

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Thailand remain on the Priority Watch List in 2015.¹

Executive Summary: Addressing piracy in Thailand remains a key element to ensuring that legitimate services being launched in the Kingdom can flourish.² Online and mobile device (smart phone, tablet) usage in Thailand are proliferating at a rapid pace, with Internet usage now surpassing television viewing.³ Due to increasing online and mobile piracy, along with physical piracy (mostly in malls and tourist areas),⁴ unauthorized camcording (mostly focused on audio feeds), and market access barriers, the market for creative content in Thailand remains difficult.⁵ In the first half of 2014, political unrest meant piracy went largely unchecked in Thailand. Online enforcement improved slightly in the second half of the year, due in part to the government delivering clearer messages to enforcement authorities to focus more attention on copyright piracy.

The establishment in 2012 by the Royal Thai government of the National Intellectual Property Committee chaired by the Prime Minister and the National IPR Center for Enforcement (NICE) under the Royal Thai Police bureau, the Department of Special Investigations (DSI), Royal Thai Customs, and the Department of Intellectual Property (DIP), was to usher in an era of enhanced enforcement.⁶ Unfortunately, this has not occurred, as the group has only coordinated a small number of trademark infringement raids. From the industry's perspective, inherent hurdles to tackling piracy in Thailand include: lack of government will and prioritization of addressing copyright piracy (including by DIP); lack of recognition of the growth of online piracy and the need to rise to this challenge; the failure of authorities to engage in upstream investigations into organized criminal behavior behind piracy; irregularities in enforcement; and lack of deterrence in courts. In the online space, right holders have had to rely largely on voluntary cooperation of willing ISPs, and, in the absence of legal requirements to take down or disable access to infringements, they are developing Memoranda of Understanding (MOUs) with willing ISPs.

The copyright amendments passed by the National Legislative Assembly (NLA) were unfortunately a missed opportunity to establish adequate and effective measures to protect copyright in Thailand. Comments by copyright stakeholders, the U.S. government, and the governments of the EU and Japan were not duly taken into account. The amendments add difficulties with respect to addressing Internet piracy, and the proposed protections against the circumvention of technological protection measures (TPMs) (key protections that would enable Thailand to accede to and ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) fail to address trafficking in circumvention technologies and introduce over-broad exceptions. Piracy was included as a predicate offense under the Money Laundering Prevention and Suppression Act (2013), but has not yet been used effectively, and the draft Computer Crimes Act reportedly does not, but should, address IP crimes.

¹For more details on Thailand's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Thailand's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.

²Legitimate services in Thailand for content include iTunes, Deezer, KKBox, Spotify, YouTube, AIS, Google Play Store, GTH Movie Store, AIS Movie Store, HTV (from True Visions), Hollywood HDTV, Clickplay TV, Doonung, and ZAB Movies, among others.

³In *Thailand, Internet Use Surpasses Watching TV*, The Nation/Asia One, June 26, 2013, at <http://news.asiaone.com/News/Latest%2BNews/Science%2Band%2BTech/Story/A1Story20130626-432391.html> (Thais spend on average 16 hours per week online, whereas they watch 10 hours of television per week, according to The Digital Advertising Association of Thailand (DAAT)).

⁴Of the stakeholder filings in the October 2014 "Notorious Markets" *Out-of-Cycle Review*, Thailand was the 6th most cited country for physical notorious markets, behind Mexico, India, China, Nigeria, and Uruguay. Thailand was also cited for having online notorious markets.

⁵In the music market as an example, physical sales declined in Thailand year-on-year from 2013 to 2014 by 54%, while there was no ground made up in the online marketplace, with virtually the same revenues year-on-year (actually, a 1% decrease).

⁶Enforcement coordination should include the Royal Thai Police, the Department of Special Investigations (DSI), Royal Thai Customs, and the Department of Intellectual Property (DIP).



