

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA associations debated Thailand's Special 301 ranking in light of what appears to be an emerging political determination to take meaningful action to alter what have been long-standing problems. Ultimately, they agreed to recommend that Thailand be moved to the Watch List for 2013 in recognition of increased levels of cooperation and political direction. IIPA also recommends that USTR conduct an out-of-cycle review (OCR) to ensure adequate progress, in particular, that the Royal Thai government robustly implements a national plan in connection with the "Year of IP Protection" that it has announced, and that this be reflected in enhanced enforcement and legislative reforms, including the prompt enactment and implementation of effective legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work (i.e., so-called anti-camcording legislation).¹

Executive Summary: The market for creative content in Thailand has never reached its full potential due to 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 many of these problems. Piracy remains rampant, with physical piracy largely being replaced by online and mobile device piracy as the Thai populace becomes more wired into the latest technologies. "Media box" digital drives filled with hundreds of movies and loads of other content or enabled to illegally download sell at low prices at the malls. Illegal camcording in Thailand continues to spiral out of control, with many audio dubs of U.S. films contributing to worldwide piracy rings (not just Thailand), while local Thai films are being illegally "cammed" within days of their release. On a positive note, the software industry has seen some modest progress against enterprise end-user piracy of software. In addition, the passage of amendments to the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA), which includes intellectual property infringements as a predicate money-laundering offense, simply awaits royal endorsement and right holders will have another tool to address significant piracy concerns, including the possibility of freezing assets related to piracy. The Royal Thai government has designated 2013 the country's "Year of IP Protection,"² and the Deputy Minister of Commerce has indicated he will head the establishment of a new "Operations Centre for the Suppression of Intellectual Property (IP) Infringement."³ The legitimate commercial market in Thailand continues to grow, as, for example, new cinemas are expanding into provincial areas.⁴ Notably, WIPO and Oxford Economics studies on the economic contribution of creativity to the Thai economy⁵ suggest that but for the problems of piracy in Thailand, the contribution of the copyright industries to the Thai economy would be even more robust.

¹IIPA has already communicated to the Royal Thai government that the current draft of such legislation presently under consideration is insufficient in this regard. For more details on Thailand's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²Royal Thai Embassy Washington DC, *Government Designates 2013 "Year of IP Protection,"* December 2012, at <http://www.visetkaew.com/wp/category/thailand-2/page/3/>.

³*Thailand Declares War on Piracy, Intellectual Property Violation*, Pattaya Mail, January 21, 2013, at <http://www.pattayamail.com/news/thailand-declares-war-on-piracy-intellectual-property-violation-21149>.

⁴The market for local music in Thailand has shrunk due to consumer behavior changes and substitution of digital downloads. These changes have had a detrimental effect on investing in music, although, as a result, international and independent repertoire have gained market share.

⁵World Intellectual Property Organization, *The Economic Contribution of Copyright-Based Industries in Thailand*, 2012, at http://www.wipo.int/copyright/en/performance/pdf/econ_contribution_cr_th.pdf. This study demonstrated that in 2006, the copyright-based industries generated Bt350.96 billion worth of total value-added, representing 4.48 percent of Thailand's GDP. In terms of employment, the industries hired 1.02 million people, which accounts for 2.85 percent of the total employment of the country. In 2006, the total export value is US\$5.73 billion, which represents 4.56 percent of the total of exports of Thailand. In another recent study conducted by Oxford Economics, *The Economic Contribution of the Film and Television Industries in Thailand*, the film and television industry in Thailand contributed US\$2.22 billion (Bt68.3 billion) to the country's economy and supported 86,600 jobs in 2011. The industry also generated tax revenues of US\$81.4 million (Bt2.5 billion). See Oxford Economics, *The Economic Contribution of the Film and Television Industries in Thailand*, at http://www.mpalibrary.org/assets/The_Economic_Contribution_of_the_Film_and_Television_Industries_in_Thailand1.pdf.



PRIORITY ACTIONS REQUESTED IN 2013

Enforcement

- Investigate and prosecute greater numbers of significant piracy cases, including against mall owners, given the opinion by the Royal Thai government that landlord liability is available under criminal law, with deterrent fines and custodial sentences.
- 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, including within the Department of Intellectual Property (DIP), and increased resources for the Technological Crime Suppression Division (TCSD) of the Royal Thai Police.
- Ensure effective enforcement against online infringements, and 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 infringements in Thailand using foreign websites.
- Close notorious piracy markets (“Red Zones” and “Yellow Zones”).
- Effectively address book counterfeiting and piracy and unauthorized copying 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.
- After Royal assent, fully implement the amended Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA), which includes intellectual property infringements as a predicate money-laundering offense, to address significant piracy concerns, including freezing assets related to piracy.

Legislative

- 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 protect against the circumvention of technological protection measures, among other changes.
- Adopt legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part, subject to interdiction by cinema employees and the police and immediate seizure of the machinery used in violating the law.
- 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.
- Add IP crimes to Computer Crimes Act to create a more effective remedy against online infringement.
- Issue sentencing guidelines and adopt minimum sentencing that provides a real deterrent to infringement.
- Amend the Evidence Law to allow the admission of digital evidence in copyright cases before the court.⁶
- Fully implement the Cabinet Resolution on legal software use, procurement, and installation in the public sector.
- 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 potentially 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.

⁶We understand that digital evidence admission is included in some electronic transactions laws, but are unaware of whether this is sufficient for copyright cases.

PIRACY UPDATES IN THAILAND

IIPA's previous reports document in detail various piracy issues in Thailand and the harm caused to the U.S. content industries. In addition to the updates below, significantly, we note the damaging effect piracy has had on local Thai creators and creative industry.⁷ Two giant local music companies, RS and GMM Grammy, have shifted resources away from music and explored new opportunities in media and broadcasting. According to public records, GMM Grammy is only a 40% music company, instead making plans to license sports events like UK Premier League and sell satellite set-top boxes for exclusive broadcasting of football matches. Anecdotally, for the first half of 2012, revenues were flat/slightly down once again for both physical and digital sales. While new legal services for music are launching in Thailand, like iTunes, Deezer, and Spotify, this cannot be said to be evidence of the Thai music market bouncing back at this stage.

