approved by the Cabinet and sits with the Council of State.
- **Evidence Law:** IIPA recommends that the Royal Thai Government amend the Evidence Law to allow the hearing and testimony of any digital evidence. Conforming changes should be made to any procedural rules of evidence in the various enforcement authorities so that they too will have clarity with respect to digital evidence.

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 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 crime, run by those attracted to the low-risk, high profit nature of piracy in Thailand. 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.²⁹ 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.³⁰

Remaining Problems with the Optical Disc Manufacture Act: IIPA has previously analyzed the Optical Disc Manufacture Act which went into effect on August 29, 2005, and specifically offered changes to improve the law.³¹ IIPA understands that DIP revised regulations to ease the burden of copyright owners in applying for the copyright owner’s code in a way acceptable to industry. This marks a major improvement. IIPA also understands that the Law is in the process of being amended, and would suggest the following improvements: 1) notwithstanding the easing of the “copyright owner’s code” requirement through regulations, the obligation in Sections 8 and 12 should be stricken from the Law;³² 2) the Law should add a requirement that a plant obtain a license prior to beginning production of optical discs, including a fixed license term and renewal process (and the exception to the notification

²⁹ 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\$58,000).

³⁰DIP 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.

³¹*Act of the Production of OD Products*, B.E. 2548 (2005, effective August 29, 2005).

³²By 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.

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) the Law should provide for an automatic permit for export of discs and import/export of machines, stampers/masters and polycarbonate; 4) the Law should 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) the Law should provide for mandatory minimum fines and imprisonment in case of violations.

MARKET ACCESS ISSUE UPDATES IN THAILAND

Problematic Film Act Potentially Imposes Screen Quota and Uncertain Censorship and Ratings System: The Motion Pictures and Video Act B.E. 2550 (2008) (effective July 1, 2008, but not yet implemented) imposes quotas and potentially onerous censorship and ratings provisions. 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 (for context, approximately 57 local Thai films were issued in 2010, accounting for around 25% of all films released). The number of screens in Thailand is more than enough to have a free market for theatrical releases, and Thailand’s restrictive measure comes at a time when most other countries are removing quotas, not putting them into place. These restrictions could, if imposed, have a significant negative effect on foreign film distribution in Thailand.

The Act also imposes onerous ratings requirements on films, music videos and live performances, and censorship requirements³³ on films, audiovisual products, music used for karaoke, and videogames.³⁴ 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\$30,000) or up to two years in jail. Industry has noted optimistically that the new law could be used to curb piracy in street stalls, shopping malls and complexes and even in Internet cafés in parallel with Copyright Law. If implemented, such restrictions would have a significant impact upon the theatrical sector as local productions of total films released.

Ban on Investment/Ownership in Terrestrial Broadcast Networks: Foreign ownership/investment in terrestrial broadcast networks is prohibited. Proposed changes in the law would still severely limit such investment to a 25% share. Such restrictions impede the development of legitimate content in Thailand, and should be relaxed.

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

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

³³In 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.”

³⁴The 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.

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 once again organized and/or participated in numerous anti-piracy trainings, regional IP seminars, and public awareness activities in 2011 in Thailand. The entertainment industry group TECA and IFPI delivered and/or participated in many trainings and seminars (including government-led trainings, and those organized by international organizations like WIPO) for related government agencies regarding Internet age investigation techniques, the future of the local Thai music industry, and updates on various copyright issues.³⁵ MPAA engaged in ongoing “Make a Difference” trainings to show cinema staff how important their role is to stop camcording, identifying illegal camcording, and identifying steps to take (e.g., who to contact) when illegal camcording is detected and the perpetrator has been confronted. Internet piracy training sessions were also held with ECD and the Cyber-Crime Police focusing on investigative techniques. Several other trainings and meetings were held with the special branches of the Royal Thai Police and IP & IT Court judges and Public Prosecutors. MPAA initiated several programs together with the DIP and the Thai Film Federation and academic institutions on IP education campaigns. In celebration of World Intellectual Property Day, representatives from across the Thai film community appeared in a video trailer to thank fans for choosing to watch movies in theaters and on legitimate copies at home. This trailer features cinema ushers thanking the audience for not camcording, highlighting the problem of illegal recordings sourced from Thai cinemas.

