

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Thailand be lowered to the Watch List in 2017.¹

Executive Summary: After amending its copyright law in 2015, the Royal Thai Government continued to press forward with copyright reforms intended to help Thailand meet the challenges of the digital age, passing amendments to the Computer Crime Act (CCA) that include an administrative, no-fault remedy to disable access to infringing content. IIPA is very encouraged by this development as well as other measures introduced by the Royal Thai Government that indicate it is beginning to recognize the seriousness of its growing online piracy problem and the importance of a thriving creative industry. The establishment of the new Suppression of Intellectual Property Infringement Subcommittee offers hope for enhanced coordination and renewed prioritization of enforcement, particularly regarding complex online piracy cases. The Department of Intellectual Property (DIP) recently introduced an intellectual property roadmap that, among other things, calls for intensifying efforts to combat piracy. IIPA is also encouraged by DIP's efforts to improve intermediaries' cooperation with rights holders. IIPA further welcomes Thailand's introduction of long-awaited incentives of up to a 20% rebate for international motion picture productions.

Thailand must build on these reforms to make progress against its escalating online piracy problem. Thailand consumers are rapidly gaining access to the Internet, creating opportunities for the creative industries, but also posing challenges. Worsening online and mobile piracy threatens the sustainability of legitimate digital platforms in Thailand. The movie industry estimated that during one three-month period, there were twenty times more page views to top piracy websites than visits to the top legitimate platforms in Thailand. As in much of the region, Illicit Streaming Devices (ISDs) are proliferating. 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) continues to damage the market for films, and rogue collective management organizations (CMOs) continue to undermine the market for music, negatively impacting both users and music rights holders.

More needs to be done to address these mounting concerns. Thailand should use all available tools, including the new CCA remedy, to take action against online piracy. Thailand must initiate more upstream investigations that target criminal organizations at the root of much of the piracy; eliminate irregularities in enforcement; and ensure courts impose deterrent penalties against infringers. IIPA urges Thailand to address shortfalls in its copyright law through robust implementation of the 2015 amendments and through additional amendments. In particular, Thailand should ensure the copyright law provides an effective remedy to address the problem of online intermediaries that facilitate infringement and an efficient and effective notice and takedown process. Thailand should also introduce a measure addressing the establishment and governance of CMOs to bring order to the chaotic panoply of music collecting societies that are distorting the market. Finally, to further its ambition to accede to the WIPO Internet Treaties, Thailand must ensure that it adequately protects against the circumvention of technological protection measures (TPMs) and that it adequately protects rights management information (RMI).

PRIORITY ACTIONS REQUESTED IN 2017

Enforcement

- Ensure proper implementation of the CCA when it enters into force in May 2017.

¹For more details on Thailand's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Thailand's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



- Encourage DIP to continue to promote and coordinate voluntary arrangements between rights holders and intermediaries, including Internet Service Providers (ISPs), payment processors, ad placement agencies such as The Digital Advertising Association of Thailand (DAAT), and search engines to foster immediate cooperation against piracy sites operating inside and outside of Thailand. Such voluntary programs should be easily accessible to all rights holders.
- The Internal Security Operations Command should take actions against IP violations, focusing on Internet and mobile piracy and on upstream criminal enterprises, and use the Money Laundering Prevention and Suppression Act in key cases to enable enhanced remedies such as asset seizure.
- Bring effective enforcement actions against camcording pursuant to the new law (and encourage enhanced efforts of cinema owners); and against notorious piracy markets (“Red Zones” and “Yellow Zones”), closing them down and prosecuting uncooperative mall owners.

Legislative

- Address shortfalls to Copyright Act in order to:
 - Ensure that measures addressing Internet piracy promote intermediary responsibility, such as requiring intermediaries to take down infringing content without a court order.
 - 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.
 - Ensure (through revision of the existing camcording provisions) that measures addressing camcording effectively 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 that any exception 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 copyright 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.
 - Bring order to the multitude of CMOs currently active in the market to protect rights holders and users from rogue CMOs, including by adding a measure addressing the establishment and governance of CMOs.
- The DIP should formally publish a statement to the public clarifying that a public performance license is required when a business plays music for a commercial purpose, including when the music is played from TV or radio.