PRIORITY ACTIONS REQUESTED IN 2015

Enforcement

- Have DIP coordinate negotiations between right holders, ISPs, and other third parties (e.g., payment processors and ad placement agencies such as The Digital Advertising Association of Thailand (DAAT)) to foster greater immediate cooperation against hosted and non-hosted piracy sites, inside and out of (targeting) Thailand users.
- Take targeted enforcement against notorious online piracy sites; establish (e.g., within Royal Thai Police) Internet piracy taskforce with dedicated expert IP officers to address Internet and mobile device piracy.
- Step up trainings to bring enforcement authorities up to speed on online piracy, including proper digital forensic and/or electronic evidence gathering particular to copyright infringement.
- Address camcording instances through greater enforcement as well as enhanced efforts of cinema owners.
- Use MLPSA in key cases of intellectual property infringement as a predicate money-laundering offense, enabling enhanced remedies including asset seizure.
- Close notorious piracy markets (“Red Zones” and “Yellow Zones”) and prosecute uncooperative mall owners.
- Issue and implement sentencing guidelines in criminal copyright cases to provide deterrence.
- Ensure provisional measures are available without burdensome proof requirements or costs.⁷

Legislative

- Make changes to copyright legislation passed by the NLA, to:
 - Ensure that measures addressing Internet piracy promote ISP responsibility and avoid: 1) a requirement to obtain a court order for ISPs to take down infringements; and 2) prohibitive costs or burdensome evidentiary requirements.
 - Include provisions to effectively address websites and services that facilitate infringement in Thailand, both hosted and non-hosted, and both domestic and foreign.
 - Ensure provisions on TPMs include coverage of access controls, prohibit trafficking in circumvention technologies, devices, components, and services, and do not permit overly broad exceptions.
 - Prohibit possession of an audiovisual recording device in a movie theater with the intent to make or transmit an audiovisual work, in whole or in part;
 - Ensure exception for visually, hearing, intellectually, or learning impaired does not run afoul of international standards, including the Berne Convention and TRIPS “three-step test.”
 - Enact a landlord liability provision, such that there will be adequate civil, administrative, and criminal remedies against those whose premises are used to engage in commercial infringement of copyright.
 - Ensure copyright offenses are non-compoundable.
 - Extend the term of protection consistent with the global trend to 70 years from the death of the author, or for sound recordings (and performances) 95 years from publication, or at least 70 years from publication.
- Add IP infringements to the Computer Crimes Act to create a more effective remedy against online infringement.
- Amend the Evidence Law to allow the admission of digital evidence in copyright cases before the court.

Market Access and Related Issues

- Fix (or withdraw) the problematic Film Act, which potentially imposes a screen quota and uncertain censorship and ratings requirements.
- Relax investment/ownership restrictions that impede legitimate distribution channels for audiovisual content.
- Do not implement film quotas in Thailand.
- Ease television advertising restrictions.

⁷Section 65 of the Thai Copyright Law states that " In case there is an explicit evidence that a person is doing or about to do any act which is an infringement of copyright or performer's rights, the owner of copyright or performer's rights may seek the injunction from the court to order the person to stop or refrain from such act." But the measure is not effective and has created burdensome and costly hurdles to copyright owners applying for provisional measures.

PIRACY AND ENFORCEMENT UPDATES IN THAILAND

Prior IIPA reports on Thailand contain more detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.⁸ Overall, the enforcement situation in Thailand worsened in 2014, with the first half of the year characterized by almost complete inaction due to political instability. Right holders, however, continued good cooperation with willing Royal Thai authorities,⁹ assisting with rights protection, and offering and participating in many trainings and IP-related events throughout the year.¹⁰ During the second half of 2014, the government sent signals to enforcement authorities to focus more attention on copyright piracy, which resulted in improved relations, particularly with respect to online investigations. Yet, much more needs to be done, as indicated in the Priority Actions noted above.