Media Box Piracy An Emerging Threat: "Media box" piracy is a phenomenon hitting Thailand hard. Many of the malls now boast such boxes, including "HD players," in which multiple gigabytes of storage space can accommodate 200 high definition movies and other content. The boxes only cost around US\$100 and customers can update the hard disk with new movies for approximately US\$30 per update. Moreover, the boxes are inextricably linked with Internet piracy, as websites provide movie lists for customers to pre-select and the movies will be delivered on the hard drive *via* postal service. These boxes are available in Pantip Plaza and other malls containing IT products, including Ban Moh, Klong Thom, MBK Mall, which also still boast hard goods optical disc piracy.

Internet Piracy Problem Worsens in Thailand: 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. Faster speeds, growing infrastructure, and lower Internet subscription fees,⁸ mean an estimated 32.5 million Thai have access to the Internet, either through fixed lines, wireless, or mobile 3G.⁹ Fixed line broadband penetration exceeded 3.7 million as of December 2011.¹⁰ Internet piracy in Thailand can be categorized into unlawful uses of cyberlockers (increasingly proliferating in Thailand, as there are now 17 in general use),¹¹ "webboards"/bulletin boards/forums (which can be free or paid membership services),¹² BitTorrent index and tracker sites (acting as intermediaries for BitTorrent distributors and downloaders),¹³ streaming sites, social media sites (used to locate infringing files), and "clouding," with cyberlocker services allowing massive uploading and downloading and advertising of illegal content being the most popular trend in Thailand. The music industry estimates that around 80% of Internet users in Thailand access music for free illegally, while only 20% buy music from legal services.¹⁴

⁷For 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 2012 was down, 33 illegal copies of Motion Picture Association of America (MPAA) member company movies were sourced to illegal camcorders in Thailand.

⁸Many 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.

⁹*Smartphones Driving Skyrocketing Internet Use*, Bangkok Post, May 15, 2012, at <http://www.bangkokpost.com/business/telecom/293332/smartphones-driving-skyrocketing-internet-use> (citing Internet Innovation Research Center report).

¹⁰ International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

¹¹Cyberlockers in Thailand are both foreign and local with some charging a membership fee and some being free of charge. There are 17 popular cyberlocker sites in Thailand. The local cyberlockers are usually responsive to notices related to infringement.

¹²Web-boards are in serious competition with one another to attract the greatest numbers of users and viewers to lure ad revenues. Users can generally join and start using the board without any registration, however, due to enforcement and monitoring by the local recording industry group TECA, some web-boards now require users to log in before joining in order to identify the IP addresses and block access of anyone monitoring their activity. Many web-boards have cooperated with right holders by imploring users not to post illegal music files. Many have also assisted right holders in having removed, or allowed right holders to remove, unauthorized files. Paid web-boards involve paid memberships which advertise faster downloading, but keep the files stored themselves thus requiring a fee to be paid either by transferring money to the web-board's bank account or through a cash card (such as Bt50 to Bt3,000 "True Money" cards). TECA reports closing down two web-boards so far due to piracy.

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. 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. Those 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\$100) 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. In 2011 and 2012, TECA had 17 BitTorrent tracker sites in Thailand closed down.

¹⁴The music industry also indicates cloud computing ("clouding") will be used widely by Internet users to store and disseminate content and they anticipate illegal uses of the cloud will be the next generation of piracy.

Industry 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 has occurred in Thailand through online stores selling hard goods pirated software accompanied by the online availability of “key generators” for circumvention offered for free download. Some of the most notorious piracy websites in the world are servicing the Thai market, including *4Shared*, registered in the British Virgin Islands, a cyberlocker which provides access to large libraries of infringing files.¹⁵ *4Shared* is the 17th most visited site in Thailand according to Alexa.com and provides access to infringing Thai and U.S. (and other international) music and has an estimated 50 million Thai visits to the site.

Camcorder Piracy Traced to Thailand Continues to Harm Film Market: The problem of camcording of full-length films in movie theaters in Thailand remains a major concern of the industry in 2012, with 33 detections of illegal camcording of Motion Picture Association of America titles.¹⁶ Many Thai-dubbed versions of Hollywood movie DVDs have been detected with the audio having been “cammed” in Thailand and the pictures generally camcordered elsewhere. Local Thai movies are fully camcordered within a couple of days after the films’ releases. There is a 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 various Internet piracy services (e.g., P2P or linking sites), becoming pirated hard goods within a matter of days.

“Red Zone” Piracy: The “Red Zone” malls remain in full operation, and in December 2012, USTR once again listed the “Red Zones” and other areas as “notorious” piracy markets. These include Panthip Plaza, Klong Thom, Saphan Lek and Baan Mor shopping areas, among others, as well as Chatuchak, MBK Shopping Centre, Siam Square, Klong Thom, Sukhumvit Road and Patpong Market in Bangkok, Karon Beach and Patong in Phuket, ITCity in Pattaya, and the Rong Klua and Friendship Border Markets at the Aranyaprathet border crossing with Cambodia.¹⁷ The situation in the malls remains a disaster, with vendors openly selling infringing copies of copyright content, including films (DVDs/Blu-ray discs, manufactured in China and imported through Myanmar have a huge impact on the legitimate market in Thailand, selling for approximately US\$1 per DVD and US\$8 for Blu-ray, and many pirated DVDs are local dubbed versions which are sourced back to illegal camcording),¹⁸ music (largely burned CD-Rs with MP3s, but also China imports through Myanmar, priced at Bt100-300), software, games,¹⁹ and published

¹⁵IIPA listed *4shared* as a notorious market in its Special 301 out-of-cycle review submission to the U.S. Trade Representative to identify notorious piracy markets. See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf. *4Shared.com* is a popular one-click hosting site (cyberlocker), with a current Alexa.com 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.

¹⁶Camcording 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.

¹⁷ See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. IIPA noted Panthip Plaza, the Klong Thom, Sapan Lek, Baan Mor Shopping Area, Patpong and Silom Shopping Areas, the Mah Boon Krong (MBK) Center, the Sukhumvit Road area (Thailand), etc. in its notorious markets filing. IIPA Review of Notorious Markets, *supra* note 15. The Royal Thai government also maintains “yellow zones,” which are targets to be aware of for possible piracy activities.

