

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Priority Watch List in 2016.<sup>1</sup>

**Executive Summary:** The Royal Thai Government took a positive step in 2015 by enacting long-awaited copyright law amendments, which included an anti-camcording provision as well as measures that potentially could provide an effective remedy against online piracy. Although the legislation on its face may have shortfalls in its copyright protection framework, much will depend on how the law is implemented. It is critical for the Royal Thai Government to begin to effectively address its longstanding piracy problem in order to protect and nurture the Kingdom's fragile ecosystem for legitimate copyright works. Online and mobile piracy continue to proliferate, and are the most significant hindrance to the growth of legitimate digital platforms in Thailand. Physical piracy (mostly in malls and tourist areas) remains harmful, particularly because Thailand is one of the few remaining markets in Asia in which physical sales of legitimate works provide substantial revenues. Unauthorized camcording of films (especially audio feeds) and the chaotic panoply of music collecting societies continue to harm the market and need to be addressed.

IIPA is hopeful that the Royal Thai Government is beginning to recognize the seriousness of its growing online piracy problem and will explore creative and effective approaches to meet the challenge. For example, the copyright law amendments may afford the government a remedy to disable access to primarily infringing websites regardless of their server location. Other actions the government should take include: initiating upstream investigations that target the criminal organizations at the root of much of the piracy; eliminating irregularities in enforcement; and ensuring courts impose deterrent penalties against infringers.

IIPA urges Thailand to address deficiencies in the copyright law amendments through robust implementation and through further amendments. In particular, Thailand must ensure that the process for "notice and takedown" does not require a court order. Thailand should also ensure it adequately protects against the circumvention of technological protection measures (TPMs) and that it adequately protects rights management information (RMIs) in order to accede to and ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

## **PRIORITY ACTIONS REQUESTED IN 2016**

### **Enforcement**

- Ensure the amendments to the Copyright Act are implemented consistent with their intent to effectively address online infringement, including by ensuring an efficient and effective notice-and-takedown process that does not require a court order, and by disabling access to primarily infringing websites whether located inside or outside of (but targeting) Thailand.
- Work with the Electronic Transactions Development Agency (ETDA) to develop legislation to disable access to primarily infringing websites.
- Encourage the Department of Intellectual Property (DIP) to promote and 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.

<sup>1</sup>For 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/2016SPEC301HISTORICALCHART.pdf>.



- The National IPR Center for Enforcement (NICE) should initiate more investigations against Internet and mobile piracy, focusing on upstream criminal enterprises.
- Continue trainings for enforcement authorities on online piracy, including digital forensic and/or electronic evidence gathering particular to copyright infringement.
- Address camcording instances through enforcement of the new law and enhanced efforts of cinema owners.
- Use the Money Laundering Prevention and Suppression Act 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.

### **Legislative**

- Include intellectual property crimes as a predicate act under the Computer Crimes Act to create a more effective remedy against online infringement (previously provided in Section 20 of draft amendments to the Act).
- Make changes to Copyright Act amendments, 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 that both the TPM and RMI provisions 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 the exception for the 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) at least 70 years from publication.
  - Manage the collection activities of the multitude of collective management organizations currently active in the market.
- Amend the Evidence Law to allow the admission of digital evidence in copyright cases before the court.
- The Department of Intellectual Property (DIP) should formally publish a statement to the public clarifying that a public performance license is required.

### **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.
- Ease television advertising restrictions.

## 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.<sup>2</sup> Overall, piracy in Thailand, especially online piracy, continued to cause damage to legitimate rights holders and licensees in 2015. Right holders continued good cooperation with willing Royal Thai authorities, who assisted with rights protection, and offered and participated in many trainings and IP-related events throughout the year.<sup>3</sup>

**Internet and Mobile Piracy Continues to Proliferate:** 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.<sup>4</sup> Over 39 million people use fixed Internet in Thailand, and the mobile penetration rate is well over 100%, with over 83 million mobile subscriptions.<sup>5</sup> Illustrating the explosive growth of mobile Internet access, in 2014 nearly 80 percent of Thailand's population had mobile broadband subscriptions, up from zero percent just 4 years earlier.<sup>6</sup>