Internet and Mobile Piracy Proliferate in Thailand: As broadband and mobile 3G and 4G services become more widely available, with faster speeds, growing infrastructure, and lower Internet subscription fees, there are opportunities for growth of a legitimate online and mobile marketplace for copyright works in Thailand. Reliable indicators suggest over 26 million people, or almost 39% of the population in Thailand, now use fixed Internet.¹¹ With well over 100% mobile penetration (over 96 million mobile subscriptions), roughly 70% of those accessing the Internet through their mobile devices, and smart phone sales on the rise (with more than 20 million reportedly registered for messaging apps),¹² clearly Thailand has become a “mobile first” market.¹³

While many legitimate services for music and audiovisual materials are launching in Thailand, most Thai users remain wedded to Internet piracy, and increasingly, mobile piracy of music, movies, video games, published materials, and all kinds of broadcasts. Services include streaming sites, now the most popular due to increasing broadband penetration and 3G and 4G telephony, BitTorrent index and tracker sites, social media sites (which are used to locate infringing files), cyberlockers, and BBS/forums. Motion picture industry investigators have reported recently that 13 rogue websites are among the top 200 most accessed sites in Thailand, according to Alexa. All of these sites specifically target Thai Internet users. These include *4shared* (the 56th most accessed site in Thailand), *kickass.so* (57th), *mastermovie-hd.com* (84th), *nungmovies-hd.com* (119th), and *tt-torrent.com* (214th). Other problematic sites include *todaybit.com* (534th) (a local Thai site identified in October 2014 industry filings on “Notorious Markets” for music piracy; in a positive sign, the site’s administrators are starting to cooperate with right holders), *zbbbit.com*, *siambit.tv*, *dedbit.com*, and *bit-th.net*. Illegal apps on smartphone devices, readily available from Apple iTunes and the Google Play Store, are increasingly popular among Thai consumers due to the vast amount of available pirated content either for free or at a very low cost.

The Royal Thai government has missed opportunities over the past couple of years to establish a suitable framework to address what is now rampant and growing online and mobile piracy in Thailand. The Copyright Act amendments create an unworkable approach that, if implemented, may shield ISPs from liability once there is a notice by a right holder, unless presented with a court order. This backwards approach should be rejected and reworked. Perhaps not surprisingly, given the lack of an adequate legal framework to address computer-related infringements, Thailand is reportedly also among the top ten hacked countries in the World, evidencing the need to

⁸See, e.g., IIPA, *Thailand*, 2014 Special 301 Report, February 7, 2014, at <http://www.iipa.com/rbc/2014/2014SPEC301THAILAND.PDF>.

⁹For example, press reports indicate the Thai music market amounted to THB4.28 billion (US\$130.8 million) in 2013, down from 2012. Revenues from digital uses were up to THB1.08 (US\$33 million), and now represent 25% of the total music market. Digital piracy causes immeasurable harm to the industry. Saengwit Kewaleewongsatorn, *Music Industry Benefits from Digital Beat*, Bangkok Times, August 8, 2014.

¹⁰For example, the music industry association TECA participated in Internet investigation trainings with law enforcement, WIPO sub-regional events on digital copyright protection needs, and an ASEAN Economic Community event on the “copyright environment,” among other activities.

¹¹*Methods of Obtaining the Number of Internet Users in Thailand*, accessed January 20, 2015, at <http://internet.nectec.or.th/webstats/internetuser.iir?Sec=internetuser>.

¹²Reportedly, 3 million smartphones were sold in just the first four months of 2014. Jake Maxwell Watts, *Thailand is Buying Record Numbers of Smartphones, But It's Facebook That People Really Want*, Quartz, June 2014, at <http://qz.com/98395/thailand-is-buying-record-numbers-of-smartphones-but-its-facebook-that-people-really-want/>. Reportedly, as of February 2014, there were 22 million registered users of Line (a popular messaging app), making Thailand second in number of registered users only to Japan. *Smartphones + LINE Drive Online Sales In Thailand*, Forbes, July 28, 2014, at <http://www.forbes.com/sites/susancunningham/2014/07/28/smartphones-line-drive-online-sales-in-thailand/>.