BSA organized and/or collaborated on software license compliance seminars (where local authorities had the opportunity to directly communicate with businesses on the impact of software copyright piracy on the country and request for software license compliance) as well as educational programs on software IP protection. Industry also participated in Royal Thai Government events at which sizeable numbers of pirated products were destroyed; these events presented opportunities to educate the public about the harm caused by piracy.³⁶ IIPA and several industry members participated in a regional ASEAN-USPTO-USDOJ Workshop on Copyright and Effective Practices Against Digital and Internet Piracy in late March 2011 in Bangkok. The Royal Thai Government also organized several public awareness events including a World IP Day event on April 26, 2011, an IP Fair 2011 in September 2011, which was expected to draw close to 100,000 people over a three-day period and was designed to promote

³⁵The following is a non-exhaustive list of some of the programs TECA was involved in during 2011:

- “The Suppression of IP Infringement in Digital Age,” February 28, 2011. The purpose of this Ministry of Commerce/DSI seminar was to educate police officers on the importance of intellectual property protection as well as discuss the current situation of piracy. There were around 70 private sector attendees mostly from ISPs, telecommunication companies, and copyright companies/associations and 200 police officers with commissioned ranks and higher, sub-inspectors under the Central Investigation Office and the Metropolitan Police Bureau also attending the seminar. Another 200 police officers from Provincial Police Bureaus Regions 1 and 8 attended the Seminar as well. IIPA also presented at this seminar.
- “New Era of Thailand’s Music Industry,” March 30, 2011. This seminar was organized in response to the question of whether the Thai music industry would be collapsed and lose to K-Pop (Korean Pop). The seminar was organized by DIP, TECA, and Bangkok University. Universal Music Thailand and TECA gave presentations at the seminar. The seminar brought in more than 400 attendees mainly from music industry.
- Short Film Making Competition, August- October 2011. MPA, the Thai Film Association Federation, and TECA organized and launched the “Anti-Piracy Short Film Competition.” The project was to raise awareness about copyright protection to young people and students. An award was given to the winner who was sent to a 3-day Seminar on Film Making in Beijing in November 2011. The first runner-up and the second runner-up got prizes of Bt10,000 and Bt5,000 Baht.
- Three Special Lectures on “Entertainment Industry in a Changing World,” June 7, June 29, and August 2, 2011. At these events, TECA, in cooperation with the MPA, provided update information on the entertainment industry locally and globally, and to have judges, prosecutors, or officers keep track with the advent of digital technology which affects consumers’ behavior with regard to copyright products. There were around 50 judges, both career and associate, attending the first session, around 60 public prosecutors attending the second session, and around 50 officers attending the third session.

³⁶The first destruction ceremony took place on June 30, 2011. DIP in cooperation with the Royal Thai Police, Royal Thai Customs, DSI and intellectual property right owners, attended the event in Phuket Municipality. Counterfeits and pirated goods weighing approximately 90 tons were destroyed, with an estimated value of the seizures being Bt58 million. The second destruction ceremony took place on August 29, 2011. DIP in cooperation with the Royal Thai Police, Royal Thai Customs, DSI and intellectual property right owners, attended the event in Phuket Municipality. Counterfeits and pirated goods weighing approximately 120 tons were destroyed, with the potential value of the goods they indicated amounted to Bt3.1 billion (US\$100 million). The third destruction ceremony took place on August 23, 2011, where Maesai Customs, Chiangrai destroyed counterfeit and pirated music and movie CDs, counterfeit clothing, bags, watches, and cell phones valued at Bt16 million (US\$500,000).

IPR awareness, and a campaign event in September 2011 called “Stop fakes – buy original,” including a seminar on “IP Respect - Solution for Thai Business,” and a fashion show to provoke the IP awareness.

GENERALIZED SYSTEM OF PREFERENCES

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. Thailand has been a major beneficiary of the GSP program. During the first eleven months of 2011, more than US\$3.46 billion in imports to the U.S. from Thailand enjoyed duty-free treatment under the GSP Program, or almost 15.1% of Thailand’s entire imports into the U.S.³⁷ Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 USC 2462(c)(4) and (5). It is essential to the continued growth and future competitiveness of these industries that our trading partners, including Thailand, provide free and open markets and high levels of protection to the copyrights on which this trade depends. Countries like Thailand should not expect to continue to receive the benefits of trade preferences if the government does not live up to its end of the bargain by providing adequate and effective protection for intellectual property rights of U.S. creators, and/or if it fails to afford equitable and reasonable market access to U.S. creative products and services.

³⁷During 2010, more than US\$3.6 billion in imports to the U.S. from Thailand enjoyed duty-free treatment under the GSP Program, or more than 15.9% of Thailand’s entire imports into the U.S.