Notwithstanding the increasing availability of legitimate services for music and audiovisual materials, most Thai users choose to visit piracy sites, and increasingly, engage in mobile piracy of music, motion pictures and television content, video games, published materials, and all kinds of broadcasts. Services include streaming sites, which are 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. Free programs that allow users to download infringing content from YouTube are an increasing source of piracy. These include ssYouTube, YouTube Downloader YYTD, Keepvid, Clipconverter.cc, and Videograbby.com, as well as mobile apps such as Video Downloader Lite Super – Vdownload on iOS and TubeMateYoutube Downloader on Android. Due to the rise of this form of piracy, the popularity of peer-to-peer (P2P) networks, including BitTorrent, have declined. However, Internet Protocol Television (IP TV) has become a platform for increasing digital piracy.<sup>7</sup> Motion picture industry investigators have reported many piracy websites among the top 500 most accessed sites in Thailand, according to Alexa rankings. These sites specifically target Thai Internet users, and include Thai as well as foreign motion picture and television content. These include *movie2free.com* (the 40<sup>th</sup> most accessed site in Thailand), *4shared* (81<sup>st</sup>), *kickass.so*, *mastermovie-hd.com* (63<sup>rd</sup>), *nungmovies-hd.com* (76<sup>th</sup>), *seriesubthai.co* (107<sup>th</sup>), *037hd.com* (126<sup>th</sup>), *siambit.tv* (132<sup>nd</sup>), *dedbit.com* (135<sup>th</sup>), *tt-torrent.com* (160<sup>th</sup>), *newmovie-hd.com* (185<sup>th</sup>), *3.mampost.com* (286<sup>th</sup>), *subthaiseries.com* (301<sup>st</sup>), *jpplaybox.tv* (352<sup>nd</sup>), *series24hr.com* (385<sup>th</sup>), and *donang-hd.com* (476<sup>th</sup>). 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. This rampant piracy has taken its toll on the market for legitimate creative content.<sup>8</sup>

It is critical that Thai authorities implement the new Copyright Act amendments consistent with their intent to effectively address online infringement, including by ensuring efficient and effective notice and takedown procedures that do not require a court order. In the meantime, right holders have been left largely to rely on the good faith cooperation of ISPs. Takedown rates for hosted content remain relatively high (the music industry reports over 90%

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<sup>2</sup>See, e.g., IIPA, *Thailand*, 2015 Special 301 Report, February 7, 2015, at <http://www.iipa.com/rbc/2015/2015SPEC301THAILAND.pdf>.

<sup>3</sup>For example, the music industry association TECA participated in numerous public awareness campaigns in an effort to counter confusion relating to the new amendments to the Copyright Act. The movie industry also participated in public awareness events and trainings, including a cyber training course for officials in the DIP in Bangkok and 17 anti-camcording trainings for 544 theater managers and staff, among other activities.

<sup>4</sup>Legitimate services in Thailand for content include iTunes, Google Play Store, Hollywood HDTV, Prime Time, iFlix, HOOQ, Doonung, ZABMOVIE, Deezer, KKBox, Spotify, YouTube, AIS, GTH Movie Store, AIS Movie Store, HTV (from True Visions), and Clickplay TV, among others.

<sup>5</sup>Mobile and Internet statistics are available through The National Broadcasting and Telecommunications Commission, at <http://www.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.

<sup>6</sup>See Measuring the Information Society Report 2015, International Telecommunications Union p. 224.

<sup>7</sup>IP TV allows streaming of television content over the Internet, and the illegal content is typically distributed either using BitTorrent while collecting a monthly fee from subscribers, or through a stand-alone server streaming the content to subscribers through a proprietary website that is typically difficult for enforcement authorities to trace.

<sup>8</sup>For example, in the music market total revenues in Thailand decreased nearly 22% from 2013 to 2014, including a 20% decrease in digital sales.

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.

IIPA is encouraged by reports that government action is being considered to ensure the copyright ecosystem in the online and mobile environments in Thailand is workable and supports legitimate business models. It is hoped that test cases will confirm that the newly-amended Copyright Act provides a remedy to disable access to websites that primarily infringe. Other avenues for Thailand to more effectively address online infringement include to amend the Computer Crimes Act to cover IP crimes, as discussed below; and for ETDA to develop legislation to authorize disabling access to primarily infringing websites. In addition, DIP should facilitate discussions between right holders and ISPs for voluntary arrangements to address hosted, non-hosted, and foreign piracy sites and services. In 2015, DIP organized a seminar for ISPs and right holders focused on improving cooperation, and right holders have had some positive follow up discussions with DIP and the IP&IT Court. More dialogue will be helpful, on a more regular basis and with additional stakeholders such as ad placement agencies (i.e., DAAT) and payment processors.