Market Access and Related Issues

- Formally remove market access barriers impacting foreign audiovisual content, including:
 - fixing (or withdrawing) the problematic Film Act;
 - relaxing investment/ownership restrictions that impede legitimate distribution channels; and
 - easing television advertising restrictions.

PIRACY AND ENFORCEMENT UPDATES IN THAILAND

Prior IIPA reports on Thailand contain a 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.² Overall, piracy in Thailand, especially online piracy, continued to cause damage to legitimate rights holders and licensees in 2016.

²See, e.g., IIPA, *Thailand*, 2016 Special 301 Report, February 5, 2016, at <http://www.iipawebsite.com/rbc/2016/2016SPEC301THAILAND.PDF>.

Rights 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.³

Worsening Internet and Mobile Piracy: 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.⁴ Almost 44 million people use fixed Internet in Thailand.⁵ Access to the Internet, including through both fixed and mobile Internet access, continues to increase.⁶

Notwithstanding the expanding availability of legitimate services for music and audiovisual materials, increasing access to broadband Internet, particularly on mobile devices, has led to escalating piracy of television content, video games, published materials, and broadcasts. As noted above, the movie industry estimates that there are twenty times as many page views to top piracy services as there are page views to the top legitimate services in Thailand, ranking among the worst in Asia.⁷ Legitimate services are simply unable to compete. The use of social media is on the rise, and has become a popular platform for distributing and accessing pirated content. Streaming unauthorized content is the most popular form of piracy, whether through social media and streaming websites, apps, or ISDs. The Thai site *IpPlayBox.tv*, which was among the websites cited by IIPA members in their “notorious markets” Out-of-Cycle Review (OCR) filings to the U.S. Trade Representative in the fall of 2016, has changed to *Doo4k.tv*. It is a portal that allows users to download an app that provides access to pirated content, including the latest run motion pictures, television content, sporting events, and live streamed PPV events and concerts.⁸ Free programs that allow users to download infringing content from YouTube (i.e. stream ripping) 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. BitTorrent index and tracker sites, cyberlockers, and BBS/forums also remain problematic, although the popularity of peer-to-peer (P2P) networks, including BitTorrent, has declined mainly due to the increase in stream ripping. Internet Protocol Television (IP TV) has also become a popular platform for digital piracy.⁹

The motion picture industry has reported that many piracy websites are 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*, *mastermovie-hd.com*, *nungmovies-hd.com*, *seriesubthai.co*, *037hd.com*, *siambit.tv*, *dedbit.com*, *tt-torrent.com*, *newmovie-hd.com*, *3.mampost.com*, *subthaiseries.com*, *doo4k.tv*, *series24hr.com*, and *donang-hd.com*. 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 continues to take its toll on the market for legitimate creative content.¹⁰ Increasingly, piracy websites are using content delivery networks and cloud services such as Google Drive, making identification of website operators and server locations very difficult. Takedown rates for hosted content remain relatively high (the music industry reports nearly an 85% takedown rate with the 20 or so ISPs with which they work, and the motion picture industry reports a

³For example, the motion picture industry participated in a number of public awareness events and trainings, most relating to the challenges of combatting digital piracy.

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

⁵The number of Internet users in Thailand in 2016 is available at http://ttid.nbt.go.th/internet_db.html.

⁶The percentage of households with access to the Internet increased from 34.7% in 2014 to 52.2% in 2015 according to *Measuring the Information Society Report 2016*, International Telecommunications Union, at p. 243, available at <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2016/MISR2016-w4.pdf>. According to Internet Live Stats, Thailand's Internet penetration rate was 42.7% in 2016, up 6.2%. See <http://www.internetlivestats.com/internet-users-by-country/>.

⁷Studies have shown that such websites containing copyright piracy materials also peddle in high-risk advertising, including malware or click-fraud schemes.

⁸The site, which is extremely popular, requires users to pay a monthly subscription fee and draws estimated revenues of US\$8.6 million a month.

