

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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December 10, 2010

Submitted to www.regulations.gov

Stanford K. McCoy
Assistant USTR for Intellectual Property and Innovation
Office of the U.S. Trade Representative
600 17th Street NW
Washington, D.C. 20508

Re: Submission of the IIPA in Docket No. USTR-2010-0035 2010: Special 301 Out-of-Cycle Reviews of the Philippines and Thailand: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment, 75 Fed. Reg. 69519 (November 12, 2010)

Dear Mr. McCoy:

This submission by the International Intellectual Property Alliance (“IIPA”) responds to USTR’s request for comments, in which it noted as part of its April 30, 2010 Special 301 Report, that

“in order to monitor progress on specific IPR issues, Out-of-Cycle Reviews would be conducted for the Philippines and Thailand. USTR requests written submissions from the public concerning any act, policy, or practice that is relevant to the decision regarding whether the Philippines and Thailand should be identified under Section 182 of the Trade Act.”

THAILAND: IIPA recommended that Thailand be moved to the Watch List in its 2010 Special 301 report earlier this year in the belief that several key actions would be taken. We have not seen sufficient progress on most of these. If progress is not made over the next few months, IIPA will re-evaluate its recommendation during the 2011 Special 301 cycle.

THE PHILIPPINES: IIPA proposed that the Philippines be elevated to the Priority Watch List in the February 2010 Special 301 cycle, noting good government cooperation in addressing computer software piracy but continuing, and mounting, problems faced by other copyright industries. USTR kept the Philippines on the Watch List, noting many of the same concerns held by IIPA. IIPA calls upon the Philippine government to address the problems identified in IIPA’s previous reports and this submission in advance of the upcoming 2011 Special 301 cycle in order to retain this ranking.



About the IIPA

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA comprises seven trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world — business software (operating systems, Internet enabling software, browsers, search engines, office productivity software, database management software, green technology enabling software, security software and mobile technologies); entertainment software (interactive games for video game consoles, handheld devices, personal computers, and the Internet); theatrical films, television programs, home videos and digital representations of audiovisual works; musical compositions, recorded music, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals, in both print and electronic media. According to the latest economic reporting by Economists Inc., the core copyright industries represented over 6% of U.S. GDP, over 4% of U.S. employment, and contributed over 22% to total real U.S. economic growth in 2007. See the 2009 economic report prepared for the IIPA by Stephen Siwek of Economists Inc., *Copyright Industries in the U.S. Economy: the 2003 - 2007 Report*, available at <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>. IIPA has participated in the Special 301 process since its inception more than 20 years ago, first made a public submission regarding piracy in Thailand and the Philippines 25 years ago, and has been tracking developments in these two markets ever since. The following submission begins with a discussion of Thailand and concludes with a discussion of the Philippines in this review.

Out-of-Cycle Review of Thailand's Progress on Copyright Reform and Enforcement

In IIPA's country report on Thailand submitted to the U.S. Trade Representative as part of its February 18, 2010 in the annual Special 301 process, IIPA proposed that Thailand be lowered to the Watch List, noting that

“[a]n Out-Of-Cycle Review (OCR) should be conducted by USTR to ... determine whether the Royal Thai government has put into place measures to ban the unauthorized camcording of movies in theaters and provide for landlord liability; and ... review progress in adopting legislation that would be WCT- and WPPT-consistent, including, *inter alia*, adequate protection for technological protection measures, and address Internet piracy and promote service provider responsibility (including statutory notice and takedown), and delete the copyright owner code from the OD law.”

IIPA further noted,

“USTR should also review whether the Royal Thai government has taken necessary action to ensure the operation and performance of adequate and dedicated



enforcement units, best achieved by vesting enforcement authority in DIP to conduct raids, make arrests, investigate, and commence anti-piracy litigation, by increasing resources in the newly created Division of Technology Crime which will oversee Internet piracy issues, and by making progress in increasing the number of criminal prosecutions with deterrent sentencing.”

IIPA appreciates the Royal Thai government’s increased transparency and dialogue with industry over the past several years, including most recently its plan and timetable for legislative improvements as well as generalized enforcement statistics. IIPA further recognizes increased efforts by some key Royal Thai government offices and within the Royal Thai Embassy to bring about incremental but commercially significant changes to the legislative framework for the protection and enforcement of copyright. IIPA’s February recommendation was made in the hope and promise of measurable progress on the aims set out by industry as critical in the Out-of-Cycle Review. However, while the government has indicated its intention to move forward on some important measures, we have not seen the level of progress we had expected during the interim period between USTR’s April 30, 2010 announcement and this review. It should also be noted that much of the Royal Thai government’s efforts and transparency have been limited to dialogue about plans of action or aggregate enforcement statistics, but have not involved inclusiveness in all aspects in the drafting of new legislation, or such inclusiveness has been highly selective (while some key right holders have been consulted, others have not).

One of our key concerns remains that neither anti-camcording legislation, nor landlord liability legislation, nor the copyright amendments, have proceeded to passage by or even introduction into the Parliament. While the Royal Thai government’s “IPR Plan” includes introduction of the anti-camcording legislation to the Parliament (it currently sits at Office of the State Council) by the end of December, it is unclear when that would be presented before the National Assembly. Meanwhile, progress on landlord liability legislation has, according to the Royal Thai government, slowed by being folded into the copyright legislation, the latter which still sits with the Ministry of Commerce. Thus, it is further from passage than the anti-camcording bill. Thus far, the Royal Thai government has not indicated its strategy for working to ensure that all of these bills move swiftly through the Parliament. Meanwhile, there has been no word from the Royal Thai government on deletion of the copyright owner code from the Optical Disc law.

There has also been little information forthcoming on IIPA’s recommendations to vest enforcement authority in DIP to conduct raids, make arrests, investigate, and commence anti-piracy litigation; increase resources in the newly created Division of Technology Crime which will oversee Internet piracy issues; and make progress in increasing the number of criminal prosecutions with deterrent sentencing. On the latter point, the Royal Thai Embassy has indicated some aggregate statistics, showing more than 2,600 “arrest cases” and 3.1 million illegal pieces seized, but as with previous statistics provided, there is no breakout of copyright materials (e.g., from counterfeits), nor is there a breakdown by industry sector. More importantly, as with previous statistics presented, there is no tracking of specific cases resulting from the “arrest cases” to determine whether there is any deterrent result other than the actual seizure of the suspected infringing products. We would note that some IIPA members continue to experience good cooperation with the Economic and Cyber Crime police.



The overall lack of establishing a record of deterrence is coupled with anecdotal evidence that the situation in Thailand has worsened in 2010 overall with respect to copyright protection and enforcement. The problem of camcording of full length films in movie theaters in Thailand has soared. Illegal copying of a film in a movie theater is already an infringement under the current copyright law, yet the government has done nothing about the problem. The number of incidences of illegal camcording of full-length motion pictures is up to 27 year-to-date in 2010 compared with 17 for the same period in 2009 . While passage of an anti-camcording bill could have proved the difference, the lack of specific *sui generis* legislation may not be used as an excuse for inaction in the face of a deteriorating problem. Further, despite reported “Red Zone” enforcement activity, and even assuming the Royal Thai government “arrest case” statistics are correct, they unfortunately only appear to scratch the surface of the piracy dilemma, as local resellers in Thailand report that physical piracy is at best unchanged and at worst has deteriorated compared with 2009. Some right holders report difficulty getting police to conduct raids and that primary targets remain retail establishments and storage units, rather than seeking to halt activity at a higher level. Audiovisual rights holders report that pay TV signal theft – cable and satellite – is a major issue, with channels right now showing in Thailand the latest run or even pre-release motion pictures (i.e., those that have either not yet been released in the movie theaters in Thailand and/or that have just come out in the movie theaters in the U.S.).

There are many other enforcement, legislative, and market access issues that are mentioned in the IIPA’s February 2010 report (which is attached to this filing). The following recounts some of these issues not already covered above and provides further updates where available. All of these ongoing issues, and lack of concrete progress during the review period from April to the present, should be taken into account by USTR in its evaluation of Thailand’s progress.

Enforcement Issues (in addition to those mentioned above)

- Expand enforcement authority to DIP, and increase manpower in enforcement authorities such as ECD and the newly created Division of Technology Crime. UPDATE: This has not been accomplished.
- New CIB Police Task Force should be activated, made permanent, and made proactive in developing and implementing an effective anti-piracy strategy. UPDATE: This has not been accomplished.
- Continue to improve search warrant issuance, facilitating a right holder’s ability to obtain a search warrant from the IP & IT Court when there is evidence of a suspected infringement. UPDATE: On September 8, the IP & IT Court held a half day seminar on “Rules for Issuing Search Warrants in Criminal Cases Related to Intellectual Property” at the IP/IT Court in Bangkok. The objective of the seminar was to hear views and comments from related sectors in regarding to the issuing of search warrants of the IP & IT Court. There were around 50 participants in the seminar, including copyright owners, the Police, DSI, DIP and Public Prosecutors. Court officials indicated they would take what they had observed into their consideration for amending the Court’s “Rules for Issuing Search Warrants in Criminal Case Related to Intellectual Property.”