¹³Mobile statistics are available through The National Broadcasting and Telecommunications Commission, at <http://www2.nbtcc.go.th/TTID/>. These statistics appear to suggest that many Thai have both fixed and mobile access to the Internet, and that many Thai citizens have more than one device.

take cybercrime issues in general more seriously.¹⁴ In the meantime, right holders have been left largely on their own (particularly in the first half of 2014) seeking self-help and the good faith cooperation of ISPs. Takedown rates for hosted content remain relatively high (the music industry reports over 90% takedown rates with the 20 or so ISPs they work with, involving hundreds of notices), but the same cannot be said for non-hosted infringement, and IIPA is deeply concerned the new Copyright Act will make matters worse.

Government action is needed to ensure the copyright ecosystem in the online and mobile environments in Thailand is workable and supports legitimate business models. The Electronic Transactions Development Agency (ETDA) (under the administration of the Information and Communication Technology Ministry) should help put into place MOUs with ISPs for voluntary cooperation to address hosted, non-hosted, and rogue foreign sites and services. The Copyright Committee of the Department of Intellectual Property should also bring stakeholders together, including right holders, ISPs (who resist cooperation on confidentiality/privacy, trade secret, or contractual grounds), ad placement agencies, and payment processors, on a regular basis to discuss better ways to cooperate. NICE should proactively spearhead more investigations, including upstream, encourage strengthening standards for computer forensics and electronic evidence gathering, and not simply wait for court orders regarding digital forensics involving third parties like ISPs or payment processors.¹⁵ Further training and education for law enforcement authorities in these areas would also be welcome.

Addressing Retail and Media Box/Set-Top Box (STB) Piracy: Physical piracy has decreased year-on-year mainly due to the shift to online and mobile platforms. Nonetheless, physical piracy still finds its place in the malls and on the streets in Thailand, particularly in tourist areas. Areas notorious for piracy include, in Bangkok: Panthip Plaza; Klomg Thom; Saphan Lek; Baan Mor Shopping Area; Patpong; Kao-Sarn Road (where reports showed Bruno Mars finding his pirated records on sale blatantly and openly while on tour in March 2014); Silom; Mah Boon Krong (MBK) Center; Sukhumvit Road. Also noted for piracy are Sakaew, Samui Island, Hua Hin, Phuket, Pattaya, and Chiangmai.¹⁶ The Royal Thai government has itself listed “Red Zones” and “Yellow Zones” which it views as vulnerable to piracy activities. Pirated films (including Thai-dubbed versions of blockbuster titles), music, video games, and published materials remain available. The IT malls conduct hard disk loading of content onto any device.

IIPA has also reported the growth of media box or set-top box (STB) piracy. These STBs have multiple purposes, including converting unauthorized content (through the circumvention of TPMs) from the Internet to signals playable on TVs or computer monitors, or filling digital drives with hundreds of movies and other content. They often come preloaded with infringing content or with instructions on how to download infringing materials. These boxes sell at low prices at the malls, and while the boxes themselves may be advertised for legitimate purposes, often they are used or modified for use to infringe copyright, calling into question the responsibility of those who traffic in or provide services related to them.

To address hard goods piracy, industry reports that Royal Thai government authorities continued conducting raids, particularly in the second half of 2014.¹⁷ These raids are generally not followed by upstream investigations, however. To the extent mall owners are uncooperative, the government has on prior occasions indicated that, even in the absence of landlord liability in the law (which was apparently not passed in the latest round of amendments to the Copyright Act), criminal action can be brought; however, we are unaware of action to date.

¹⁴Thailand in *Top Ten Most Hacked Countries Worldwide*, CityNews Chiang Mai, Jun 30, 2014, at <http://www.chiangmaicitynews.com/news.php?id=4140> (the data is based on live tracking by NORSE).

¹⁵By contrast, we note the Korean Anti-Piracy Task Force boasts more than 30 expert officers undertaking *ex-officio* monitoring activities related to Internet piracy on a 24/7 basis, with the power to request takedowns.

¹⁶Many of these markets are notorious for availability of pirated materials. See International Intellectual Property Alliance, *IIPA Written Submission Re: 2014 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 79 Fed. Reg. 58026 (September 26, 2014), October 24, 2014, at http://www.iipa.com/pdf/2014_Oct24_IIPA_NotoriousMarkets.PDF (citing member submissions).