⁹IP TV allows streaming of television content over the Internet, and the illegal content is typically distributed using BitTorrent while collecting a monthly fee from subscribers. The television content may be streamed through a stand-alone server streaming the content to subscribers through a proprietary website that is typically difficult for enforcement authorities to trace, or through caching in a cloud service, such as Google Drive, which is also very difficult for enforcement authorities to trace.

¹⁰For example, the music market total revenues in Thailand decreased by nearly 6% in 2015, including a 4% decline in digital sales, continuing an alarming trend of year-on-year decreases in Thailand's music market.

takedown rate of 90%, involving thousands of notices), but the same cannot be said for non-hosted infringement. Stronger action is needed against non-hosted infringement and piracy sites hosted outside of Thailand.

IIPA is encouraged by actions the government has taken to ensure the copyright ecosystem in the online and mobile environments in Thailand is workable and supports legitimate business models. In particular, recent amendments to the CCA, which will enter into force in May 2017, will permit disabling of access to infringing websites. In addition, DIP has taken positive steps, including organizing a September 2016 seminar, to facilitate discussions between rights holders and intermediaries, including ISPs, payment processors, and advertising services (i.e. DAAT), to institute voluntary arrangements to address hosted, non-hosted, and foreign piracy sites and services. Additional efforts are needed, as there is not yet an agreement in place with intermediaries to address infringement on their services.

IIPA also welcomes DIP's recently introduced intellectual property roadmap, particularly the call to intensify efforts to combat piracy. To further this goal, the Internal Security Operations Command should proactively spearhead more digital piracy investigations, including into upstream criminal organizations.¹¹ The new Suppression of Intellectual Property Infringement Subcommittee 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 handling digital piracy cases, particularly to improve understanding of newer technologies such as stream ripping and content delivery networks, 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 remains a significant concern, harming 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; and Sukhumvit Road. Also noted for piracy are Rong Klua Market, Sakaew, Samui Island, Hua Hin, Phuket, Pattaya, and Chiangmai.¹² 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 have conducted raids.¹³ Unfortunately, those raids have generally not been 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. Unfortunately, hard goods piracy takes place at certain government-supported activities or events, such as Silom Walking Street on Sunday. The Royal Thai Government should review the effectiveness of its anti-piracy efforts (including the designations of "Red Zones" and "Yellow Zones"), and seek improvements.

Illicit Streaming Device (ISD) Piracy Growing: ISDs¹⁴ are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from

¹¹By 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.

¹²Many of these markets are notorious for availability of pirated materials and were identified as Notorious Markets by the Motion Picture Association of America (MPAA). See MPAA *Written Submission Re: Request for public comment on the 2016 Special 301 Out of Cycle Review of Notorious Markets*, Docket No. USTR-2016-2013 October 7, 2016.

¹³The music industry group Thai Entertainment Content Association (TECA) reports 43 total raids in 2015, resulting in 21 arrests and 21 indictments.

¹⁴In past filings, IIPA has referred to Illicit Streaming Devices (ISDs) as media boxes or set-top boxes. Because media boxes and set-top boxes have non-infringing uses, IIPA is changing our terminology to ISDs to make clear that we are referring to devices that are used to access pirated content.

the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes around the world, and they have become an increasing problem in Thailand. China is a hub for the manufacture of these devices. ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The devices are either pre-installed with apps that facilitate infringement or include instructions for users to easily obtain apps to access unauthorized motion picture and television content. These apps allow users 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. ISDs sell at low prices at the malls, and may be promoted and/or advertised to enable infringement of copyright or other illegal activities. Consequently, Royal Thai authorities must increase enforcement efforts, including cracking down on piracy apps and on vendors who preload the devices with apps that facilitate infringement, and taking action against key distribution points for devices that are being used illegally.