- Close notorious piracy markets (“Red Zones” and “Yellow Zones”), hold mall owners accountable, and conduct progress surveys to demonstrate overall decrease in numbers of vendors throughout the country. UPDATE: DIP and the Royal Thai Embassy have asserted a significant number of “Red Zone” enforcement actions and so-called “arrest cases” although neither have indicated mall-owner liability cases have been brought successfully (and as noted the government has been developing landlord liability standards to be introduced into the copyright law). There is little indication of closure of any of the notorious piracy markets or significant decrease in the number of pirate vendors, and some resellers indicate (anecdotally) a worsening in retail piracy in Thailand. For international music piracy, by contrast, piracy has become less open and blatant. In many stalls, only sleeves are now displayed, with no physical products contained inside, and there is apparently a decrease in the total number of products displayed on the shelves. Pirate stall owners reportedly leave their shelves unattended, hiding themselves in the crowd or standing away from their shelves, then promising purchasing customers the product after a short wait (10-15 minutes) to “burn-to-order” the content.
- Continue investigating business of counterfeit book production for export, as well as other key book and photocopy piracy issues.
- Investigate and prosecute greater numbers of key piracy cases, including those involving business software end-user piracy, Internet piracy, mobile device stores or services, burner labs, pirate plants, warehouses, retailers, and pirate book producers, with deterrent results actually imposed and publicized. UPDATE: There are apparently a few court cases related to piracy being heard in the courts. For example, in June, the IP & IT Court came down with a conviction for copyright infringement, imposing a five month imprisonment term and a 50,000 Baht fine without suspension for selling and distributing illegal music discs. This case involved a repeat offender (found to have committed crimes in the same manner at least six other times). It would be helpful if the Royal Thai government could provide a database of other cases, their status, and any results obtained.
- Through meetings between agencies, copyright owners and Internet service providers (ISPs) and appropriate legislation, ensure active cooperation of ISPs with right holders to prevent the use of networks for the commission of infringing acts, including but not limited to effective and fair policies to deal with repeat infringers. UPDATE: To IIPA’s knowledge, dialogue has not ensued, and, for example, while IIPA has been told that new copyright legislation would include a notice and takedown procedure, IIPA members have not been consulted or included in any way in developing such legislation (notwithstanding that IIPA members are the ones ultimately to use such a mechanism).

Legislative Issues (in addition to those mentioned above)

- Join the WCT and WPPT. UPDATE: IIPA knows of no plans by the Royal Thai government to join the WCT and WPPT soon, although the copyright bill would, through its intended implementation of those treaties, create a certain impetus for Thailand to finally join these treaties, which currently have 88 and 87 members, respectively.



- Address organized crime by adopting measures to make copyright piracy a predicate offense that triggers remedies to deal with organized crime, including freezing of all assets related to piracy. UPDATE: There is no mention of attempts to link piracy to organized criminal behavior or provide asset seizure in piracy cases by the Royal Thai government linked to any of the current legislation.
- Issue clarification that copy exceptions in the copyright law comply with TRIPS Article 13 and do not allow whole copying of books without permission and payment.

Market Access and Related Issues

- Fix the Motion Pictures and Video Act B.E. 2550 to address potential quantitative and screen time quotas on foreign films that undermine market access for legitimate content. UPDATE: There is no indication from the Royal Thai government of plans to address this problem.

Out-of-Cycle Review of the Philippines' Progress on Copyright Reform and Enforcement

In IIPA's country report on the Philippines submitted to the U.S. Trade Representative as part of its February 18, 2010 in the annual Special 301 process, IIPA proposed that the Philippines be elevated to the Priority Watch List. In making that recommendation, IIPA noted:

"IIPA commends the government of the Philippines for its work in addressing computer software piracy. Nonetheless, our recommendation that the Philippines be elevated is made in light of the continuing, and mounting, problems faced by other copyright industries. The OCR would be to assess whether progress has been made in reducing piracy and passing pending legislative initiatives."

USTR, in its April 30, 2010 Special 301 Report announcement, noted in part,

"Ineffective enforcement of IPR continues to be a concern. Although some agencies continue making progress to increase raid and seizure activity, these efforts have proven insufficient to address widespread piracy and counterfeiting in the country. The United States encourages ongoing efforts to address inefficiencies in the judicial system, and to establish specialized IPR courts so that rights holders have a reliable avenue for recourse and prosecutions move forward effectively and without delay. The United States also encourages the Philippines to complete its work on legislative reforms needed to strengthen IPR protection, including the implementation of the WIPO Internet Treaties, which has been pending in Congress for years, and the final signing of the anti-camcording bill. ..."



IIPA has noted the promise of an incoming leadership of the IPO Philippines, the Optical Media Board, the Philippine National Police (PNP), and the National Bureau of Investigation (NBI), among other key agencies. IIPA members continue to work with cooperative agency efforts like the Philippine Anti-Piracy Taskforce to achieve some good results against, e.g., end-user piracy of business software. That said, key problems remain unresolved, such as lack of implementation of the new anti-camcording law (which is very low on the list of PNP priorities), lack of political willingness at the highest levels to take steps to eradicate Internet infringements, lack of adequate funding for the activities of the Optical Media Board, and the unwillingness of any agency to take ownership over growing Internet piracy. The most disappointing development in 2010 is the introduction of a significantly weakened draft copyright amendment legislation, which fails to fully implement the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, to which the Philippines is already a party, and contains other weakened provisions compared with the bills that have been introduced in previous years (see brief discussion below).

On the new anti-camcording law, although PNP has attended some industry training, sources report that PNP has neither visited cinemas nor met with exhibitors to ensure that notices of the new law are being displayed. On the ground, the number of full length movies sourced to Philippine cinemas is 18 year-to-date in 2010 compared to 17 for the same period in 2009, with no interdictions reported by exhibitors or industry since the law took effect. Industry, after consulting with the new Director General of the IPO Philippines, has referred a particular investigation of a criminal syndicate that has expanded operations outside of Manila to the National Bureau of Investigations and the Intellectual Property Office, but no action seems to have been taken yet. Anecdotally, local films seem to receive a longer piracy-free window than foreign films (generally two weeks following their theatrical release). Foreign films are illegally camcordered on or closer to the initial date of theatrical release.

The following recounts some of the enforcement, legislative, and market access issues that are mentioned in the IIPA's February 2010 report. All of these ongoing issues, and relative lack of concrete progress during the review period from April to the present, should be taken into account by USTR in its evaluation of the Philippines' progress.

Enforcement Issues

- Ensure search warrants are obtainable on a reasonable and timely basis consistent with international law and that they are not easily quashed. UPDATE: A comprehensive solution is needed to ensure that court cases are more predictable in terms of obtaining straightforward remedies such as search warrants in infringement cases. The "New Fields Case" and "Tyger828 / X-Habit Cases" are just the latest examples in a litany of cases in which search warrants for blatant piracy have been quashed and/or pirate goods (or materials or implements used in piracy) have been returned to defendants.
- Remedy enforcement bottlenecks, including inquests and preliminary investigations by the Department of Justice by streamlining signing procedures. UPDATE: There is no indication that any progress has been made during the review period to improve judicial hurdles noted.



- Develop IP expertise in judges and prosecutors and re-establish specialized IP courts, with the goals of increasing speeds of dockets and enabling a significant number of cases, including criminal cases, to move forward in the system. UPDATE: The “New Fields Case” and “Tyger828 / X-Habit Cases” exemplify the result of (a) not having dedicated IP courts in the Philippines and (b) appointing executive judges who have little working IP knowledge to handle search warrant cases involving IPR.
- Maintain raiding on suspected business software end-user piracy targets; run surprise and transparent inspections on all (licensed or unlicensed) optical disc plants and CD-R burning operations in cooperation with industry; take enforcement against piracy activities in the malls and against pirate book and photocopy shop operations both on and off university campuses; prosecute cases involving illegal camcording of movies in the movie theaters; and shut down some of the estimated 800 pirate cable systems, revoking their licenses or permits. UPDATE: While the anti-camcording law went into force, there is little indication of actions taken against this form of piracy, with 18 full length camcord movies linked to cinemas in the Philippines in 2010 year-to-date, compared with 17 in 2009 for the same period. There has been little progress against other forms of piracy. Physical piracy of music is slightly down in the Philippines, chiefly due to the increase in Internet-based infringements.¹ In addition, legitimate music sales are slightly up in 2010, chiefly due to better marketing by local distribution channels.²
- Investigate and eradicate P2P and other Internet-based piracy, implement and improve current laws (like the E-Commerce Law), and draft and enact legislation to facilitate removal of infringing material or services from the Internet through fostering ISP cooperation and implementing an effective notice and takedown system. UPDATE: Internet piracy has worsened in the country and should be dealt with as a high priority by the Philippine government. There are many sites offering free downloads in exchange for “donations.” Industry seeks clarification regarding the jurisdiction and powers of the National Telecommunications Commission (NTC) and the Commission on Information and Communication Technology (CICT) over content transmitted over the Internet. Although NTC is under CICT, CICT has reportedly claimed that NTC has jurisdiction to regulate the Internet. NTC meanwhile denies that it has any power to do so (and, e.g., complaints filed with NTC are being referred back to IP Philippines, further delaying and deflecting blame between agencies). The IP Philippines has apparently tried to get the NTC to commit to talking to communication companies and their ISP companies about remedies to minimize piracy, but so far, no result has come from such dialogue. Ultimately, NTC and/or CICT must be placed in a good position to take enforcement actions against infringing content in the online environment, and a streamlined procedure should be in place to allow copyright owners to file complaints to NTC and CICT in a more efficient manner.
- Issue implementing rules for the penal provisions of R.A. 8792, particularly on piracy.

¹ Nonetheless, physical piracy still affects certain public markets and sidewalks, where pirated CDs (burned discs selling for US\$0.58).

² For example, the local music industry reports that legitimate sales of music are up due to more focused marketing of compilations in stores and the launching of TV-based new artists who participate in well-publicized music competitions.