¹⁷The Royal Thai Government reported that there were around 9,700 intellectual property cases (trademark, patent and copyright) in 2013, mostly made up of small-scale infringements. Around 80% of cases were initiated by IP right owners, thus, 20% were *ex officio* actions. The Royal Thai government is expected to report the number of raids in 2014 as part of its response in the Special 301 docket. It is critical that authorities maintain authority to, and increase the number of, *ex officio* raids in 2015. The music industry group TECA reports 32 total raids, with 21 on retail shops, 5 involving music piracy websites, and 6 involving public performance piracy.

Camcorder Piracy Traced to Thailand Continues to Harm Film Market: The problem of camcording of films in movie theaters in Thailand remains a concern of the industry in 2014. The rise in audio forensic matches in 2013 continued in 2014, suggesting that camcording remains prevalent in the country, driven in part by domestic demand for films dubbed in Thai, but also by the need for English audio to “marry” with video “cams” from other markets. In all, there were 42 instances of unauthorized camcording of major U.S. motion pictures detected between 2013 and 2014, with 40 being audio-only and 2 being both audio and video. Local Thai films are camcordered within days of their release in the movie theater. Increasing broadband Internet and 3G connections in Thailand mean faster uploads to the Internet of movies illegally camcordered there. These titles are then made available to the world through various Internet piracy rings, becoming pirated hard goods within a matter of days. The Copyright Act amendment deeming camcording an infringement of copyright might be helpful, notwithstanding it does not, as all other countries adopting laws in this area have done, create a “time-and-place” violation but expressly links the act of camcording to copyright infringement. There was one interdiction and arrest for unauthorized camcording in 2014, and it is hoped this is a positive indicator that enforcement will ensue to eradicate this problem from Thailand.

Book Piracy Problems Abound: The book and journal publishing industry continues to face photocopy piracy, especially in and around schools (and including by teachers), as well as unauthorized translations, print piracy, and increasing amounts of online piracy in Thailand. Copy shops continue to photocopy textbooks and coursepacks for students, primarily on a “print or copy to order” basis to avoid keeping infringing stock on site. Other pirated materials include academic journals, chapters of reference books, language dictionaries, travel guides, history books and foreign language newspapers. Thailand is considered an important market for publishers, but in the face of lack of Royal Thai government efforts to address the problem, the situation in Thailand is worse than in most of Asia. The Royal Thai government has yet to initiate efforts to encourage the adoption of policies that promote the use of authorized published materials in educational institutions.

Pay-TV Piracy (Cable and Satellite) and 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 problem in Thailand, especially outside of Bangkok. While the National Broadcasting and Telecommunications Commission (NBTC) 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, unlicensed new operators of satellite channels (showing DVDs of recent films not yet released in Thailand) have entered the industry with business models based on stolen content, and have achieved substantial business success without any interference by Royal Thai government authorities. These channels make stolen content available not only in Thailand but to other countries covered by satellite transponder signals as well. Pay-TV content also continues to be freely stolen and re-sold by many provincial cable operators.¹⁸ Public performance piracy also continues to be a problem, with many hotels outside Bangkok retransmitting unauthorized videos over in-house movie systems, and with bars in tourist areas openly exhibiting films without authorization. Bars and restaurants have added “private” rooms to screen motion pictures illegally.

Lack of Overall Effective Civil Remedies or Criminal Penalties in the Courts: While the establishment of the Thai IP&IT Court in 1998 encouraged 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 for most industries because civil damage awards are far lower than costs and attorney’s fees associated with bringing the case. Further, neither additional damages, punitive damages, nor pre-established (statutory) damages are available. 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 damages and lost profits awarded in civil cases are so low in Thailand. Also, because there are no upstream investigations,

¹⁸The 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 to our knowledge, thus far, no such conditionality has been accepted.

many infringers appearing before the court are pirate vendors at the lower end of an organized criminal enterprise. In criminal cases, convictions almost always lead to suspended sentences.

The Money Laundering Prevention and Suppression Act (2013) now includes IP crimes as a predicate act for money laundering investigations, potentially leading to significant criminal fines, imprisonments, and asset seizure. It is time for prosecutors and judges to recognize this, and to build key cases involving copyright infringement to test this new tool. In addition, sentencing guidelines should be issued, adopting minimum sentences that provide a real deterrent to infringement.