NICE should proactively spearhead more investigations, including into upstream criminal organizations.<sup>9</sup> NICE should also encourage improved standards in investigations for computer forensics and electronic evidence gathering so that investigations are not bogged down simply waiting for court orders for digital forensics request from third parties such as ISPs or payment processors. Further training and education for law enforcement authorities in these areas would also be welcome.

**Retail and Hard Goods Piracy Still Prevalent:** Physical piracy has decreased year-on-year mainly due to the shift to online and mobile platforms. Nonetheless, physical piracy harms local and foreign creators alike. Such 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; Klong 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 Rong Klua Market, Sakaew, Samui Island, Hua Hin, Phuket, Pattaya, and Chiangmai.<sup>10</sup> The Royal Thai Government has itself designated many of these markets “Red Zones” and “Yellow Zones” to indicate that it views these markets 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.

To address hard goods piracy, industry reports that Royal Thai Government authorities continued conducting raids in 2015.<sup>11</sup> Unfortunately, these raids are generally not followed by upstream investigations to target the criminal organizations at the root of this piracy. 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 not included in the amendments to the Copyright Act), criminal action can be brought against mall owners; however, we are unaware of any actions to date.

**Media Box/Set-Top Box (STB) Piracy:** Media boxes or set-top boxes (STBs) are proliferating throughout Asia. These STBs have multiple purposes, including facilitating access to unauthorized content (through the circumvention of TPMs) from the Internet and converting to signals playable on TVs or computer monitors, or filling digital drives with hundreds of movies and other content. STBs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. They often come preloaded with infringing content or with instructions on how to download infringing materials. The boxes are either pre-installed with apps that facilitate infringement or users are easily able to obtain apps to access unauthorized motion picture and television content.

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<sup>9</sup>By 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.

<sup>10</sup>Many of these markets are notorious for availability of pirated materials and were identified as Notorious Markets by the MPAA. See MPAA *Written Submission Re: Request for public comment on the 2015 Special 301 Out of Cycle Review of Notorious Markets*, Docket No. USTR-2015-2016 October 5, 2015.

<sup>11</sup>The music industry group TECA reports 43 total raids in 2015, resulting in 21 arrests and 21 indictments.

These apps allow the user to connect to a supporting over-the-top (OTT) online infrastructure, including foreign piracy sites (usually hosted in mainland China), that provide users with instant access to infringing audiovisual content. These boxes sell at low prices at the malls, and although the boxes themselves may be advertised for legitimate purposes, they are frequently used or modified for use to infringe copyright. Consequently, Royal Thai authorities must ensure those who traffic in these boxes or provide services related to them are held appropriately liable for this infringement.

**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 2015. Audio forensic matches continued to rise in 2015, suggesting that camcording remains prevalent in the country, driven mainly by the need for English audio to “marry” with video “cams” from other markets, and by the ease with which audio cams can occur without detection or forensic tracing. In 2015, there were 12 instances of unauthorized camcording of major U.S. motion pictures detected, with 11 being audio only and 1 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. If strongly implemented, the Copyright Act amendment, which deems camcording an infringement of copyright, could help.<sup>12</sup> There was one interdiction and arrest for unauthorized camcording in 2014, but no arrests in 2015.

**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. A number of publishers have been pursuing a case against a known producer and exporter of counterfeit/pirate books for over 4 years. But the case has been bogged down by drawn out mandatory mediation sessions (often used by the defendant to further delay proceedings) and now protracted delays in court. Such delays, endemic to the system, underscore the lack of effective remedies against producers of counterfeit and pirated works.

**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.<sup>13</sup> Pay-TV content also continues to be freely stolen and re-sold by many provincial cable operators.<sup>14</sup> 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

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<sup>12</sup>Unfortunately, as set forth below, the amendment is not as helpful as it could have been because it requires a link between the camcording act and a copyright infringement instead of establishing a “time-and-place” violation as all other countries adopting laws in this area have done.

<sup>13</sup>These unauthorized channels are well known to the government and also harm the local pay television industry; thus, there should be sufficient incentive to act against these illegal operators.