- Provide funding for OMB verification visits, and allow right holders to participate in OMB plant visits and other investigations and accompany inspectors. UPDATE: The OMB remains under-funded, and it remains the case that industry is not participating generally in OMB visits or other investigations. OMB operations are also marred by procedural hurdles that hinder the ability to go after illegal operations. For example, OMB requires proof that an OD plant has rights to copy a particular copyright material prior to issuance of a license to operate and replicate such product. However, OMB, when faced with challenges by right holders against a plant/licensee for claiming that it is not authorized to produce a particular product, has refused to resolve such cases saying the matter should be resolved by a court. On an immediate and ongoing basis, the OMB should allow stakeholders to inspect seizures and take examples of seized items, and obtain details of inspection reports and search warrants obtained.
- Launch measures to reward good and honest government work and work to eradicate corruption and compromises in IP enforcement (and take action to punish offenders).

Legislative Issues

- Pass as a matter of first priority an IP Code amendment Bill comparable to SB880 from the previous Congress aimed at implementing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and making other positive changes. UPDATE: Unfortunately, the latest “substitute” House bill we have seen leaves much to be desired, especially when compared with SB880, and considering the bill’s stated goals, e.g., of implementing the WCT and WPPT. Among the deficiencies are the following:
 - Apparently no coverage of “access control” technological protection measures; and no prohibition on the preparatory acts in relation to circumvention of technological protection measures (i.e., coverage of only the “act” of circumvention and not trafficking in circumvention devices, technologies, tools or provision of circumvention services).
 - Unclear provision of WCT- and WPPT-compatible “distribution” right and the absence of an “importation” right (which appeared in SB880 and previous corresponding legislation).
 - Unclear ownership provisions for audiovisual works (SB880 had confirmed that “exploitation” rights reside in the producer; the new bill does not).
 - Introduction of new, confusing provisions requiring an “accounting” to a “copyright owner” (The draft provision is both confusing and constitutes an interference and impingement on free contractual relationships).
 - Introduction of a new provision which requires “necessary accreditation from the intellectual property office” for collective management, which could constitute an unreasonable restriction on a right holders’ ability to enter voluntary arrangements for the management of rights.



- The new draft would broaden the exception for reprographic reproductions for libraries from a “single copy” to a “limited number of copies” of the work “as may be necessary for such institutions to fulfill their mandate.”
- Significant broadening of exceptions with respect to sound recordings and performances (related rights), by the application of exceptions in a *mutatis mutandis* manner.
- Introducing incongruous concepts into the draft liability provisions (the previous formulation of draft Section 216 tracked U.S. law, whereas the new draft introduces a “notice” prong to vicarious liability, and a requirement to show that “inducement” was done “purposely and with the intent” to enable or induce infringement).
- Significantly weakens the damages provisions, by 1) removing the explicit mention of harm to the right holder plus deterrence as the proper measure of civil damages; 2) setting the statutory damage minimum at a paltry US\$1,140, with the innocent infringer amount at US\$230; and 3) introducing a finite and arbitrary set of factors for consideration in determining statutory damages. The result of this provision is likely that a right holder would never elect such damages, and it is certain this damage structure will not deter infringement since no defendant would be concerned about such a meager damage award.
- Finalize national legislation (HB5699, which passed third reading in February 2009, and SB3529 which passed third reading in January 2010) to halt illegal camcording of motion pictures, and promote and support implementation of the law and city ordinances through training for PAPT officers. UPDATE: While the law was adopted in early 2010, at present there is very little being done on the ground in the Philippines to promote or enforce the new anti-camcording law. Industry has taken self-help steps and anti-camcording actions seem to be very low on the list of PNP priorities. PNP officials have attended industry trainings but they have reportedly not yet visited cinemas or met with exhibitors to ensure that notices of the new law are being displayed. As noted, 18 full length films have been copied off the screens in the Philippines, with no interdictions reported in by exhibitors or industry representatives since the law took effect, despite industry information having been provided about specific piracy operations.

Other Issues in the Philippines

- We believe it is critical that NTC and/or CICT must take a more active role, for example, through education campaigns to the public, about online copyright protection; NTC should also help nurture an environment facilitating the development of electronic commerce for creative industries.



We thank USTR for providing IIPA with the opportunity to comment in these out-of-cycle reviews of Thailand and the Philippines.

Respectfully submitted,

Michael Schlesinger
International Intellectual Property Alliance (IIPA)

Appendix:
IIPA 2010 Special 301 Report
(February 18, 2010):
Thailand and
The Philippines

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Thailand should be lowered to the Watch List.¹ An Out-Of-Cycle Review (OCR) should be conducted by USTR to:

- determine whether the Royal Thai government has put into place measures to ban the unauthorized camcording of movies in theaters and provide for landlord liability; and
- review progress in adopting legislation that would be WCT- and WPPT-consistent, including, *inter alia*, adequate protection for technological protection measures, and address Internet piracy and promote service provider responsibility (including statutory notice and takedown), and delete the copyright owner code from the OD law.

USTR should also review whether the Royal Thai government has taken necessary action to ensure the operation and performance of adequate and dedicated enforcement units, best achieved by vesting enforcement authority in DIP to conduct raids, make arrests, investigate, and commence anti-piracy litigation, by increasing resources in the newly created Division of Technology Crime which will oversee Internet piracy issues, and by making progress in increasing the number of criminal prosecutions with deterrent sentencing.

Executive Summary: IIPA congratulates His Majesty the King of Thailand for launching with his Ministries the “Creative Thailand” initiative along with the twelve “Creative Thailand Commitments” in February 2009.² The laudable goals of the initiative include promoting Thailand as a “hub of creative industries in South East Asia” and boosting the economic contribution of Thailand’s “creative industries” to 20% (from its current 12%). IIPA believes adequate protection and enforcement of the existing intellectual property framework will lead to reductions in piracy, which in turn will spur the kinds of investments in local Thai IP industries necessary to achieve the “Creative Thailand” goals. Studies such as that done by the Business Software Alliance and IDC (discussed below) and a just-released study by the Fiscal Policy Research Institute (FPRI) and the Kenan Institute Asia conclude that better protection of copyright could generate additional income. The FPRI/Kenan study, for example, concludes that better copyright protection will generate an additional BT3.7 billion (US\$111 million) for the movie sector and BT1.7 billion (US\$51 million) for the music industry in Thailand.³

Unfortunately, losses due to copyright piracy in Thailand grew worse in 2009, and piracy levels remained well above average for the Asia region. For example, losses due to piracy of business software grew to US\$367.8 million in 2009, up from US\$335 million in 2008, while the piracy level for business software grew to 77% in 2009, up from 76% in 2008, many points higher than the regional median.⁴ Pirate product remains widespread in Thailand, with some evidence of decreasing optical disc factory production but higher levels of burning and other forms of piracy such as mobile device and online piracy, piracy of published materials in the form of pirate photocopying, and some evidence of counterfeit print piracy at least some of which is destined for export. In conjunction with the global

¹ For more details on Thailand’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

² In conjunction with the launch of Creative Thailand, the Royal Thai government reported establishing a National Committee on Prevention and Protection of Intellectual Property Rights in January 2009 (now called the National Committee on Intellectual Property Policy), Chaired by the Prime Minister, and a Sub-Committee on Prevention and Suppression of Intellectual Property Rights Violation chaired by the Minister of Commerce, comprising senior officials from major enforcement agencies in Thailand.

³ *IP Rights Vital to Creative Economy*, Bangkok Post, January 28, 2010, at <http://www.bangkokpost.com/business/economics/31876/ip-rights-vital-to-creative-economy>.

⁴ The record industry suffered at least US\$15.1 million in losses with a 50% piracy rate in 2009. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2010 Special 301 submission at www.iipa.com/pdf/2010spec301methodology.pdf. BSA’s 2009 statistics are preliminary, representing U.S. software publishers’ share of software piracy losses in Thailand. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.



economic downturn, piracy has devastated the local creative economy in Thailand. In 2008, physical sales of legitimate music products decreased 40%, causing record companies to lay off employees, cut costs, freeze salaries, or close down their businesses. In 2009, physical sales of legitimate music products decreased an additional 17%.

The Royal Thai Police, specifically, the Economic and Cyber Crime Division (ECD) of the Central Investigation Bureau (CIB) and the Department of Special Investigations (DSI) continued assisting copyright owners seeking targeted enforcement. Raiding activity ensued, including against business software end-user piracy targets and many retail targets. However, enforcement actions continued to focus mainly on smaller targets, thus having only a minimal effect on overall piracy rates or losses. Increases in manpower in ECD, expansion of the authority of DIP, and expanding resources and training of the newly created Division of Technology Crime and are needed to achieve maximum deterrent effect. In 2009, the government proposed some initiatives that would aid in efforts to thwart piracy. Proposals like imposing liability on landlords who benefit from piracy and either know or should know that infringement is occurring on their premises will be helpful and appear poised for passage into law. IIPA commends the government for its decision to propose a bill outlawing camcording movies in a movie theater, and urges the government to act on long-awaited copyright legislation to modernize protection and, among other things, join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Conversely, IIPA is concerned by the proposed preference policy of the Prime Minister mandating government agencies to buy open source software, which is inconsistent with APEC policy guidance on technology choice.