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 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.

materials. Pirated goods are also available in other cities such as Chiangmai and Pattaya. The piracy in these “red zones” and other locations noted is so egregious that there is essentially no excuse for continued non-action on the part of enforcement authorities. Piracy in these locations should be shut down immediately. IIPA notes enforcement in these areas was mentioned as a goal of the Royal Thai government in 2012.²⁰

Enterprise End-User Software Piracy Level Remains High, and Industry is Harmed by Hard Disk Loading and Circumvention of Technological Protection Measures (TPMs): The software piracy rate in Thailand was 72% in 2011, a decrease of one percent from 2010, with a commercial value of this unlicensed software of \$852 million.²¹ Use of unlicensed software by enterprises remains a leading concern. Reducing PC software 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 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 software industry include hard disk loading of illegal software onto computers at the point of sale, the use of illegal software programs to circumvent TPMs used to protect legitimate software, and software piracy occurring at Internet cafés. The failure to fully implement the existing Cabinet Resolution on legal software use, procurement, and installation in the public sector remains an irritant. BSA has proposed software asset management (SAM) policy initiatives to DIP and the Software Industry Promotion Agency (SIPA) and is currently working with a number of Thai government agencies to bring to life the government’s commitment to make 2013 the “Year of IP Protection,” including to help train SAM personnel and implement a SAM policy to reduce software piracy in the public sector.

Mobile Device Piracy Worsening: Mobile penetration is now well over 100% in Thailand, and right holders report that mobile device piracy by mobile retailers seriously harms right holders in Thailand. Many shops engage in the illegal business of providing unauthorized copies of content onto phones, tablets, 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. The shops typically charge Bt100 (US\$3.35) per GB for downloading, while some charge Bt50 (US\$1.67) per music album and some charge a Bt800-1,200 (US\$27-\$40) one time fee with free updates. To avoid being caught, these retailers often are grouped together and may pay protection fees to police. They also sometimes share a hidden spot for downloading which has a login and password and has a Wi-Fi or Bluetooth connection.

Book Piracy: The book and journal publishing industry continues to face the following problems in Thailand: print piracy, illegal photocopying, unauthorized translations, and online piracy. Copy shops continue to copy books for students, primarily on a “print or copy 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 compilation, and claiming authorship of the work. Other pirated materials include novels, travel guides, history books and foreign language newspapers. Additionally, as in previous reports, IIPA notes that the Royal Thai government’s efforts to address the production and export of counterfeit books have not yielded any actionable results and neither has there been substantive improvements to

²⁰See Kingdom of Thailand, Ministry of Commerce, Department of Intellectual Property, *Thailand’s Implementation on Intellectual Property Rights (February 2011-2012)*, February 16, 2012, para. 2.3.1.

²¹BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Thailand was 72%, representing a commercial value of unlicensed software of US\$852 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

the protection of published works.²² 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 book piracy, and in particular, the rampant unauthorized commercial photocopying occurring on and around university campuses.

Hard Goods Piracy Through “Virtual Shops”: As hard goods piracy has waned somewhat, it is being replaced by “virtual shops” offering physical pirated products for sale through their websites. Customers browse, picking music tracks by clicking their mouse, filling in their address and transferring money to a designated bank account. Within a couple of days, the made-to-order piracy is delivered. Virtual shops are also apparently popular within offices, and offer not only pirated discs but counterfeit wristwatches and leather goods as well.

Pay-TV 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. While the National Broadcasting and Telecommunications Commission was established in September 2011, and established a Broadcasting Committee to handle regulation of the broadcasting industry, there is not yet effective government supervision of pay-TV content. In recent years, some unlicensed new operators of satellite channels have entered the industry with business models based on stolen content, and have achieved substantial business success without any hindrance by Royal Thai government authorities of their illegitimate operations. Some satellite “movie channels” are made up of unauthorized DVDs, including recent films not yet released for any television distribution in Southeast Asia. There are also now at least four completely unlicensed direct-to-home satellite TV companies. Broadcast of these channels from satellites over Asia makes them available not only in Thailand, but to other countries as well. Thai piracy therefore continues to harm other markets as well. Pay-TV content continues to be freely stolen and re-sold by many (but not all) provincial cable operators. The industry association CASBAA has attempted to ensure that in broadcast regulations, an explicit condition for a broadcast license includes that “the operator must not commit, permit or suffer any conduct which is an infringement of any intellectual property right,” but thus far, no such conditionality has been accepted. 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.

ENFORCEMENT UPDATES IN THAILAND

IIPA views positively the announcement by Deputy Commerce Minister Nattawut Saikua in late January 2013 that the Policy Committee of the National Intellectual Property Bureau had moved to set up an “Operations Centre for the Suppression of Intellectual Property (IP) Infringement” to deal strictly with the long-standing issues of piracy. The Deputy Commerce Minister will reportedly head the center, which will, in addition to taking swift action against piracy in Thailand, also monitor money trails, tax payment records, and money laundering activities of piracy suspects.²³ In early 2012, DIP reportedly infused a budget of Bt8.3 million (then US\$266,000) for the establishment of a ‘piracy suppression information system’ linked between related enforcement authorities, in order to serve as a connection between all related agencies in analyzing piracy information in the country. There is no indication that this system has been launched or had any positive effect against piracy in the market.

²²IIPA’s previous reports noted that publishers uncovered a sophisticated book counterfeiting operation, which used a network of consignees and shell companies as fronts for exporting counterfeit books to the U.S. IIPA’s 2012 report also noted that the Special Committee formed by the Royal Thai government in 2010 to address this problem did not produce any meaningful results.

²³*Thailand Declares War on Piracy, Intellectual Property Violation*, *supra* note 3. We note that the Royal Thai government, in its submission in February 2012 to the United States Trade Representative in the Special 301 process, indicated that the National Committee on Intellectual Property Policy had set up the Sub-Committee on Prevention and Suppression of Intellectual Property Rights Violations chaired by the previous Deputy Minister of Commerce and with essentially the same ends, so it can only be hoped that this time the task of seriously addressing IPR violations will be taken up with a view to making significant changes in the enforcement structure and effectiveness of the various organs at work to fight piracy in all its forms. See *Thailand’s Implementation on Intellectual Property Rights (February 2011-2012)*, *supra* note 20.