<sup>14</sup>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 to our knowledge, thus far, no such conditionality has been accepted.

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 are no longer 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 bear all the burdens of proof, from copyright ownership to losses and damages, which is extremely burdensome, especially since damages awarded in civil cases are so low. Provisional measures are very costly and require evidence that is overly burdensome to produce.<sup>15</sup> Also, because upstream investigations are rare, most 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. Sentencing guidelines should be issued, adopting minimum sentences that provide a real deterrent to infringement

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 tool, and use it to build key cases involving copyright infringement.

## **COPYRIGHT LAW AND RELATED ISSUE UPDATES**

**Deficient Copyright Act Amendments Entered Into Force:** Amendments to the Copyright Act, B.E. 2558 (2015), fully entered into force in August 2015. 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) and protections for rights management information (RMI), key obligations of the WCT and WPPT, which Thailand has not yet acceded to or ratified; 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 may be 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 although the Royal Thai Government indicated it would study 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 implementation, or in technical amendments to ensure that the amendments achieve their stated purpose to modernize the law,<sup>16</sup> 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 of the amended Copyright Act requires service providers subject to a court order to stop infringing acts or to remove infringing works. This approach to addressing online infringements could permit a remedy against non-hosted websites if a court were to order an ISP to stop infringing acts, which could be executed through disabling access to infringing content. To date, however, the

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<sup>15</sup>Section 65 of the Thai Copyright Law states, “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.

<sup>16</sup>We also note the drafters had discussed repealing Section 66 of the Copyright Act to ensure that copyright offenses are non-compoundable. The Royal Thai Government should take this step.

law has provided little more than court-ordered notice-and-takedown (if that).<sup>17</sup> Helpfully, 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. Nonetheless, 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 remove infringing works or stop infringement upon a right holder obtaining a court order, and the evidentiary burden for right holders has proven to be substantial in the first test cases.<sup>18</sup> 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 expressed concern in last year’s filing that voluntary cooperation from ISPs regarding takedown of infringing content in Thailand would cease as these amendments were implemented, and that appears to be happening.<sup>19</sup> Notwithstanding these shortcomings, additional cases are moving forward under this provision, and if those result in disabling access to infringing content, the remedy under Section 32/3 could be workable. At a November 2015 seminar, DIP indicated that Section 32/3 is not merely a notice-and-take down provision, but that it can in fact be used to disable access to infringing websites. On the other hand, a case brought by the movie industry based on Section 32/3 resulted in an order to block the infringing content, but the ISP failed to execute the order and there was no follow up enforcement. Thus, there may be practical challenges in enforcing orders to disable access to infringing sites. IIPA urges Thailand to ensure this provision is implemented effectively. In any case, technical amendments could help to ensure an effective process 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. Accordingly, 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 obligations 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.” Technical amendments are needed to add the phrase **“or may result in unauthorized access to a work or object of related rights”**. Otherwise, the intention of the drafters to cover access controls in the definition in Section 3 is for naught.
  - **Trafficking:** Second, Section 53/4 of the amendments appears to cover only the act of circumvention (“avoidance”) of TPMs, and does not explicitly outlaw trafficking in circumvention devices, technologies, and components.<sup>20</sup> The trafficking offense should be confirmed in implementing regulations, through adopting a sufficiently broad definition of “avoidance”; otherwise, technical amendments should be passed to ensure trafficking is covered. Coverage of trafficking violations is found in U.S. law and

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<sup>17</sup>Normally 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, which usually means copyright owners monitor infringement and notify ISPs, and ISPs in turn remove (or remove 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 liability for contributory infringement, but litigation against ISPs usually occurs only if cooperation is refused.

<sup>18</sup>For example, copyright owners must present the court with evidence like sworn affidavits of copyright ownership, evidence of infringement, and 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. Industry is already finding this evidentiary requirement too burdensome. The movie industry reports difficulties in seeking a court order for ISPs to take down infringing content, with one request granted and two requests denied for insufficient evidence. Unfortunately, some ISPs subject to the granted order have not complied because they claim the infringing content is not hosted on their system. As noted above, it is critical for Thailand to ensure that the process for obtaining court orders for ISPs to remove infringing content is efficient and effective.