Priority Actions Requested In 2010: IIPA requests that the Royal Thai government take the following actions, which would result in the most significant near-term commercial benefits to the copyright industries:

Enforcement

- Expand enforcement authority to DIP, and increase manpower in enforcement authorities such as ECD and the newly created Division of Technology Crime.
- New CIB Police Task Force should be activated, made permanent, and made proactive in developing and implementing an effective anti-piracy strategy.
- Continue to improve search warrant issuance, facilitating a right holder's ability to obtain a search warrant from the IP & IT Court when there is evidence of a suspected infringement.
- Close notorious piracy markets ("Red Zones" and "Yellow Zones"), hold mall owners accountable, and conduct progress surveys to demonstrate overall decrease in numbers of vendors throughout the country.
- Continue investigating business of counterfeit book production for export, as well as other key book and photocopy piracy issues.
- Investigate and prosecute greater numbers of key piracy cases, including those involving business software end-user piracy, Internet piracy, mobile device stores or services, burner labs, pirate plants, warehouses, retailers, and pirate book producers, with deterrent results actually imposed and publicized.
- Through meetings between agencies, copyright owners and Internet service providers (ISPs) and appropriate legislation, ensure active cooperation of ISPs with right holders to prevent the use of networks for the commission of infringing acts, including but not limited to effective and fair policies to deal with repeat infringers.

Legislative

- Introduce (and enact) landlord liability bill.
- Introduce (and enact) planned legislation to ban unauthorized camcording of movies in theaters.
- Introduce (and enact) planned amendments to fully implement the WCT and WPPT, including amendments to address Internet piracy and promote service provider responsibility, e.g., statutory notice and takedown and mechanisms to address hosted piracy, P2P file sharing, web bulletin board services and torrent sites, advertising sites, and Internet-based mobile device piracy.
- Join the WCT and WPPT.
- Address organized crime by adopting measures to make copyright piracy a predicate offense that triggers remedies to deal with organized crime, including freezing of all assets related to piracy.

- Fix the Optical Disc Manufacturing Act to remove the onerous and unprecedented obligation that rights holders acquire a “copyright owner’s code” before any replication of legitimate CDs.
- Issue clarification that copy exceptions in the copyright law comply with TRIPS Article 13 and do not allow whole copying of books without permission and payment.

Market Access and Related Issues

- Among other market access restrictions to be addressed, reverse proposed policy mandating use of open source software, and, e.g., requiring bundling of government funded computers and computers for schools with open source software; maintain neutral policies with respect to technology choice.
- Fix the Motion Pictures and Video Act B.E. 2550 to address potential quantitative and screen time quotas on foreign films that undermine market access for legitimate content.

PIRACY AND ENFORCEMENT CHALLENGES IN THAILAND

End-User Piracy of Business Software and Other Software-Specific Issues: The greatest source of losses to the business software industry is the use of unlicensed or pirate software in the workplace. The rate of unauthorized uses of business software in business settings remains unacceptably high, at 77% in 2009, higher than 2008 and well above the Asia regional median (which was 61% in 2008). Other piracy phenomena harming the business software industry include hard disk loading of illegal software onto computers at the point of sale. The Business Software Alliance (BSA) also reports illegal software programs being used for the purpose of circumvention of technological protection measures (TPMs) on legitimate business software. This last problem highlights the urgent need for copyright amendments to provide protection against products being used to circumvent TPMs, which is also an important part of WCT and WPPT implementation. Reducing piracy would have a net positive effect on Thailand’s economy. A January 2008 study done by the International Data Corporation (IDC) with BSA concluded that decreasing Thailand’s software piracy rate by ten percent over a four year period would add US\$1 billion to Thailand’s economy, create 2,100 new high-wage high tech jobs and generate an additional \$55 million in tax revenue.

The business software industry reported that they received good support from ECD for end-user software piracy actions and also the support of DIP and ECD in building awareness and promoting the use of legal software in the workplace.⁵ As a result, business owners and IT managers appear to have become more aware of the risks of using pirate or unlicensed software in the workplace. While insufficient in terms of manpower, BSA finds ECD officials to be competent and dedicated to their work. BSA also received good cooperation from the state prosecutor’s office. ECD has indicated that in 2008, the division arrested individuals and businesses who were later charged in 85 illegal software cases involving BT300 million (US\$9 million), and that it expected the number of arrests in 2009 to reach about 120, in cases involving about BT433 million (US\$13 million). In October 2009, ECD announced it would begin investigations into about 1,000 companies for possible infringement of software copyright, which is also a welcome sign.⁶

There were also improvements in 2009 regarding fines in a few IP & IT Court verdicts in 2009 (following on one case in 2008) for end-user raid actions. The fines in these cases are equivalent to the requested amount for actual damages. For example, the maker of design and engineering software was awarded BT1.8 million (US\$54,000) in damages for the infringement of its copyright by a Bangkok-based manufacturing company. In one case in 2008, a software company was awarded civil damages of BT3.5 million (approximately US\$105,000), which included the retail value of the software at legitimate prices (BT2.5 million or US\$75,400) found on the computers,

⁵ Unfortunately, the authorities refuse to name targets of end-user raids, for fear of defamation claims, but the failure to fully publicize raids makes them much less effective as a deterrent. This reluctance arises out of a feature of Thailand’s criminal law that allows a party charged with a criminal offense to bring a defamation action against anyone who publicizes the charge before a final judgment has been issued. In the past, right holders have on occasion gotten cooperation from the police to release the names of infringers to the press, but they have become reluctant to do so.

⁶ Jirapan Boonnoon, *Police Probe Corporate Software Violators*, The Nation, October 8, 2009, at <http://www.nationmultimedia.com>. The article also indicates that ECD has sent 30,000 letters to companies around the country to encourage their use of legal and properly licensed software.

plus legal fees, interest, and damage to the software copyright holder's reputation. This civil judgment marks a welcome improvement over the norm. Court verdicts for sale of counterfeit products over the Internet have also been higher as software representatives have been able to demonstrate that the offenders also duplicated the infringing material themselves, which carries a higher penalty than distribution alone.

The chief problems with the IP & IT Court for the software industry remain non-transparency in the granting of search warrants (and the requirement for continuous evidence submission to obtain warrants) and the imposition of non-deterrent sentences in many cases (with the above-noted cases being the exception to this rule). In particular, judges often side with or express sympathy toward small offenders and on occasion sentence them to probation only. These attitudes can be found within key agencies as well, and extend specifically to end-user software piracy such that due to a lack of understanding, some officials have indicated disinterest in enforcing the law with respect to such piracy activities.

Regarding government legalization of software usage, IIPA is pleased that, according to the Royal Thai government's latest report, it has requested the cooperation of all government sectors to abide by the decision of the Cabinet in 1999, which stipulates that all government sectors are to strictly use legitimate software. However, this positive request may be made much less valuable by the Prime Minister's apparent policy that government agencies acquire open source software, thus restricting their technology choice.

Internet Piracy Grew Worse in 2009 with Greater Connectivity: Internet-based piracy affects nearly all industries and is unfortunately on the rise. Internet connectivity continued to grow in Thailand in 2009. Thailand boasted 16.1 million users, or 24.4% penetration as of September 2009, and well over 900,000 broadband connections, or almost 1.5% penetration as of November 2008.⁷ Broadband connections are mainly found in big cities, while rural villages continue to rely mainly on dial-up connections, thus, Internet piracy in its most virulent forms is primarily prevalent in major hubs. The local music and record industry group, the Thai Entertainment Content Trade Association (TECA), estimates that there are as many as 4,000 websites dealing in recorded music piracy that are hosted in Thailand (this number excludes overseas sites that cater to the Thai market and excludes other industry-specific sites). Bit torrent index sites and tracker sites are also increasingly being used in Thailand to facilitate the unlawful distribution of copyrighted files.⁸ Public and private web bulletin boards (some of which are supported by advertising), free social networking sites, web blogs and cyberlockers are just a few of the additional ways Internet piracy is spreading in Thailand. Traditional P2P file sharing sites, both commercial and non-commercial, download services, deep linking, and websites advertising pirate product remain ever present.⁹ Many consumers have replaced the purchase of copyright materials in hard copies with ripping such content from the Internet to use on their computers or store on mobile devices. IIPA is encouraged by a raid in early 2009 involving a man advertising pirate movies and TV series' over the Internet through a website based in Thailand.¹⁰

To effectively deal with Internet piracy, the government should enact an appropriate legal framework and put in place an enforcement infrastructure that includes a group of competent officials to deal with Internet-based infringements. These officials should also oversee how the private market – meaning mainly ISPs in cooperation with copyright owners – respond to the challenge. Unfortunately, neither the Computer Act nor the Copyright Act of

⁷ These statistics are according to the International Telecommunications Union.

⁸ In Thailand, tracker sites consist of general trackers which are open to any user, and exclusive trackers which accept only a particular group of users (i.e., based on the amount of torrent files uploaded), which are by invitation only or referral and involve membership fees. The contents available in these tracker sites are mostly unauthorized files as well as pornography files.

⁹ For example, in April 2008, following an in depth investigation, the Business Software Alliance (BSA) supplied details to the police who raided and arrested the operator of idsoft.org, a website offering counterfeit software to be sent by mail, which was directed at the local Thai market.

¹⁰ The Motion Picture Association reports that on February 6, 2009, MPA Thailand representatives teamed up with ECD officers to conduct the first ever raid in the country specifically targeting Internet piracy. It was the second significant operation in 2009 for MPA Thailand following a January 2009 raid on a burner lab where 500 burners were seized. The suspect arrested confessed to running a web-based pirate operation from his home using pirated DVD copies as masters, and admitted to selling pirated movies as well as local and international TV series' for less than US\$1 each through courier delivery. Among the products seized were over 150 MPA member company titles such as "Wanted," "The Kingdom" and "Enchanted." Also seized were 14 packages of pirated DVDs from the nearby post office which the suspect had sent for shipment to buyers outside Bangkok. Initial investigations revealed that the suspect's bank account showed an inflow of approximately US\$12,000 (BT400,000) over a two-month period. The police completed their investigation and passed the matter over to the public prosecutor.