Most industry sectors report strong relationships with DIP, the Department of Special Investigation (DSI), the Economic Crimes Division (ECD)²⁴ under the Central Investigation Bureau of the Royal Thai Police, the Technology Crime Suppression Division (TCSD),²⁵ and the Office of the State Attorney. Over the years, the IP and IT Courts offered a well-informed core of prosecutors and judges on IP matters, although in recent years both civil but especially criminal cases have yielded fewer satisfactory results. Notwithstanding these good relationships, the Thai enforcement system remains difficult, in the lack of consistency and overall lack of effective deterrence in dealing with Internet, mobile device, mall, end-user, and book piracy, lack of mechanisms to address online piracy (including no notice and takedown and no efforts to halt repeat infringers or disable foreign websites used to infringe), and no enforcement against illegal camcording. For example, industry reports the ECD was inactive in enforcing physical piracy in 2012, but they are hopeful that the reshuffle of the Chief Commander in October 2012 will result in improved enforcement responses in 2013. Industry has recently (in late January 2013) been informed from a high-ranking official that the ECD will informally set-up an “internal task force” to deal with Internet piracy particularly.

Industry reports some continued difficulties in obtaining issuance of search warrants, an issue raised in this report for many years.²⁶ Industry also reports that generally enforcement officials in Thailand have not done a credible job to date running cases up the chain (hard goods cases are “a cut-out process” with no tracing to the source or the mastermind). IIPA notes much public information about tip-offs, and remains concerned about such difficulties in enforcement and other irregularities.²⁷ Such corruption has no place in a working IP enforcement system. Moreover, although cases appear to be moving somewhat more quickly through the courts, the results have been disappointing, with judges urging paltry settlements and failing to impose deterrent jail sentences for commercial scale infringements. These are all endemic and systematic problems which must be addressed by the new “Operations Centre for the Suppression of Intellectual Property (IP) Infringement.”

Internet Enforcement: Growing Internet piracy in Thailand requires a multi-faceted approach, since the different methods of infringing online require different enforcement responses, and since those who engage in Internet piracy range from professionals who establish services for commercial gain, to amateurs or students who are tech-savvy but have no commercial motive (other than to obtain free content). Both types of online piracy, regardless of motive, hinder the development of authorized online distribution. Unfortunately, the Royal Thai government has not to date kept up with the challenges apart from dedicated actions of some ECD and TCSD officers.²⁸ For example, TCSD was active in 2011 in the preparation and execution of enforcement against 13 unauthorized websites making available illegal content for file sharing, and takedown notices to infringing websites targeting Thailand (even those located outside of Thailand). Most other positive Internet enforcement has been due to self-help²⁹ and some ISP cooperation. Larger and more established ISPs have been responsive to member notices about online infringement, and voluntary takedown rates among them remain fairly good. In 2012, takedowns occurred in 574 cases out of 624 notifications to ISPs by the music industry group TECA, or a 91% takedown rate, with some cases resulting in immediate action. Some ISPs have assisted in searching for illegal files kept on their rented (colocation) servers.

Without an MOU with ISPs, without a legal framework to address the issues, and without a mechanism to deal with repeat infringers and to disable access to infringing websites, the situation in Thailand will continue to grow more severe. The draft amendments to the Copyright Act would unfortunately not provide a panacea as drafted, since action on the part of ISPs would still require a court order (as of now, some ISPs that provide colocation services ignore notices and fail to cooperate, requiring TCSD to obtain an Order which they have done on occasion).

²⁴ See www.ecdpolice.com.

²⁵ See www.tcscd.in.th.

²⁶ The Royal Thai government agreed to follow up on ensuring swift issuance of search warrants in its Special 301 report to USTR in February 2012. See *Thailand's Implementation on Intellectual Property Rights (February 2011-2012)*, *supra* note 20, para. 2.3.1.

²⁷ *The Knock-on Effect for Bangkok's Knock-offs*, Bangkok Post, January 20, 2013, at <http://www.bangkokpost.com/news/investigation/331682/the-knock-on-effect-for-bangkok-knock-offs>.

²⁸ Most Internet piracy enforcement in 2012 was done jointly between ECD and TCSD. ECD usually spearheads the raid, while TCSD provides technological support to ECD.

²⁹ For example, the local recording industry group TECA found out the unreleased album of Michael Jackson, “Blue Gangster,” was leaked and sold online by a German national and his Thai girlfriend. An investigation found the IP address of the seller, the email address of the girlfriend was used to make a test purchase, and an arrest warrant was issued by the IP/IT Court on April 2, 2011. The German national fled Thailand and has reportedly not been apprehended. ECD has issued a search warrant and is in the process of cooperating with Interpol's Bangkok Office to alert the foreign country where he is believed to be.

While the Royal Thai government has facilitated discussions between right holders and ISPs, these have ended up being mostly listening sessions and have not led to greater ISP cooperation. It will also be critical to develop expertise within DIP and other agencies in IT who also will have the capacity, resources, and will to investigate and effectively enforce against Internet piracy services, many of which engage in increasingly damaging and evasive infringements. For example, Internet pirates (services, businesses, and users) often hide their identities and addresses, and ways to address such concerns and impediments to effective enforcement in this space must be devised.

Lack of Effective Remedy Against Illegal Camcording: IIPA is deeply disappointed that the Royal Thai government has failed to address the issue of illegal camcording. While the government claims illegal copying of a film in a movie theater is already an infringement under the current Copyright Law, in the end, an effective standalone remedy will be needed to address this concern. DSI has enlisted industry's support to help identify the primary camcorder syndicate groups responsible for the majority of illegal camcording, but unfortunately, there has been no consistent cooperation in investigations into illegal camcording and there remain reports of leaks in investigations and/or raid schedules in 2011. In addition, the Royal Thai government indicates it has "combated unauthorized camcording" through awareness-raising campaigns at cinemas and that warning signs are up at cinemas and cinema employees are being asked to patrol their cinemas regularly. With due respect, these actions cannot substitute for a strong *sui generis* law and swift enforcement against those who are camcording and causing severe damage to the industry through the release of their "cams" on the Internet or in hard goods formats.