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 2016. Pirate syndicates continue to minimize risk by focusing almost exclusively on Thai audio captures, which are then added to video camcords found on the Internet. In 2016, there were 22 audio captures in Thailand: a 100 percent increase in audio forensic matches over 2015. 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. In addition, the rise of live streaming content over the Internet has contributed to the growing camcording problem. If strongly implemented, the Copyright Act amendment, which deems camcording an infringement of copyright, could help.¹⁵ While the movie industry conducted nine training sessions for 515 cinema managers and staff in 2016, enforcement remains weak. There was one interdiction and arrest for unauthorized camcording in 2014, but no arrests in 2015 or 2016.

Book Piracy Problems Abound: The book and journal publishing industry continues to face photocopy piracy, especially in and around university campuses, as well as unauthorized translations and print piracy. Unauthorized photocopying activities at copy shops around university campuses continue 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 with the lack of Royal Thai Government efforts to address these problems, the situation in Thailand is worse than 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 four years. The case has been long mired in drawn out mandatory mediation sessions (often used by the defendant to further delay proceedings) and court delays.

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.¹⁶ Pay-TV content also continues to be freely stolen

¹⁵Unfortunately, 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.

¹⁶These 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.

and re-sold by many provincial cable operators.¹⁷ 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 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. The burdens of proof in Thailand, from proving copyright ownership to losses and damages, do not appropriately take into account presumptions and are 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.¹⁸ 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 practice of rotating out IP&IT court judges with judges from the provincial courts has eroded the specialized expertise of the IP&IT Court. As a result, copyright cases are often heard by judges with little understanding of copyright law or the copyright industries. We recommend the IP&IT Court build expertise by retaining specialized judges trained in adjudicating IP cases.

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.

Protection Needed for Legitimate Licensees: The music industry has heard that many operators of restaurants, bars, shops and other commercial establishments have been harassed by “rogue” entities, despite having obtained licenses from legitimate CMOs and paid royalties for the use of sound recordings played on their premises. These “rogue” entities, often accompanied by threatening individuals, or sometimes even police officers, harass and threaten to sue the legitimate licensees for copyright infringement, or even imprison them, if they do not pay additional fees to obtain additional purported licenses. Often, the legitimate licensees have felt that their personal safety was in jeopardy. We urge the Royal Thai Government to take appropriate actions to protect these legitimate business operators from such unlawful threats and intimidation, which also harms music rights holders and users in Thailand.

COPYRIGHT LAW AND RELATED ISSUE UPDATES

CCA Amendment: In a significant development, the 2016 Amendment to the Computer Crime Act B.E. 2550 (2007) adds IP infringement as a predicate crime in Section 20, permitting injunctive relief against ISPs to disable access to infringing websites hosted outside of Thailand. The Amendment was passed by the National Legislative Assembly (NLA) and signed by His Majesty King Rama X on January 24, 2017; the law is set to enter into

¹⁷The industry association Cable and Satellite Broadcasting Association of Asia (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.

¹⁸Section 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.

force on May 25, 2017. IIPA looks forward to working with the Royal Thai Government to ensure this provision is implemented to provide an effective remedy against foreign piracy sites.

Copyright Act Remains Deficient: Amendments to the Copyright Act, B.E. 2558 (2015), which entered into force in 2015, have not achieved the goals of 1) effectively addressing online piracy; 2) prohibiting circumvention of TPMs and protecting RMI, important benchmarks pursuant to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), which Thailand has not yet acceded to or ratified; and 3) effectively addressing unauthorized camcording of an audiovisual work in a movie theater. The amendments also included a new, overly broad exception to provide access to works for those who are “unable to access” a work due to visual, hearing, “intellectual” or “learning” disabilities. Unfortunately, the amendments did not include 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 of the amendments 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 with the amended Copyright Law that need to be addressed in implementation, in technical amendments, or in additional legislation to ensure that Thailand achieves its stated goal of a modernized copyright law¹⁹ that brings Thailand closer into compliance with its international obligations and implements the WCT and WPPT:

- **Service Provider Liability Is Ineffective:** 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 law has provided little more than court-ordered notice and takedown (if that). Although it provides for liability for ISPs that directly infringe, 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.²⁰ Unfortunately, unlike most countries in the world and contrary to global best practices, this provision has not allowed for a notice and takedown approach. In all cases, the ISP must remove infringing works or stop infringement upon a rights holder obtaining a court order, and the evidentiary burden for rights holders has proven to be substantial in the first test cases.²¹ As noted above, DIP is working to facilitate cooperation between rights holders and intermediaries, but an effective voluntary system for notice and takedown has been elusive. IIPA urges Thailand, either through implementation or technical amendments, to ensure an effective remedy to address the problem of online intermediaries that facilitate infringement.²²
- **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. IIPA understands that Thailand

¹⁹We 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.