Thailand provide for statutory notice and takedown, nor for service providers to assist right holders in investigations. As a consequence, there is no mechanism for rights holders to learn the identities of suspected infringers. The Royal Thai government should ensure that ISPs are aware of their responsibility to deal with infringements, by enacting statutory notice and takedown and otherwise fostering cooperation to defeat online infringements including P2P file sharing. We urge DIP to call together copyright owners and ISPs to forge an MOU on anti-piracy cooperation in the online space.

In 2008 and again in 2009, industry reported good relationships with DIP and the Royal Thai Police on Internet piracy issues, and reported fairly high takedown rates. For example, in 2009, the local music and record industry association was able to achieve 645 takedowns based on 749 cease and desist letters to webmasters and ISPs, a takedown rate at 86% (compared with 155 takedowns out of 163 notices to service providers in 2008, a 95% takedown rate).¹¹ BSA also has had some success in the past seeking takedowns. Unfortunately, service providers, while fully aware of copyright piracy on illegal sites and services, have become reluctant to divulge IP addresses or names, refusing even to name the webmaster. The Royal Thai Police used to obtain such information on an informal basis, but in 2009, the information flow and cooperation have slowed considerably. The Royal Thai Police have also been slow to establish a procedure for requesting court orders for ISPs to release this information and wait for rights holders to obtain a warrant from the court. The Communication Authority of Thailand (CAT) provides space for ISPs to set up a server to operate their business but has not to date helped rights holders monitor the operation of ISPs. In one positive development, TECA was able to obtain agreement from some cyberlocker sites not to accept MP3 files, but this does not guarantee the absence of such files since file names can be easily changed.

IIPA is pleased that the Royal Thai Police established a new Technology Crime Suppression Division on September 7, 2009. While the Division is not up and running in full force yet, IIPA commends the government for recognizing the need for a separate unit to deal specifically with Internet-based infringements. However, the unit has only 20 police officers working in the new Royal Thai Police building, and is short on tools and supplies, with only 10 standalone computers and no high-speed Internet connections. Some personnel lack Internet access, some even lack the requisite computer knowledge, so training is urgently needed.

Judicial Reforms Still Desirable to Ensure Consistent Issuance of Search Warrants, and Deterrent Results: IIPA heralded the establishment of the IP & IT Court in Thailand more than a decade ago as a necessary step to achieve deterrence in regard to copyright piracy cases. Having this specialized court has meant speedier dockets and dedicated judges who are better aware of the needs of a copyright case adjudication practice. The court's expertise has also led to some more significant civil judgments in piracy, as noted was the case in a couple of end-user software cases decided recently.

Unfortunately, some problems remain with court adjudication, some of which are fundamental to the overall effectiveness of judicial enforcement in Thailand against copyright piracy. One example involves the issuance of search warrants. Copyright cases are unique in that evidence of infringement can be easily discarded or erased, especially in the age of digital or online content. Thus, quick and consistent issuance of search warrants, on an *ex parte* basis, is vital to ensure preservation of the element of surprise and the preservation of evidence which might otherwise be easily lost or discarded. Unfortunately, in recent years, copyright owners have faced inconsistencies in the process of obtaining a warrant and a lack of transparency in decision-making in certain instances, especially

¹¹ On a positive note, it appears that industry was able to get a takedown of the notorious site BitThailand.com, since the site itself is no longer available. However, we note that it redirects to a site called 2bbit.com, which has a suspicious disclaimer that provides,

None of the files shown here are actually hosted on this server. The links are provided solely by this site's users. These BitTorrent files are meant for the distribution of backup files. By downloading the BitTorrent file, you are claiming that you own the original file. The administrator of this site (<http://www.2bbit.com>) holds NO RESPONSIBILITY if these files are misused in any way and cannot be held responsible for what its users post, or any other actions of its users. For controversial reasons, if you are affiliated with any government, ANTI-Piracy group or any other related group, or were formally a worker of one you CANNOT download any of these BitTorrent files. You may not use this site to distribute or download any material when you do not have the legal rights to do so. It is your own responsibility to adhere to these terms.

when warrant requests are rejected. The arbitrary nature of the review process makes it impossible for right holders to anticipate what any particular judge may request in terms of evidence of to support a warrant. In 2008, such arbitrary decision-making led to a terrible drop in success rate for issuance of warrants for the business software industry, down to 3% for all of 2008. While the issuance rate improved in 2009, IIPA members report that the same judges continue denying search warrants or set truly onerous proof standards, e.g., requiring pictures of the distributor selling the product or of the plant operator actually producing discs. IIPA recommends that in 2010, a series of discussions ensue between affected rights holders and the court to sort out the standards for issuing search warrants. Unreasonable proof burdens such as those described above should be disfavored and a more reasonable approach, based on reasonably obtainable evidence and a reasonable suspicion of illegal activity, should be adopted.

IIPA also strongly urges the Royal Thai government and the courts to consider sentencing guidelines and adopting minimum sentencing that provides a real deterrent to infringement, as well as applying maximum sentences allowable under the law where warranted. While IIPA also notes that criminal enforcement would be improved by bringing more high profile cases involving source piracy, it still remains the case that, especially in recent years, most cases involving pirate distribution result in non-deterrent fines. Of the cases concluded in 2009, over 90% of them resulted in a fine from US\$1,000 to \$5,000. For example, in a few cases where the defendant was shown to have reproduced and distributed the product, a slightly more significant penalty was imposed (e.g., in a recent Internet piracy case, a fine of US\$3,000 and a suspended six month sentence were imposed). The Court has also been applying discounting factors to first-time offenders or those who plead guilty, further limiting the deterrent effect.

Physical Piracy in Retail Hotspots in 2009; Some Indication of Drop-Off: Street piracy still pervades the markets in Thailand (in places like Bangkok, Phuket, Samui, Pattaya, Chiangmai, and Krabi), although there was some drop-off in physical piracy in 2009, attributable to the economic downturn, sporadic enforcement campaigns, and the rise of other forms of piracy.¹² The “Red Zones” and “Yellow Zones” designated by the Royal Thai government denote specific areas, or even whole provinces, targeted for enforcement activity, and indicate the continued scope and severity of the piracy problem in Thailand.¹³ Industry reports indicate the Royal Thai Police applied pressure through raids and investigations in the Red and Yellow Zone areas, forcing the pirates (especially music pirates) to change their strategy, opting for sales in open street markets scattered around villages and narrow streets and roads. These street hawkers erect small stalls and move around from day to day selling their wares, for example, compilation discs with the top 50 to 100 songs, sometimes selling for only a couple hours a day. Street hawkers in general have also changed their selling habits by displaying only the sleeves and inlay cards without the discs inside, and in many cases, by leaving their stalls entirely unmanned, often only appearing when a buyer wants the product. Such hawkers then burn-to-order the product or pick it up from a nearby storage facility or warehouse.

IIPA members continued to note a decrease in the quality of the physical product, as pirates move from factory discs to burned discs, and from off-set printing for labels to sticker labels or no labels at all. However, there remain a few cases in Thailand of politically “untouchable” factory plants producing higher-quality pressed discs, and many of the more sophisticated counterfeits are imported from places like China and Malaysia. Pirates operating in the physical market have also made changes to accommodate technology and better compete, for example, offering thousands of songs in MP3 format on one pirate disc.

¹² Regarding the pricing of pirated versus legitimate discs, industry reports that Factory-pressed pirate CDs and DVDs (movies, music, or software) are not surprisingly more expensive than burned discs in Thailand, running at about BT100 per disc (US\$3), while pirate burned discs are around BT80 (US\$2.40) and Chinese imported discs are from BT120 to BT150 (US\$3.60 to 4.50) and pirate Bluray discs from China (mostly normal discs being “passed off” as Bluray) are BT150 (US\$4.50). By contrast, legitimate local Thai music discs start at BT99 (about US\$3) while imported content can range from BT149 (US\$4.50) to BT1,499 (US\$45.00), depending on the kind of music, whether the product is a special edition, box or “bonus” set.

¹³ Red Zones include: in Bangkok – Klong Thom, Sapan Lek and Baan Mor shopping areas, Patpong and Silom shopping areas, Mah Boon Krong (MBK) Center, Sukhumvit area (Soi 3 – 19), Panthip Plaza; Chiangmai Province; Phuket Province; Koh Samui District in Surattani Province; Pattaya in Chonburi Province; Haad Yai District in Songkla Province; Ao Nang area in Krabi Province; Hua-Hin in Prajuebkriran Province. Yellow Zones include: in Bangkok – Nom Chit shopping area, Lad Prao, Pata Pin Klao shopping area, Fortune shopping area, Taladmai Don Muang shopping area, Tawanna shopping area, Pratumnam shopping area, Jae Leng shopping area, Kao San Road shopping area, Sapan Bhud shopping area; Patumtani Province; Nonthaburi Province; Nakhonratchasima Province; Konkan Province; and Ratchaburi Province.