Lack of Overall Effective Civil Remedies or Criminal Penalties: While the establishment of the IP & IT Courts in 1998 held out great hope for a sustained workable judicial system to protect copyright, in recent years, both civil judgments and criminal convictions have failed to meaningfully deter further infringements for most of the copyright industries. Civil judicial remedies have ceased being effective due to very low civil damage awards that are far lower than the costs and attorney's fees associated with bringing civil cases in Thailand. In addition, there are no additional or punitive damages in the Thai legal system, nor are there pre-established (statutory) damages. Civil procedures are extremely lengthy with an average pendency of three years from filing to judgment. Plaintiffs also bear all the burdens of proof, from copyright ownership to losses and damages, which becomes burdensome but critical since profits awarded in civil cases are so low in Thailand. The criminal system has not provided much better relief. In order to more effectively address the endemic piracy problem in Thailand, a credible, deterrent criminal remedy must be available. Very few raids achieve meaningful results which would, when publicized, have a deterrent effect on piracy activities in the country. For example, in 2012, the music industry reported 113 CD shop raids and 9 website actions resulting in the seizure of thousands of discs. Eighty-nine criminal cases were commenced in 2012, and there were 92 reported convictions. Out of those, though, only nine cases resulted in jail sentences, with eight resulting in suspended sentences; more than half of the cases commenced in 2012 remain pending. Out of the criminal convictions, 33 cases resulted in criminal fines, but the total amount of fines was just over US\$45,000 (i.e., an average fine of almost US\$1,400 per case). The Royal Thai government noted 9,844 overall IP raids in 2011 resulting in seizures of over 4.4 million infringing items, and 576 Customs actions in 2011 resulting in seizures of over 290,000 items. None of these statistics are broken down by IP type, although the government indicates "copyright violations predominate." This is helpful information, but there is no breakdown of criminal cases resulting and penalties imposed against those raided, investigations up the organized crime chain, or deterrent outcomes. These numbers are all telling as anecdotal evidence of the problem of lack of deterrence.

End-User Enforcement: The software industry continued to receive positive support from the Royal Thai government including ECD for end-user software piracy actions, noting a growing number of criminal raids and civil cases conducted in 2012. 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. For the most part, the software industry has found civil and criminal penalties awarded in end-user cases to be sufficient. The number of raids in 2012

increased, with 187 raids run against software piracy by enterprise end-users, compared with 33 in 2011 and 152 raids in 2010. There have been a couple of criminal cases in recent years, with some positive outcomes.³⁰

Mobile Piracy Enforcement Non-Existent and Marred by Difficulties: 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. There are some reports of tip-offs of raids which only exacerbates the problem.

COPYRIGHT LAW UPDATES/RELATED ISSUES

Flawed Camcording Bill Should be Revamped Prior to Passage: IIPA appreciates that the Royal Thai government has drafted a bill to attempt to address the issue of unauthorized camcording of motion pictures in Thailand. Since early 2006, IIPA has provided ample evidence of the problem to the Royal Thai government, and advocated that the Royal Thai government seek an effective approach to deal with illegal camcording – the unauthorized copying or transmission of, or attempt to copy or transmit a whole or part of any audiovisual material off a cinema screen. Since 2007, when IIPA and industry first discussed with the Royal Thai government model legislation to deal with illegal camcording in Thailand, Thailand has grown to have one of the highest instances of illegal camcording in the world, seriously harming commercial markets domestically and abroad. Something must be done urgently to address this significant problem, which represents a significant irritant to the film industry and epitomizes problems faced by other industries. Illegal camcording harms not only U.S. and other foreign creators, but local Thai creators, cinema owners, and all those involved in the film and television businesses in Thailand. Thus, it is in the Royal Thai government’s interest and the interest of the Thai people to firmly address the problem of illegal camcording.

Failure to act will mean the Royal Thai government fails to make available in its laws and in practice enforcement procedures so as to permit effective action against illegal camcording, or to provide for an expeditious remedy as to the same, and as required by Thailand’s current international obligations. From our experience, when anti-camcording laws were adopted in other countries/territories, including in the Asia region, the number of cases of illegal camcording went down. The record is clear in Hong Kong, Japan, South Korea, Malaysia, and the Philippines. In the Philippines for example, before the Philippine anti-camcording law was passed in 2010, there were 86 cases between 2008 and 2010. Since the start of 2011, there have been just 5.

It is therefore deeply disappointing that the latest draft legislation which we have reviewed falls well short of the goals set out in model approaches provided to the Royal Thai government. Indeed, the current draft, if enacted, would fail adequately to address the problem of illegal camcording in the country, and could worsen the situation by imposing a new broad exception for certain acts of camcording (acts which now presumably remain illegal). The following are some brief and non-exhaustive comments on the draft Bill we have been provided and reviewed, compared with key elements of an effective anti-camcording law. Comments have also been provided to the Royal Thai government.

- **Effective Legislation Would Establish an Offense for Unauthorized Use or Possession of an Audiovisual Recording Device:** A model approach to deal with illegal camcording would make it illegal to use or possess an audiovisual recording device³¹ to copy or transmit, or attempt to copy or transmit, the whole or part of any

³⁰In 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).

³¹An “audiovisual recording device” should be defined as including “a digital or analogue photographic or video camera, or any other technology or device capable of enabling the recording or transmission of a cinematograph film or other audiovisual work, or any part thereof, regardless of whether audiovisual recording is the sole or primary purpose of the device.”

audiovisual material (including an audiovisual work or its soundtrack) in an exhibition facility. As a “time and place” offense, this creates an effective approach for cinema owners, right holders, and police, to work in conjunction to stamp out illegal camcording before an entire film’s commercial release pattern is destroyed. Unfortunately, the draft merely covers actual “reproduction” – an act which should already be covered under the copyright law, but which is encumbered by laborious and ineffective processes to seek redress. By contrast, the model approach which should be adopted in the Royal Thai government’s next revision to the draft should create a separate offense for the “use” or “possession of” (or for one who attempts to use or possess) an audiovisual recording device in an exhibition facility. The grounds for the offense must not be tied to motive, although the penalties should be enhanced (e.g., doubled) if it can be proven that the illegal camcording activity (or attempt to engage in such) was done for the purpose of the sale, rental or other commercial distribution.