²⁰Furthermore, the definition of “service provider” includes the qualification “whether the services [to access the Internet] are provided on its behalf,” raising questions regarding whether the exemption of liability applies only to passive intermediaries.

²¹For 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.

²²IIPA encourages Thailand to look at how Europe has addressed this problem, in particular, through Article 8.3 of the European Information Society Directive, which permits injunctive relief against intermediaries to remove access to infringing content.

intends to join the WCT and WPPT, which would be a positive step, but Thailand must first address the following shortcomings to ensure proper implementation:

- **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.²³ 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 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 RMI appear to be extremely overbroad, which risks undermining important protections for rights holders and raises serious questions regarding consistency with the three-step test governing exceptions and limitations under the WCT and WPPT treaties.²⁴ IIPA urges the Royal Thai Government to narrow or, if necessary, eliminate these exceptions to bring them in line with international standards.²⁵
- **Camcording Provision Should Be Revised:** The provisions 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, these provisions will be revised to 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

²³Preferably, 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 technological protection measure (TPM).

²⁴Section 53/3(2) allows deletion or modification to the rights management information (RMI) 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).

²⁵The IIPA understands that the Department of Intellectual Property (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).

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.²⁶ In particular, legislation should address the establishment and governance of CMOs to provide at least that (i) only entities whose ownership or membership comprises rights holders or bodies representing them may operate as CMOs, (ii) rights holders or bodies representing them must be represented in the governing bodies of the CMOs, and must have fair and balanced representation in the supervisory bodies of the CMOs, and (iii) the management, including collection and distribution practices, of the CMO must be transparent and accountable. Further information on good practice is available in the WIPO Collective Management Organizations Toolkit and IIPA urges the Royal Thai Government to implement international best practices in this area, not least to address the problem of rogue entities masquerading as legitimate CMOs, which is damaging to users and music rights holders alike. In addition, DIP should take measures to ensure the accuracy of its copyright registration system, such as by developing a Copyright Registration Database System allowing examination of the accuracy of copyright owners and the registered contents to ensure accuracy and protect consumers from rogue CMOs.

- **New Exception for the Visually, Hearing, Intellectually, or Learning Impaired:** The amendments added 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. DIP has revised this provision to include allowing beneficiaries to communicate works to the public underscoring concerns regarding the scope of the exception. This 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 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.²⁷ 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 copyright protection to be 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.

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.

²⁶IIPA understands that DIP is in the process of setting up a Working Group to review previously drafted legislation (a 2007 bill) amending the Copyright Law to address this issue.

²⁷The 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 Department of Special Investigation (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.”

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.²⁸ 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.” Such administrative guidance should be kept within the legal bounds of existing exceptions, and it is imperative that affected publishers and stakeholders 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.²⁹ 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. DIP has made an effort to clarify informally, but the situation has not improved. We urge DIP to issue a formal, written guideline or clarification.

MARKET ACCESS ISSUE UPDATES IN THAILAND

Film Act Remains Problematic: The Motion Pictures and Video Act B.E. 2550 (2008) (not yet implemented) potentially imposes quotas and 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, these restrictions could, if imposed, have a significant negative effect on foreign film distribution in Thailand.

The Act would also impose 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 rights 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 would place 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\$28,536) 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,

²⁸A 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.

²⁹In 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.

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.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Many of the deficiencies in Thailand's enforcement framework described above—including inadequate efforts to combat piracy, burdensome and inefficient civil and criminal procedures, and inadequate and non-deterrent civil and criminal remedies—run afoul of Thailand's obligations under the TRIPS enforcement provisions, particularly Articles 41, 42, 45, and 61.