The Royal Thai government reported over 6,500 raids involving intellectual property violations in 2009, although these are not broken down by type of IP involved.¹⁴ Many of these raids involved retail locations, with few focusing on the source of pirated goods, such as manufacturing facilities or warehouses raids and the raids are almost always run based on copyright owner complaints.¹⁵ IIPA would like to see a comprehensive approach to retail piracy that enables authorities to close notorious piracy markets ("Red Zones" and "Yellow Zones"), hold mall owners accountable, and conduct progress surveys to demonstrate an overall decrease in numbers of vendors who sell pirate product throughout the country. For example, just taking the zones alone, the government could measure how many stalls exist today, and then measure on a monthly basis how many remain and how many have been closed. Reducing the number of stalls will make an impact on retail piracy rates.

Camcorder Piracy: Thailand is a significant source of pirate camcording¹⁶ in the Asia region, with 22 recordings forensically matched to cinemas in Thailand in 2009 (over 35 cases of illegal camcording of U.S. major motion pictures were detected in 2008). Many major U.S. motion pictures, but also local Thai films, fell victim to camcording piracy in Thailand, harming the films' onward distribution since pirate versions taken from such camcorded copies would then appear on pirate DVD or even over the Internet. IIPA urges the Royal Thai government to ensure that the problem of illegal camcording is properly addressed and we are pleased that the government has decided to legislate a ban on camcording in movie theaters (in addition to any protection that currently exists in the copyright law). There has been only one case prosecuted under the copyright law, involving a guilty plea by the defendant resulting in an insignificant and non-deterrent penalty following the arrest of a suspect caught recording *Body of Lies* at the Siam Paragon theater on October 9, 2008.¹⁷

Mobile Device Piracy: Thailand's mobile subscriber penetration grew once again in 2009, as Thailand hosted 66 million mobile subscribers by mid-2009 (compared with 53 million in 2008).¹⁸ As a result of this growth in the market, right holders experienced greater harm in 2009 from businesses in Thailand providing content on mobile devices, thumb drives, MP3 players, and the like. Industry surveys reveal that mobile shops in the Red and Yellow Zone areas, i.e. Pantip Plaza, Klongtom and Saphan Lek, Koa Sarn Road, Fortune Center and Sear Department Store, all offer "pre-downloaded" music files to customers on mobile devices as a service. Fewer consumers purchased legitimate or pirate product in physical format, instead choosing to rip their content onto mobile devices from various sources including from the Internet. In addition, former retailers of pirate optical discs continued to set up brick-and-mortar shops offering digital download services to consumers for mobile devices, some maintaining an in-store hard drive containing literally thousands of files to purchase and load onto mobile devices. The local music and record industry association monitors this type of infringement on a regular basis and continues to find some mobile phone shops in big cities and tourist attraction areas that provide services for illegal pre-loaded tracks to consumers who are buying new mobiles phones or are requesting infringing content. In an investigative survey conducted in Thailand, investigators were able to purchase players with infringing pre-loaded tracks, or received offers from shop staff to load extra tracks upon purchase of a device. Book and journal publishers have in the past reported occurrences of downloading reference books and dictionaries in a similar manner.

¹⁴ In Thailand's Department of Intellectual Property (Ministry of Commerce) report, *Thailand's Implementation on Intellectual Property Rights, March 2008 – February 2009*, the government indicated 5,328 raids (2,973 copyright) resulting in seizures of almost 3.2 million pieces (2.3 million copyright) from January to November 2008, and 521 Customs seizures resulting in seizure of almost 1.3 million pieces. The Customs statistics are not broken down by sector. ECD ran 130 copyright raids in 2008 with seizures of over 170,000 pieces.

¹⁵ For example, the record industry group in Thailand, TECA, reported 194 successful raids, with 184 defendants arrested, and over 50,000 discs seized. They report 173 indictments, with 68 convictions or guilty pleas, and 105 cases still pending. Out of the 68 convictions, 7 resulted in jail time although the sentences were all suspended. 43 of the cases resulted in criminal fines, with all but three of the fines ranging from US\$1,000 to \$5,000. Only one fine in 2009 exceeded US\$5,000. For the motion picture industry, there were 47 raids, resulting in over 400,000 seized discs, and out of 121 criminal cases commenced, there were 19 jail sentences imposed, although all but one were suspended. Out of 28 criminal fines imposed, 24 ranges from US\$1,000 to \$5,000, and no fine of over US\$5,000 was imposed in 2009. The business software industry reports 28 end-user raids, with one positive outcome, and 16 cases pending.

¹⁶ Illegal camcording occurs when professional camcorder pirates who use video cameras to illicitly copy a movie during its theatrical exhibition in a movie theater, usually very early in its run. The pirates sell the master recordings to illicit source labs where they are illegally duplicated, packaged and prepared for sale on the pirate market and upload illegal copies to the Internet.

¹⁷ *Id.* The Royal Thai Embassy's February 13, 2009 report mentions this case.

¹⁸ *Thailand – Mobile Communications – Overview*, at <http://www.budde.com.au/Research/Thailand-Mobile-Communications-Market-Overview.html>.

Thai law enforcement officials remain behind the curve on mobile piracy, with some even questioning whether the mobile download (or upload) services provided by the stores can be considered copyright infringement, and refusing to go after the stores that are reproducing the content from the Internet and then distributing it to customers. Such copying and file-transferring clearly constitutes copyright infringement, and must be dealt with severely or this problem of mobile device piracy will grow more harmful.

Book Piracy, Including Production for Export and Unauthorized Photocopying: The book and journal publishing industry continues to face the following problems in Thailand: print piracy, illegal photocopying, unauthorized translations, and online piracy, though the latter is not yet a significant threat. Of these, unauthorized photocopying of educational materials, in and around universities, remains the predominant form of book piracy in Thailand. Copy shops continue to copy books for students, often on a “made to order” basis to avoid keeping infringing stock on site. Lecturers are culpable too, compiling “course packs” of works without permission from publishers, with some producing unauthorized translations of works and claiming authorship. Other pirated materials include novels, travel guides, history books and foreign language newspapers. Various private institutes in Thailand provide illegally reprinted Test of English as a Foreign Language (TOEFL) materials to their students.

In recent years, the industry alerted Thai authorities to the problem of counterfeit/pirated books being produced for export – a problem of considerable concern as these pirated books were making their way into the U.S. market.¹⁹ The Thai based-producer and exporter of these pirated books runs a sophisticated operation and network of consignees, using several companies as fronts for the export activities. Though there was little action by the Thai authorities in the past, in 2009, the relevant agencies of the Royal Thai government began to vigorously pursue an investigation into the production and export of pirated/counterfeit books. In October 2009, the Sub-Committee on Investigation and Suppression of export of counterfeit books was formed, and the Association of American Publishers is working closely with the member agencies in pursuing investigations into the problem of counterfeit book exports. The member agencies of the Committee include the Department of Intellectual Property (DIP) and the Department of Special Investigation (DSI), ECD Police and Royal Thai Customs. The industry appreciates the vigor with which the Committee and its member agencies are now pursuing investigations into this problem. Though there has been considerable effort to address the problem of counterfeit book exports, it remains the case that no *ex officio* actions are conducted against unauthorized photocopying that occurs quite openly

A longstanding problem has been the misconception about “fair use” in the educational context. IIPA is appreciative of recent efforts made, such as sending officers to lecture on book copyright to teachers and librarians, and to explain its manual on fair use at universities. IIPA continues to request input into the Royal Thai government’s development and release of “Fair Use Guidelines for Education,” particularly in light of older court decisions which may be easily misinterpreted by the universities regarding the scope of allowable copying (IIPA recommends amending Section 32 to ensure that broad interpretations allowing wholesale copying of textbooks without authorization and payment cannot be upheld). At least, it must be made clear in such activities by DIP that wholesale copying of academic materials without permission and payment is impermissible.

Optical Disc Piracy Mainly Consists of “Burned” Discs, with Some Imported and Factory Pressed Discs: Changing technologies has meant shifts in the kinds of pirate optical discs found in the market. Shops, back rooms, and even private premises are increasingly being turned into pirate recordable disc burning labs, especially in rural areas of Thailand. Imported discs have increased, particularly from China which are generally higher quality sophisticated counterfeits,²⁰ and discs are still detected coming in from Malaysia. There has been an overall decrease in audio discs, since much of the pirate audio market has been replaced by Internet- and mobile-based piracy. There remains some factory production, with some untouchable plants still in operation. Industry indicates the

¹⁹ As reported last year, U.S. Customs authorities seized shipments of pirated books, including English language technical and professional books, and English language textbooks, in varying quantities.

²⁰ The local music and record industry group reports that smuggling CDs and DVDs from China is popular since consumers of piracy believe Chinese pirate compilations have high quality covers and are relatively inexpensive. These are smuggled in through the Thai-Myanmar border in small amounts to avoid detection by Royal Thai Customs, or are sent via postal service or delivery companies to retailers for further distribution.

ratio of burned-to-factory discs now stands at about 80%-20%. While historically industry had not been permitted to participate in investigations of particular plants, one breakthrough in 2009 was the inclusion of industry in the latest plant visits. The Plant Visit Program was conducted in July and August 2009 with 30 (out of 38) plants visited. The local recording industry group, TECA, and the Motion Picture Association's local group were invited and teamed-up with the DIP, Police Bureau and DSI to visit all of these plants. IIPA appreciates the government's willingness to open the process, since it is through this cooperation that the optical disc piracy problem (at least, the factory production problem) will be resolved. The Team was able to collect three sets of exemplars from almost every plant visited. DIP generously gave industry a set of exemplars to be sent to IFPI's lab in London. The plant visits remain important due to some continued evidence of some exports out of Thailand. Recent years' anecdotal evidence indicated that discs were being exported from Thailand to Malaysia²¹ and to Australia (through an operation run by a Thai student community in Australia, operating a website in Thailand that shipped discs to Australia), and in 2009, some exports were detected flowing into Japan.