- **Effective Legislation Would Include Search and Seizure Remedy With Respect to the Offense, as Well as Detention Remedy:** Establishing the “use” or “possession” offense, effective legislation would also provide for the authorized enforcement persons to: 1) enter and search any exhibition facility if an authority has reason to suspect that an offense has been or is being committed; 2) search anyone suspected of having in his possession any audiovisual recording device in respect of which an offense has been committed; 3) seize (or remove or detain) any audiovisual recording device or other thing which appears to him to be or to contain evidence of an offense; and 4) detain any person if, after inquiry, there are reasonable grounds for believing the person is connected with the subject-matter of the search and it is necessary to detain the person in order to be able to adequately perform the search. While it is generally assumed that cinema owners and other operators of exhibition facilities in which illegal camcording takes place will have the incentive to cooperate in investigations, it may also be useful to provide that operators of exhibition facilities or other persons who appear to be responsible for the control or management of the exhibition facility are required to give information or render assistance that may be necessary to carry out the search etc.³²
- **Effective Legislation Would Ensure Appropriate Presumptions of Subsistence and Ownership:** Where a copyrighted work is involved in the suspected offense, appropriate presumptions of subsistence³³ and ownership³⁴ of copyright should be in place. In the case either subsistence or ownership issues are placed into issue by a defendant, an affidavit by the right holder should create prima facie evidence which can only be rebutted by proof to the contrary.³⁵
- **Effective Legislation Would Ensure Destruction or Delivery Up of All Copies of Materials Illegally Camcorded as well as Materials and Implements Related Thereto:** The current draft contains criminal remedies but no forfeiture, destruction, or delivery up remedy. It must be ensured that a court before which a person is charged with an offense for illegal camcording may order that any unauthorized copy of audiovisual material and any audiovisual recording devices or other equipment in the possession of the alleged offender be forfeited, delivered up to the right holder (or its exclusive licensee), or destroyed.
- **Effective Legislation Must Not Create Broad Exceptions:** As the prohibition on unauthorized use or possession of an audiovisual recording device is set out as a separate offense, it is inappropriate to craft new copyright exceptions within the statutory framework (indeed, countries having legislated on this issue have

³²To the extent the operator of the exhibition facility is required to detain persons suspected of carrying out an offense, it may be desirable to draft an immunity clause as to such operators. Again, model draft text has been provided on several occasions.

³³For example, the legislation should provide, “in the case of copyright materials, copyright shall be presumed to subsist in the work if the accused person does not put in issue the question whether copyright subsists therein, but where the accused person puts such question in issue without adequate evidence or does not satisfy the court that he does so in good faith, the presumption as to the subsistence of copyright shall nonetheless apply.”

³⁴For example, the legislation should provide, “in the case of copyright materials, where the name of a person appears on copies of the work as made available to the public in such a way as to imply that the person was the maker thereof and, in the case of a person other than a body corporate, that name was his true name or a name by which he was commonly known, that person shall be presumed, unless the contrary is established, to be the maker and copyright owner thereof.”

³⁵For example, the legislation should provide, “where the accused person puts in issue the question of whether copyright subsists in the work or the ownership of the copyright, an affidavit made on behalf of the copyright owner in which he makes assertions of facts relevant to showing: i) that copyright subsists in the work or other subject matter; and/or ii) that he is the owner of the copyright, shall be admitted in evidence and shall be prima facie proof of the matters stated therein until the contrary is proved.”

viewed it as critical to close loopholes, e.g., with respect to private copying, rather than open new exceptions). Unfortunately, the draft proposes an extremely broad exception for the “reproduction or adaptation for the benefit of visually impaired people, hearing impaired people, intellectually impaired people or other types of impaired people as prescribed in [a] royal decree,” as long as such reproduction or adaptation is not done for “profit making.” This proposed exception does not belong in this specialized statute, and as written and applied to copyright materials, is overly broad.

Organized Crime Prevention Legislation Set to Enter Into Force: IIPA is very pleased that amendments to the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA) have been passed by Parliament and only await Royal assent.³⁶ The new law will add another tool to address significant piracy concerns, including the possibility of freezing assets related to piracy (if the proceeds of piracy exceed Bt500,000). The Director General of DSI, Mr. Tharit Pengdit, supported pressing for these amendments to the MLPSA, and we note he has indicated that confiscation of proceeds derived from piracy is an effective measure to tackle piracy. The government reportedly has called a meeting with owners of rental spaces both at department stores and state-owned buildings as well as with Internet service providers, asking them for cooperation to help tackle IP violations.³⁷ These are all positive steps. The Royal Thai government should address the issue of organized criminal syndicate involvement in piracy and counterfeiting operations through strict implementation of this anti-organized crime legislation.

Copyright Modernization Appears to Be Moving Forward: IIPA is pleased that the Royal Thai government has proceeded to draft legislation to modernize the Copyright Act, B.E.2537 (1994). IIPA has reviewed what appears to be the latest draft which has been approved by the Cabinet. We make the following non-exhaustive and preliminary observations on this draft, and hope that changes can be made consistent with these comments.³⁸

- **Absence of Landlord Liability Provision:** A landlord liability provision outlawing one who “provides physical or digital spaces for infringing activities” is no longer included in the Draft as it had been in the March 2010 document. In 2011, DIP was apparently informed by the Thai Trade Representative that the provision was “redundant with the existing contributory offense of the Criminal Code” and it has never reappeared. 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. The Royal Thai government, in its February 2012 submission to USTR, indicated that the Office of the Attorney General had concluded that “criminal prosecution is possible if there is enough evidence of the landlords supporting the wrongdoing.”³⁹ The report indicated DIP would be working alongside the Royal Thai Police and DSI to bring an appropriate test case in a place where “tenants are large-scale infringers, and offences are committed repeatedly to prove negligence and illicit facilitation on the part of the landlords.”⁴⁰ Such a test case would be extremely helpful, but should not ultimately 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. The original landlord liability provision should be re-added to the copyright law amendment prior to passage. We are pleased that DIP has indicated it would continue to revisit the issue in 2012, and hopes for swift progress in 2013 toward a workable solution.
- **Technological Protection Measures Provision May Need More Detailed Treatment:** IIPA is pleased that the Draft contains measures to outlaw the circumvention of TPMs, which are key enablers of new legitimate business models for content distribution in the digital and online environments. The Draft unfortunately falls short

³⁶ Nont Horayangura and Say Sujitaya, *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).

³⁷ *Ministry to Seize Assets of IP Flouters*, Bangkok Post, January 29, 2013, at <http://www.bangkokpost.com/business/economics/333099/ministry-to-seize-assets-of-ip-flouters>.

³⁸ We understand there remains a proposal to amend Section 66 of the Act. If this is done, BSA urges that enterprise end-user software piracy should remain as a compoundable offense or be carved out from the category of offenses considered non-compoundable.