COPYRIGHT LAW AND RELATED ISSUE UPDATES

Copyright Act Amendments Passed Without Changes Proposed by Copyright Stakeholders, Governments: Amendments to the Copyright Act, B.E. 2537 (1994) were passed by the National Assembly on November 27, and they are believed to have been signed, awaiting only publication in the official gazette.¹⁹ The intent of the amendments was laudable: 1) to address online piracy by providing a mechanism to address online infringements, including ISP liability; 2) to adopt prohibitions on circumvention of technological protection measures (TPMs), key obligations of the WCT and WPPT; and 3) to address unauthorized camcording of an audiovisual work in a movie theater. The amendments also provide for performers' rights, and set forth a new exception (which arguably is overly broad) to provide access to works for those who are "unable to access" a work due to visual, hearing, "intellectual" or "learning" disabilities. The amendments unfortunately omitted a landlord liability provision, and while the Royal Thai government has indicated it was studying whether it could prosecute cases under the Penal Code, there has been no progress on this issue.

It is highly unfortunate that the drafters did not take into account comments provided by stakeholders, including IIPA, or foreign governments, including Japan, the EU, and the United States. The following are critical issues that will need to be worked out in implementing regulations, or possibly in technical amendments, to ensure that the amendments achieve their stated purpose to modernize the law,²⁰ bring Thailand closer into compliance with its international obligations, and implement the WCT and WPPT.

- **Service Provider Liability Provisions Must Permit Efficient Notice and Takedown, Provide Approach for Non-Hosted Infringements:** Section 32/3 provides a rudimentary approach to addressing online infringements, but falls well short of global standards.²¹ Positively, it provides first and foremost that an ISP that "controls, initiates or orders the causing of an infringement of copyright in the service provider's computer system" shall always be liable. However, in cases in which the ISP does not control, initiate or order the infringement, the ISP is essentially shielded from liability, even in the case of constructive knowledge of infringing activities on its service. In all cases, the ISP must only take down infringements upon a right holder obtaining a court order, and the evidentiary burden for right holders is substantial.²² Thus, unlike most countries in the world, the Thai law does not provide an easy notice and takedown approach. Indeed, this approach is contrary to global best practices. IIPA members currently receive fairly good cooperation with respect to voluntary takedown of infringing content in the hosted environment. IIPA is deeply concerned that this cooperation from ISPs in Thailand will cease if these amendments are implemented. Further, the amendments do nothing to address non-hosted infringements, for which right holders currently receive little assistance. In technical amendments, a true

¹⁹Suchit Leesa-nguansuk, *Copyright Act Will Get Amendments*, Bangkok Post, December 23, 2014, at <http://www.bangkokpost.com/business/telecom/451644/copyright-act-will-get-amendments>.

²⁰We also note the drafters had discussed repealing Section 66 to ensure that copyright offenses are non-compoundable. The Royal Thai government should take this step.

²¹Normally the practice of notice and takedown is carried out between concerned copyright owners and ISPs, often on a voluntary basis. Both sides agree to be responsible as is comfortable for them. This usually amounts to copyright owners monitoring infringement and notifying ISPs, and ISPs removing (or removing access to) infringing content once notified by copyright owners. If not done in a reasonable time or refused, depending on the law, ISPs might be subject to liable for contributory infringement, but litigation against ISPs usually only occurs if cooperation is refused.

²²For example, copyright owners have to present the court with evidence like sworn affidavits of copyright ownership, evidence of infringement, guarantees for any collateral damages; then an *ex parte* preliminary trial ensues until the court is satisfied with the copyright owners' claim. ISPs in the meantime have no responsibility except to wait for an order from the court.

notice and takedown process should be adopted in the hosted environment, and effective procedures to address non-hosted infringements, including repeat infringer policies and methods to address services built on facilitating infringement, whether located inside or outside of (but targeting) Thailand.