IIPA previously reported three major optical disc actions.

- **Cyber Planet:** This plant was raided on April 10, 2007, and the managers were charged with violating the Optical Disc Manufacturing Act for failing to inform DIP regarding production. The Cyber Planet case is now in the hands of the State Attorney, and industry reports that it is likely that the State Attorney will bring charges against the plant for violating the Optical Disc Law.
- **The "307 Plant":** Referred to in DIP's February 2009 report as "Million Silver Gold Factory," this plant was raided on June 20, 2007, leading to prosecutions under the copyright law and the Optical Disc Manufacturing Act. On February 24, 2009, the IP & IT Court found all the defendants in the "307" Plant guilty of violating the Copyright Law, the Optical Disc Law, and the Criminal Code. Each of the named defendants, the Managing Director of the plant, and two employees, received unsuspended sentences of two years in jail, and all defendants, including the "307" CD Plant Company, were punished with a BT506,000 (US\$15,300) fine. The judgment also resulted in confiscation of all machinery and equipment seized, including one optical disc factory line, one printing machine, and the pirated discs found in the initial raid. IIPA commends ECD, DSI, DIP and the Office of the Attorney General for carrying through this legal action. IIPA notes that the judgment has not been fulfilled as the defendants all appealed the case to the Supreme Court where the case is under consideration. The defendants are now free on bail. The appeal in the Supreme Court normally takes one to two years before a final judgment is rendered. Notwithstanding the appeal, the plant is closed.
- **Unregistered Plant:** One unregistered plant was raided October 19, 2007, leading to the arrest of the home owner for not registering the property as an optical disc plant under the Optical Disc Manufacturing Act and for infringing copyright. The owner's two employees, nationals of China and Myanmar, were also arrested for copyright infringement. The courts have suspended consideration of the case since the defendants absconded after being let out on bail, but arrest warrants have been issued.

In another case, in September 2009, ECD conducted operations involving an optical disc plant called "LLI Technology Company Limited" in Nonthaburi Province. A lengthy investigation revealed reproduction of pirate discs at night which were delivered to customers/downstream distributors in the early morning. Two drivers delivering thousands of pirate music and movie discs, CD-R burners and thousands of cover sheets for packaging were arrested and pled guilty to dealing in pirated items and the pirate product was seized. On the early morning of September 24, 2009, the plant was searched and six CD/DVD replicating lines were seized, along with a number of

²¹ On September 24, 2008, Royal Thai Police with assistance of the Motion Picture Association, cracked a piracy ring operating from an abandoned warehouse in Yanawa district, Rama 3 Road, Bangkok. The front of the warehouse was disguised as a junk garage, while the air-conditioned back area housed one DVD replicating line, one printing machine, and 2,400 kilograms of polycarbonate, used in the production of optical discs, 16,000 pirate discs and 93 stampers (the key glass part containing the content and used to produce discs). Titles included *The Mummy: Tomb of the Dragon Emperor* and *Batman: The Dark Knight*. The officers also found 14,000 pirated optical discs in the trunk of a car, and arrested one Thai man and two Malaysian suspects, the only people found. It is believed the plant was run by the Malaysian mafia and had been producing pirate product for six months for export back into Malaysia. The investigation is ongoing.

stampers, molds and printing machines. The plant operator and management team were charged with copyright infringement. IIPA commends the government for taking this high-profile and important case, and while IIPA understands the case will be sent to the Office of the Attorney-General for litigation very soon, the owner of the plant unfortunately was able to successfully petition the Court for the return of all his machines. Time will tell whether the plant will remain shuttered and justice brought to bear on the owner of the plant, but the government should be commended for following through on this search and arrests given the overwhelming evidence of a highly organized operation.

Since the U.S. government has provided the Royal Thai government with optical disc forensic equipment, IIPA strongly urges the U.S. to ask the Royal Thai government to maximize the use of this equipment by taking (seizing) sample pirate discs from all areas known to be havens for piracy, e.g., in the Bangkok area, and sending such discs for forensic testing to match the discs with optical disc facilities. This will help pinpoint the Thai facilities that are supplying the retail and street markets. To the extent that discs are imported, it may be that industry can help identify the plant, which in turn would help Royal Thai Customs in their identification of pirate shipments and otherwise help cross-border investigations into import piracy.

Entertainment Software Piracy: Piracy of entertainment software remains prevalent in Thailand, whether through sales of burned, factory pressed or imported optical discs or cartridge-based games and use of pirated games in unlicensed Internet game rooms or cafés. Malls and street hawkers serve as retail channels for pirated entertainment software products. To evade authorities, vendors often store their pirated product in a separate location, and display only game covers or empty boxes in their stands. When a customer, after browsing the shop “catalogues,” requests a specific title, often times a runner is sent to meet a backpacker (whose function is to roam the mall carrying a number of pirated discs in a bag) to retrieve the requested product.

Signal Piracy (Cable and Satellite): Piracy of cable and satellite broadcasting signals in Thailand, which involves the unauthorized transmission or retransmission of U.S. programming over systems from original cable or satellite transmissions, remains a major problem, especially outside of Bangkok. Cable piracy and signal theft in Thailand involves not only major channels, but also the feed by many unlicensed cable operators, particularly in provincial areas outside of Bangkok, of continuous, unauthorized motion pictures on dedicated movie channels operating on their systems. The cable industry group CASBAA reports losses to industry in the range of US\$211 million due to signal theft in 2009 (the second highest losses in Asia, only surpassed by India), with an estimated \$76 million in lost tax revenues to the Royal Thai government for allowing piracy to continue unabated.²² The main source of losses was illegal distribution of signals, although there remain some losses due to illegal individual connections and satellite overspill. The cable industry reports 1.64 million illegal hookups in the country out of more than 2.5 million total hookups in Thailand, a more than 2-to-1 ratio between illegal and legal hookups.

Illegal decoder boxes and smart cards remain widely available in Thailand and a growing problem. Individual hackers continue to cause undue damage to the legal market by applying for a legitimate pay television subscription service, and then using the Internet to share the smart card with others, collecting a monthly fee from the users of the pirate service. Such Internet card-sharing is starting to have serious repercussions for the legitimate industry as well as direct-to-home pay television services.

The Royal Thai government has been very slow to recognize this form of piracy as a priority, but given the size of the problem and the amount the authorities can expect to reap just in terms of lost tax revenues, they need to take this problem seriously and address it. A welcome development was the inclusion in the Broadcasting Act of a provision (Section 70) that punishes manufacturers, importers, sellers and those who service pirate decoders aimed at decrypting Thai-licensed services. IIPA hopes that this change will stimulate many additional cases but expresses disappointment that the international industry's recommendation to the Council of State that the legislation be broadened to encompass pirate decoders of international program providers' signals was not accepted.

²² CASBAA and Standard Chartered, *Digital Deployment: Asia-Pacific Pay-TV Industry Study*, November 2009.

Public Performance Piracy of Motion Pictures: Public performance piracy continues to be a problem with many hotels, especially outside Bangkok, retransmitting unauthorized videos over in-house movie systems and bars in tourist areas openly exhibiting films without authorization. A growing number of bars and restaurants have also added “private” rooms to screen major motion pictures illegally.

Link Between Piracy and Organized Crime: It has long been the case that powerful interests have been attracted to the low-risk, high profit nature of piracy in Thailand, placing copyright industry representatives in danger and creating a dangerous situation for those in law enforcement fighting piracy. In 2006, an industry representative was shot and killed in Nakorn Pratom Province, and a staff person was attacked during a raid in Open Market in Nonthaburi Province. In 2007, at the Tanwanna shopping mall, a scene between two rival gangs involved in pirate optical disc businesses erupted in violence, resulting in one death and another serious injury. There are connections between organized criminal piracy and corrupt practices, like influence peddling with politicians to avoid being caught or prosecuted for piracy, or substituting pitiful, undesirable defendants in a criminal trial for the real big fish target, which has happened on many occasions in Thailand. To address the involvement of organized crime, the government of Thailand should ensure that copyright infringement is a predicate offense for remedies like freezing assets of organized criminals, and that copyright infringement is a predicate offense in the Money Laundering Act. The government prosecutors should also consider filing charges against pirates on the basis of tax evasion in parallel with copyright offenses whenever this presents itself. There remain examples of “untouchable” plants, including one reportedly owned by an ex-member of the Royal Thai Parliament.

Fighting Corruption: IIPA congratulates those in the Royal Thai government who have indicated their awareness of corruption issues and their willingness to stand up to such interference with the legal process. In the 2008 Special 301 report, IIPA highlighted a stoppage in enforcement by a local police station, and the courageous acts of the then-head of ECD to re-establish the rule of law. In other instances, corruption is more subtle, for example, substitution of low-level defendants for the major target well after the raid has been run, delays in post-raid inquiries, and leniency of police officers on pirate targets during raids. Some simple but concrete steps, like rotating police officers every year or two, and securing raid parties (for example, by removing mobile devices from those on a raid party to avoid leaks, which has been highly effective in other markets where this technique has been employed), can ensure that honest government officials are able to do their honest work without worry that corrupt forces around them will nullify their good intentions.

DIP Enforcement Agency Should Be Established: We recommend that the Royal Thai government establish in DIP an enforcement agency with full power to do all piracy raids. The Royal Thai government should also give full authority to DIP officials to conduct searches, arrests, investigations as well as the authority to initiate litigation against infringers. Establishing such enforcement authority at the DIP has precedents in other markets (e.g., Malaysia and Hong Kong), and will provide needed additional resources (i.e., to the police) to significantly reduce piracy.