³⁹ See *Thailand's Implementation on Intellectual Property Rights (February 2011-2012)*, *supra* note 20, para. 3.2.2.

⁴⁰ *Id.* The Royal Thai government has also indicated that “cooperation between DIP and the Excise Department and Department of Business Development to monitor the balance sheets and tax records of suspect landlords will be continued to put extra pressure on them.”

of meeting the requirements of the WCT and WPPT in several critical ways. The following are some non-exhaustive and preliminary comments based on a first review of the Draft:

- **Coverage of Access Controls:** It appears the drafters have covered access controls in the definition of “technological protection measures” in Draft Section 3, but then outlaws in Draft Section 53/4 circumvention only “knowing that such act may induce or cause the infringement of copyright or performer’s rights.” The phrase **“or may result in unauthorized access to a work or object of related rights”** should be added. Otherwise the intention of the drafters to cover access controls in the definition in Draft Section 3 will have been for naught.
- **Coverage of All Copy Controls:** By only mentioning “technology designed to prevent the reproduction” in the definition of TPM, the Draft may be missing out on coverage of other important exclusive rights. TPMs should also include those that protect any copyright or related right, not just “reproduction.” Also, while the term “technology” may cover all devices and components, there may be concerns about the word “designed” since the TPM should be defined based on its performance (i.e., whether it controls access or whether it protects copyright or related rights), not how it was designed. We suggest altering the wording from “technology designed to prevent the reproduction, or to control an access” to **“technology, device, or component that protects any copyright or related right designed to prevent the reproduction, or to control access.”**
- **Coverage of Trafficking in Circumvention Devices/Services:** Draft Section 3 indicates, “avoidance of technological protection measures’ is defined as an act in any manner whatsoever which makes the technological protection measures unproductive.” This definition may be broad enough to encompass trafficking, but should be made more explicit in Draft Section 53/4. As of now, the Draft merely outlaws “avoidance” of TPMs or “a provision of service causing an avoidance of” TPMs (coverage of services is quite positive). Preferably, the Draft Section would also outlaw anyone who “manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components which 1) are promoted, advertised or marketed for the purpose of circumvention, or 2) have only a limited commercially significant purpose or use other than to circumvent, or 3) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of a TPM.”
- **Avoidance of Broad Exceptions to the Prohibition on Circumvention:** While some of the enumerated exceptions in Draft Section 53/5 may be acceptably narrow, in order to preserve the adequacy and effectiveness of protection, some need to be deleted or reworked. For example, Draft Section 53/5(1) would be overly broad on its face since it would allow circumvention for any exception to copyright under the law. It is axiomatic that to allow circumvention for any exception would render protection against unlawful circumvention ineffective. The exception in Draft Section 53/5(7) should also undergo further scrutiny, since it seems overly broad to allow circumvention for “an act by any educational institutes, archives, libraries or public sound and video broadcasting organizations” as long as it is not for profit and the work is not otherwise made available. This exception is overly broad.
- **Service Provider Liability Provisions:** Draft Section 32/3 provides a rudimentary and ultimately unsatisfactory approach to the issue of addressing online infringements, including in both the hosted and non-hosted environments, and fostering greater responsibility and cooperation among Internet service providers (ISPs). According to the Draft, rather than a direct notice and takedown approach for the hosted environment, Draft Section 32/3 provides, “Where there is a reasonable ground to believe that there is an infringement of copyright in the computer system of a service provider, the owner of copyright may file a petition to the court in order that the court orders the service provider to suspend such infringement of copyright.” As such, to “suspend such infringement” a court order must be obtained. While “service provider” seems to be broadly defined, the phrase “in the computer system” is not, so there is at least some ambiguity with respect to whether all hosted and non-hosted infringements would be covered. However, the major problem with the formulation in the Draft is that it does not appear to foster any kind of responsibility or cooperation of the ISP. The ISP, rather than being in a position of liability if it knows or has constructive knowledge of infringing activity occurring through the use of its

services, can, under the Draft's formulation, simply wait for a court order. The level of cooperation IIPA members now experience in Thailand from ISPs under the current legal structure is not perfect, but members suspect that virtually all cooperation will cease if this Draft is enacted as drafted. The drafters should go back to the drawing board and consider approaches that will foster cooperation (such as traditional "notice and takedown" in the hosted environment) and fair and effective procedures to deal with repeat infringers and non-hosted environment infringements, including addressing infringing websites that operate in Thailand (regardless of where those websites' servers are located). In addition, the drafters would be wise to heed the advice of DIP officials who have espoused a much more effective and commonsense approach through a simple amendment to the Computer Crime Law, as discussed immediately below.

- **Computer Crime Law:** The Electronic Transactions Development Agency (ETDA), Ministry of Information and Communication Technology (MICT) is reportedly drafting amendments to the Computer Crime Act. Intellectual property infringement should be included as an offense under the law, as DIP has supported. As DIP has indicated, an amendment to Article 14(3) of the Computer Crime Act to include all IP online crimes would "enable blocking or shutting down websites selling IP infringing goods, publicizing copyright infringement content or facilitating copying and sharing of copyrighted works." Further, DIP notes, "The ISPs will also be able to block internet access to the domains of infringing websites."⁴¹ 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.
- **Other Aspects of Modern Copyright Law Needed:** The Draft does not currently, but should, 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"; and 2) an amendment of the definition of "reproduction" to unambiguously cover temporary reproductions. IIPA hopes for swift passage of an adequate bill and would be interested in reviewing the latest draft.
- **Customs Law:** Draft amendments to the Customs Act have been prepared to empower Royal Thai Customs to seize transshipments containing pirated goods. This would be very helpful. As of February 2012, the draft Bill reportedly had been endorsed in principle by the Cabinet and is being deliberated by the State Council before being resubmitted to the Cabinet for approval.⁴²
- **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 Copyright Act, 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

⁴¹ See *Thailand's Implementation on Intellectual Property Rights (February 2011-2012)*, *supra* note 20, para. 3.2.3.

⁴² *Id.* para. 3.2.4.

defendant's activities, photocopying books and producing unauthorized compilations of excerpts for commercial purpose, did not qualify as exempt acts under Section 32.