- **Technological Protection Measures Provision Should Cover Access Controls and Trafficking, and Should Not Permit Expansive Exceptions:** TPMs are key enablers of new legitimate business models for content distribution in the digital and online environments. Therefore, their proper protection is necessary to shape a healthy digital marketplace for Thailand. The amendments unfortunately fall short of providing adequate protection and fail to meet the requirements of the WCT and WPPT in critical ways.
 - **Access Controls:** First, Section 53/4 outlaws circumvention of a TPM only when carried out by someone “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 Section 3 will have been for naught.
 - **Trafficking:** Second, Section 53/4 of the amendments appear to cover only the act of circumvention (“avoidance”) of TPMs, and does not explicitly outlaw trafficking in circumvention devices, technologies, and components.²³ The trafficking offense should be confirmed in implementing regulations, through adopting a flexible definition of “avoidance”; otherwise, technical amendments should be added to ensure trafficking is covered. The WCT and WPPT require “adequate” and “effective” measures to protect TPMs, and such will not be the case with coverage of trafficking violations.
 - **Exceptions:** While some of the enumerated exceptions in Section 53/5 may be acceptably narrow, others need to be deleted or reworked in order to preserve the adequacy and effectiveness of protection. For example, Section 53/5(1), allowing circumvention for any exception to copyright under the law, is overly broad and would undermine needed protections, especially for access controls. The exception in Section 53/5(7) should also undergo further scrutiny, since it appears to allow circumvention by educational, archival, library, or public broadcasting entities in fairly broad circumstances.
- **Camcording Bill Could Provide Relief If Properly Implemented:** IIPA has reviewed the amendments intended to outlaw unauthorized camcording of motion pictures in Thailand. The amendments unfortunately fall well short of model approaches provided to the Royal Thai government on numerous occasions, because they restate what is already true, namely, that the reproduction of an audiovisual work in a movie theater is a copyright infringement. Notwithstanding this significant shortcoming, IIPA is still hopeful the law can be strongly implemented and provide an avenue to eradicate all acts of reproduction or transmission (or attempts at the same) of whole or part of a movie, whether audio or video, or both. Preferably, the amendment can be expanded through a technical amendment to prohibit ‘the possession of an audiovisual recording device in an exhibition facility with the intent to copy or transmit a whole or part of an audiovisual work (including the video, the soundtrack, or both).’ Those engaging in the act proscribed should be subject to interdiction by cinema employees and the police, immediate seizure and forfeiture of the equipment used in violating the law and any unlawful copies made, as well as civil and criminal remedies. In particular:
 - The amendments only outlaw the actual “reproduction,” not the preparatory steps of possession or use of recording equipment, which in practice would be the basis for enforcement in many cases.

²³Preferably, the draft Section would 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.”

- The amendments fail to authorize specific enforcement steps and spell out the conditions under which they could be taken, including: 1) entering and searching exhibition facilities; 2) searching suspects on site (and detaining them if necessary to carry out the search); and 3) seizing any audiovisual recording device or other evidence of an offense.
- The amendments do not expressly create appropriate presumptions of subsistence and ownership of copyright. In case either is placed into issue by a defendant, an affidavit by the right holder should create *prima facie* proof rebuttable only by evidence to the contrary.
- The amendments do not expressly empower courts to seize, forfeit, deliver up or destroy any unauthorized copy of audiovisual material and any audiovisual recording devices or other equipment in the possession of the alleged offender.
- **Collective Management Provisions:** The current collective management and collection system for music is unwieldy and remains unclear, with many collecting bodies operating in the market. Clarification in the law and implementing regulations for clear, fair, market-based, and transparent collection rules are overdue. We strongly suggest that the Copyright Act be further revised in this regard.
- **New Exception for the Visually, Hearing, Intellectually, or Learning Impaired:** The amendments contain a new exception allowing the “reproduction or adaptation” of a work for the visually, hearing, intellectually, or learning impaired. The international community at WIPO, in June 2013, adopted *The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* to create a limitation and exception for the benefit of the blind, visually impaired and otherwise print disabled, which will be mandatory for individual WIPO members that ratify the Treaty. The new Thai exception goes well beyond the Marrakesh Treaty’s mandate. The exception must be further scrutinized, and in any event, must not be implemented in such a way that it would conflict with the Berne Convention and TRIPS “three-step test.”
- **Absence of Landlord Liability Provision:** It is highly unfortunate that the Royal Thai government did not take the opportunity to enact a landlord liability provision, to provide adequate civil, administrative, and criminal remedies against property owners who lend their premises to those who engage in commercial infringement of copyright. While a previous draft of copyright law amendments included a landlord liability provision imposing criminal liability on one who “provides physical or digital spaces for infringing activities,” 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.” DIP then commissioned a research team to conduct an in-depth study on this issue. The authorities indicated they may opt for existing provisions under the Penal Code to prosecute landlords who facilitate infringement activities if there is enough evidence of the landlords supporting the wrongdoing.²⁴ Such a test case would be extremely helpful, but should not ultimately substitute for a strong landlord liability provision, since in order to crack down on piracy in the malls.