<sup>19</sup>Indeed, there are indications that this is already happening. As noted, above, the movie industry reports that some ISPs are refusing to comply with a court order to take down infringing content. Thailand must take steps to ensure there is cooperation between right holders and ISPs. DIP’s recent efforts to initiate a stakeholder dialogue to encourage cooperation is a good start, but more must be done.

<sup>20</sup>Preferably, this 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.

is necessary for “adequate” and “effective” measures to protect TPMs, which is required by the WCT and WPPT.

- **Exceptions:** Some of the enumerated exceptions in Section 53/5 may be acceptably narrow, but others must be eliminated or reworked 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 undermines needed protections, especially for access controls. The exception in Section 53/5(7) also risks undermining necessary protections because it appears to allow circumvention by educational, archival, library, or public broadcasting entities in fairly broad circumstances.
- **The Exception for Rights Management Information (“RMI”) Should Be Narrowed:** The exceptions to the protections for RMIs appear to be extremely overbroad, which risks undermining important protections for right holders and raises serious questions regarding consistency with the three-step test governing exceptions and limitations under the WCT and WPPT treaties.<sup>21</sup> IIPA urges the Royal Thai Government to narrow or, if necessary, eliminate these exceptions to bring them in line with international standards.<sup>22</sup>
- **Camcording Bill Could Provide Relief If Properly Implemented:** The amendments intended to outlaw unauthorized camcording of motion pictures in Thailand 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 to provide an avenue to eradicate all acts of reproduction or transmission (or attempts at the same) of all or part of a movie, whether audio or video, or both. Preferably, implementing regulations will ensure that 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) is prohibited. 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 penalties.
- **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.<sup>23</sup>
- **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 needs further scrutiny, 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

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<sup>21</sup>Section 53/3(2) allows deletion or modification to the RMIs by any educational institutes, archives, libraries or public sound and video broadcasting organizations with no profit-taking purpose. Section 53/3(3) further allows communication to the public of works in which the RMI is deleted and modified under section 53/3(2).

<sup>22</sup>The IIPA understands that the DIP is now in the process of drafting a Ministerial Regulation to further clarify the exceptions for RMI infringement under Sections 53/3(2) and (3).

<sup>23</sup>IIPA understands that DIP is in the process of setting up a Working Group to review previously drafted legislation amending the Copyright Law to address this issue.

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.<sup>24</sup> A test case under the existing law would be extremely helpful, but should not ultimately substitute for a strong landlord liability provision, which is necessary to crack down on piracy in the malls.

- **Inadequate Term of Protection:** Regretfully, the amendments also failed to extend Thailand’s term of protection in line with the international trend of 70 years after the death of the author, or, in cases in which term is calculated based on publication, to at least 70 years.

**Computer Crime Act:** Draft amendments to the Computer Crime Act B.E. 2550 (2007) now sit with the Ministry of Information and Communication Technology (ICT Ministry). The draft initially included IP infringements as a predicate crime in Section 20, but that section was removed. Right holders have urged members of National Legislative Assembly (NLA) and the Prime Minister to re-introduce this IP provision into the draft before passage.

**Evidence Law:** IIPA recommends that the Royal Thai Government 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 and has been interpreted at times to allow wholesale copying of academic materials.<sup>25</sup> 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.

**Clarify that a license is required for public performances:** In early 2015, as a result of two Thai Supreme Court judgments from 2010, widespread rumors spread in Thailand that the public performance of recorded music is not subject to the payment of royalties.<sup>26</sup> The Thai Government is urged to publish an official statement clarifying that the public performance of sound recordings is subject to a license and the payment of royalties.

## **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

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<sup>24</sup>The 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.”

<sup>25</sup>A 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.

<sup>26</sup>In the two cases that resulted in the Supreme Court judgments, charges were apparently brought under provisions of law that were inapplicable, which led to findings of non-infringement.

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, 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 long time frame (15 days) for obtaining ratings or censorship approval, allowing pirates (who do not adhere to the law's requirements) to gain a head start; 2) the costs associated with rating or censorship, 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 onerous requirement that the relevant rating or censorship code must be "fixed" onto the container of films or audiovisual products and on the packages, and that right holders "embed" the code into the content of films and audiovisual products to appear 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 is it 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 in parallel with the Copyright Law to curb piracy in street stalls, shopping malls, complexes, and Internet cafés.

**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.

**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 undermines the economic viability of licensing of content for broadcast, and should be lifted.