Remaining Problems with the Optical Disc Manufacture Act: IIPA has previously analyzed the Optical Disc Manufacture Act⁴³ which went into effect on August 29, 2005, and specifically offered changes to improve the law. 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 continues to 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 Act;⁴⁴ 2) the Act 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 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 Act should provide for an automatic permit for export of discs and import/export or machines, stampers/masters and polycarbonate; 4) the Act 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 Act 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) potentially 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 were 766 screens as of 2012 in Thailand. 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 requirements on films, audiovisual products, music used for karaoke, and videogames. 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.

⁴³Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).

⁴⁴By 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.

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.

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 minutes in any single hour.

TRAINING AND PUBLIC AWARENESS

The copyright industries continued steadfastly supporting the public awareness and outreach activities of the Royal Thai government, while also engaging in critical trainings to seek more effective protection and enforcement of their rights. The following are among the trainings and public awareness activities, many of which were organized by the Royal Thai government, but in which industry participated, as well as industry trainings:

- A series of seminars entitled “Intellectual Property Infringement Suppression in Digital Era”: 1) January 26, 2012, organized by DIP (TECA was invited to speak in this seminar to educate police officers of the importance of intellectual property protection as well as to apprise them of the current situation of piracy; there were around 200 Inspectors and Sub-Inspectors from the Central Investigation Police Bureau); and 2) August 10, 2012, organized by DIP (a similar training for around 200 Inspectors and Sub-Inspectors from Provincial Police Region 5, held in Chiang-Mai Province).
- A series of seminars entitled Campaign “Stop Piracy – Buy Original Now”: January 30, 2012, organized by DIP (DIP aimed to persuade Thai buyers to support real products; DIP also announced to the public its appointment of IP Ambassador, Mr. Arak Amornsupsiri); and 2) June 6-7, 2012, organized by DIP (held at Park@Siam, Chulalongkorn University; “Teenager’s DNA Changing: stop buying fake products” was the theme of this event. DIP organized the event to persuade college students and young people to support real products and say no to fakes, as well as educate the crowd about the ill effects of IP piracy. During the event, there were many activities which attracted students and allow them to show their creative talent); 3) June 15-16, 2012, organized by DIP (held for two days at Lan Hor Pra, Saun Sunandha Rajabhat University).
- A series of destruction ceremonies: 1) March 29, 2012, organized by DIP in cooperation with the Royal Thai Police, Customs, DSI and right owners (held in Phuket Municipality; 79,524 pieces from various kinds of counterfeit seizures ranging from clothes, pirated discs, leather goods, and fake watches were destroyed); and 2) September 7, 2012, organized by DIP, TCSD, Customs, DSI and right owners (Bangkok event at which around 1,134,843 counterfeits and pirated goods weighing approximately 90 tons were destroyed).
- A series of seminars entitled “The Compromising Dispute Resolution”: 1) April 23, 2012, organized by DIP (held at Khon Kaen Province, TECA was invited to be a speaker by DIP, to discuss alternative dispute resolution for parties to resolve disputes without litigating by using governmental officials of DIP as mediators); and 2) May 14, 2012, organized by DIP (held at Phitsanulok Province).
- World IP Day 2012, April 26, 2012, organized by DIP (celebrated by a number of activities run by private and governmental organizations, focusing on “Visionary Innovators”).
- Music Video Making Competition, also held April 26, 2012, and organized by TECA in cooperation with the National Federation of Thai Film Associations, MPA (Thailand), and DIP (competition was open to targeted students of all universities in Thailand.)
- IP Fair 2012, May 4-6, 2012, organized by DIP (held annually to promote intellectual property awareness, and expected to draw 100,000 people for the three day fair).
- A series of seminars entitled “How to Play International Music Legally”: 1) June 25, 2012, organized by DIP, TECA, and MPC Music (DIP joined with MPC and TECA to hold a half-day seminar at Grand Sole Hotel, Pattaya, to give attendees information about the copyright law and general criminal procedures as well as alert them as to

how to defend themselves from harassment; there were 50 attendees from pubs, bars, karaoke establishments, and restaurant operators in Pattaya); 2) July 9, 2012, organized by DIP, TECA, and MPC Music (held at the Empress Hotels, Chiangmai, for 100 attendees from pubs, bars, karaoke establishments, and restaurant operators in Chiang-Mai); 3) August 6, 2012, organized by DIP, TECA, and MPC Music (held at the Blue Ocean Resort Patong Hotel, Phuket, for 80-90 attendees from pubs, bars, karaoke establishments, and restaurant operators in Phuket); 4) September 3, 2012, organized by DIP, TECA, and MPC Music (held at the City Beach Resort Hotel, Hua Hin, Prachuabkhirikhan, for 80-90 attendees from pubs, bars, karaoke establishments, and restaurant operators in Hua Hin).

- Seminar on “Developing Your Business with IPRs,” November 16, 2012, organized by DIP and the European-ASEAN Business Centre: EABC (to foster a high level dialogue with the Thai authorities on how European businesses can contribute toward improving the trade and investment climate in Thailand, to promote and raise awareness on the importance of IPR protection for business success among targeted European and Thai participants; TECA was invited to be a speaker by DIP, and there were around 80 participants attending this seminar).
- “Keep It Real” Anti-piracy Campaign, in which the U.S. Embassy cooperated on an awareness campaign with DIP, TECA and MPA; “Keep It Real” was the theme of this campaign, aimed at directing messaging to Thai youth and foreigners, namely, that: 1) digital piracy hurts Thai artists (famous Thai musicians and actors discussed this); 2) digital piracy damages creativity in Thailand, and 3) digital piracy is unfashionable.

The local Motion Picture Association (MPA Thailand) also engaged in educational outreach to both government and industry representatives during 2012. For example, MPA conducted Internet investigation trainings for DSI, the Cyber Crime police, ECD, and DIP. MPA Thailand also conducted “Make A Difference” trainings on anti-camcording for Major, SF Cinemas, Thana, and Coliseum theatres in the Northern and Southern part of Thailand.

GENERALIZED SYSTEM OF PREFERENCES

Thailand enjoys preferential trade benefits under the Generalized System of Preferences trade program. 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). In 2011, more than US\$3.7 billion worth of Thailand’s goods entered the U.S. under the duty-free GSP code, accounting for almost 15.1% of its total imports to the U.S. In the first eleven months of 2012, more than US\$3.4 billion of Thailand’s exports to the U.S., or more than 14.4% of its total exports to the U.S., received duty-free treatment under the GSP code. The Royal Thai government needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.