Computer Crime Act: The Electronic Transactions Development Agency (ETDA) has reportedly drafted amendments to the Computer Crime Act B.E. 2550 (2007), but did not initially include IP infringements as crimes. Latest reports indicate the draft may have been revised to include IP infringements. This would be a positive development. DIP has been a proponent of adding IP crimes to the Computer Crime Act.²⁵ One change still being contemplated by the Royal Thai Ministry of Information and Communications Technology would be to draft and insert

²⁴The Royal Thai government, in its February 2012 Special 301 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.” See *Thailand’s Implementation on Intellectual Property Rights (February 2011-2012)*, para. 3.2.2. 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.”

²⁵IIPA’s understanding is that IP could be included in Section 20, which provides in draft, “In case of the dissemination of computer data that is an offence under this Act or the computer data that related to the country’s security or the terrorism-related offences under the Criminal Code or the dissemination of computer data that is an offence under other laws required by the officials under the laws, the competent official shall file a petition and provide any proof and evidence to the court in order to give an instruction to restrain the dissemination of such computer data.”

notice and takedown for computer crimes (which would include IP) into the Computer Crime Act. However, to our knowledge, to date, IP has not been included in the drafts.

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 January 2015, the draft had not yet been submitted to the Cabinet for approval.

Evidence Law: IIPA recommends that the RTG amend the Evidence Law to allow the hearing and testimony of 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 at times to allow wholesale copying of academic materials.²⁶ DIP has issued three sets of guidelines on fair use in recent years, namely, the *Fair Use Guidelines for News Reports*, the *Fair Use Guidelines for Education*, and the *Fair Use Guidelines for Software*. 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.” Affected publishers and stakeholders should be afforded the opportunity to provide input into the development of such *Guidelines* given their experience in helping formulate similar rules in other countries.

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, and film/screen time quotas. The number of screens in Thailand (nearing 1,000 as of the end of 2014) is more than enough to have a free market for theatrical releases. 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 video games. 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 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 (including criminal liability) for failure to comply with the ratings and censorship system; and 4) the requirement 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 Royal Thai government should reevaluate this ill-conceived and outmoded legislation.

One positive aspect of the Film Act places responsibility on Internet cafés, distributors (shops or stalls) of films and audiovisual products, theaters, and 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, complexes, and Internet cafés in parallel with Copyright Law.

²⁶A Supreme Court decision (No. 5843/2543 [2000]), on appeal of a criminal copyright case brought against a photocopy shop, did provide some helpful 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.

Ban on Investment/Ownership in Terrestrial Broadcast Networks: Foreign ownership/investment in terrestrial broadcast networks is severely limited, to not more than 25% of the voting stock. This includes free to air, pay TV and channel content provider operators. Such restrictions impede the development of legitimate content in Thailand, and should be relaxed.

Potential Quota: Section 9(5) of the Motion Picture and Video Act (MPVA) allows the Thailand Film Office to establish ratios and quotas applied to foreign films. If implemented, such restrictions would have a significant impact upon the theatrical sector, as local productions account for around only 25% of total films released.

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. This restriction should be lifted.