TRAINING AND PUBLIC AWARENESS

Industry Participation in Trainings and Government Events in 2009: Copyright owners organized and engaged in numerous anti-piracy trainings and public awareness activities in 2009. These included BSA trainings provided on a continuous basis with the judiciary in Thailand, as well as training provided to ECD officials. TECA, along with their international group, the International Federation of Phonographic Industries, have delivered many trainings and seminars for related government agencies regarding investigation techniques, how to distinguish piracy from real products, enforcement techniques, legal controversies, updates on various copyright issues, scientific laboratory forensic techniques, and Internet piracy issues. In September 2009, the Motion Picture Association's local group organized a training in Bangkok for 100 officials and industry (including theater employees) on anti-camcording training. In addition, industry was invited to various events coordinated by or with the participation of the Royal Thai

government, including two destruction ceremonies and one event co-sponsored by the WIPO at Suvarnabhumi International Airport in Bangkok.²³ The two major destruction ceremonies conducted in Thailand in 2009 occurred on March 27, 2009, involving 1,070,170 pieces of pirated and counterfeited goods, and on September 29, 2009, involving 557,876 pieces of pirated and counterfeited goods. At both ceremonies, the Royal Thai Police, the Ministry of Commerce, the Royal Thai Customs, and the DSI were in attendance, and both were presided over by Deputy Ministry of Commerce Alongkorn Ponlaboot.

COPYRIGHT LAW AND RELATED ISSUES

In Thailand, copyright protection is governed chiefly under the Copyright Act, B.E. 2537 (A.D. 1994), which was last revised in 1995. The law created an adequate basis for protection, if properly enforced with the imposition of the statutory maximum sentences (but as discussed above, this is not happening generally in the courts).

Mall Landlord Liability: Legislation has been drafted to incorporate criminal liability for landlords, namely, in a new Section 31/2 of the Criminal Code, the law would provide that criminal liability shall be imposed against the owner or a person in possession of a building or land that knows, or has reason to know, that its lessee is using the

²³ The following is a non-exhaustive list of some of the government organized programs in 2009:

- **January 14, 2009 Ceremony at the Suvarnabhumi International Airport in Bangkok:** DIP and the Airports Authority of Thailand launched an anti-piracy and anti-counterfeiting effort, in a ceremony attended by WIPO Director General Francis Gurry. Posters and leaflets displaying messages in both Thai and English were placed at different areas of the airport and handed out to travelers, warning them, "Warning, carrying fake goods to some European countries is a crime, France: up to 3 years in Jail/300,000 Euros Fine, Italy: up to 10,000 Euros fine."
- **January 22, 2009 "Task Force Released - Fighting Against an Infringement of Intellectual Property" in Bangkok:** DIP and 853 Metropolitan Police Bureau officers ran a one week campaign to stamp out pirated shops and stalls throughout the Bangkok area.
- **February 2, 2009 DIP Seminar entitled "IP Dispute Reconciliation" in Pattaya:** Local record industry representative presented for 200 attendees from the business sector (SMEs, hotels, restaurants, pubs, bars, karaoke) on proper uses of IP.
- **February 14, 2009 DIP campaign roll-out of "Love Thai, Use Copyrighted":** IP right owners, representatives, artists and government officials marched on main shopping areas to persuade Thais to buy and use only legitimate copyright products.
- **March 18, 2009 Seminar "Penetration to World Market by the Intellectual Property: New Choice for Thai Entrepreneurs" in Ubonratchathani:** DIP seminar to encourage Thai entrepreneurs to use intellectual property as a value-added for their existing products. The local record industry representative was a guest speaker on the topic, "Gateway to the value added of Copyright work." There were around 200 attendees.
- **April 30, 2009 Seminar "Penetration to World Market by the Intellectual Property: New Choice for Thai Entrepreneurs" in Krabi:** DIP seminar to encourage Thai entrepreneurs to use intellectual property as a value-added for their existing products. The local record industry representative was a guest speaker on the topic, "Gateway to the value added of Copyright work." There were around 200 attendees.
- **May 13-15, 2009 Seminar "Intensive Course on the Management of Creative Enterprises and the Role of IP":** DIP and World Intellectual Property Organization (WIPO) organized the seminar, at which the Chairman of the local record industry group, TECA, gave a presentation.
- **May 29, 2009 DIP Seminar entitled "IP Dispute Reconciliation" in Chiang Mai:** Local record industry representative presented for 200 attendees from the business sector (SMEs, hotels, restaurants, pubs, bars, karaoke) on proper uses of IP.
- **June 12-14, 2009 Seventh Annual IP Fair in Bangkok:** DIP asked the local record industry to participate in the IP Fair at the Sirikit Convention Center, Bangkok, at which the industry had legitimate products for sale. Crowd of around 100,000 people attended.
- **June 16, 2009 Seminar "Penetration to World Market by the Intellectual Property: New Choice for Thai Entrepreneurs" in Sukhothai:** DIP seminar to encourage Thai entrepreneurs to use intellectual property as value-added for their existing products. The local record industry representative was a guest speaker on the topic, "Gateway to the value added of Copyright work." There were around 200 attendees.
- **August 31, 2009 Inauguration Ceremony of the "Creative Thailand" Project:** DIP coordinated the launch of the "Creative Thailand" project with a BT21 billion (US\$634 million) budget. IIPA members have participated in this launch, and in addition have had ongoing discussions with the government regarding the IP component of the project, specifically, the need to have an adequate legal framework and enforcement infrastructure in place as a prerequisite to seek to achieve the GDP goals set forth by the project.
- **September 16-20, 2009 The Second Thailand Entertainment Expo 2009:** The Export Promotion Department (DEP), Ministry of Commerce, coordinated this Expo at Siam Paragon, Bangkok. The Expo was intended to promote the potential of the Thai entertainment industries and to upgrade Thailand as a market place for entertainment. There were around 200 film, music, animation and TV companies participating in the Expo.

property for the purposes of copyright (or trademark) infringement. Such landlord liability would subject the landlord etc. to jail time from 3 months to 1 year or a fine from BT20,000 (US\$600) to BT100,000 (US\$3,000), or both. IIPA supports swift passage of this bill which we understand sits with the Minister of Commerce.

Enact Statute to Ban Illegal Camcording: IIPA applauds the government for the news that it is drafting legislation to ban illegal camcording. Such standalone legislation has proved to be invaluable in markets where enacted against the fight against illegal camcording, which causes enormous damage to the motion picture industry. As highlighted in this report, not only U.S. films but local Thai and other foreign films get stolen right off the screen, stripping the livelihoods away from filmmakers and all those involved in the creative process, as well as damaging the cinema owners in Thailand who rely on theatrical exhibition receipts for their livelihoods. The draft bill should ban the illegal use of or intent to use an audiovisual recording device in a movie theater to record a film off the screen. A standalone mechanism independent of copyright is needed so that the courts can be alleviated of various procedural hurdles to enforcement (such as subsistence and ownership issues) in order to effectively fight this virulent and fast-spreading form of piracy in Thailand.

Prospects for Passage of Copyright Law Amendments in 2010: Amendments to the Copyright Act have been in the planning stages for many years. The comprehensive draft amendments dating back to 2005 would have made some important improvements to copyright protection in Thailand.²⁴ Included in those amendments were provisions to strengthen civil remedies by allowing courts to award compensatory and punitive damages and lost profits, make it an offense for a photocopy shop to provide infringing copies of works, clarify that temporary copies are covered as reproductions under the Thai Act, distinguish between “disposal” (sale or other transfer), rental, and “communication to the public” as separate exclusive rights, attempt to implement WCT and WPPT requirements to prohibit the circumvention of technological protection measures (TPMs) (although not totally satisfactorily),²⁵ and prohibit the unlawful tampering with rights management information (RMI), strengthen criminal penalties in certain respects, and establish voluntary collective management of copyright. Technological developments make it important for the Royal Thai government to make changes to modernize the statute and make it more effective. IIPA hopes that the latest draft retains the strong criminal penalties structure of the current statute, and fully implements the WCT and WPPT. IIPA further hopes that the government will decide to join the WCT and WPPT.²⁶ IIPA looks forward to having an opportunity to review the latest draft copyright legislation. The draft apparently sits now with the State Council.

ISP Liability Issues: One very important question which should be resolved in the copyright law involves the extent to which Internet service providers can be held liable for infringing activities hosted on their servers, or engaged in by third parties using their services, such as P2P file sharing services, and therefore, whether ISPs have proper incentives in place to assist copyright owners in combating Internet piracy. IIPA understands that rudimentary provisions on ISP liability, fashioned in part on the U.S. approach to this issue, may be included in the latest draft copyright amendment bill. IIPA would welcome the opportunity to review the draft, and reiterates that enacting the appropriate legal framework to deal with Internet-based infringements is vital, including statutory notice and takedown, and other measures to foster cooperation to defeat online infringements and repeat infringers, including P2P file sharing, bit torrent technologies, web bulletin boards, and cyberlockers. Other laws passed to date, such as the Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000),²⁷ and the Computer Crime Act B.E. 2550 (2007), which went into

²⁴ A fuller description of the improvements and problems with previous drafts has appeared in previous IIPA Special 301 country reports on Thailand, at <http://www.iipa.com/countryreports.html>.

²⁵ An additional form of illegal circumvention came to light in 2009. Apparently, those who are producing counterfeit textbooks for export are also providing a pin code which is being used to provide the purchasers of counterfeit with unauthorized access to ancillary and supplementary materials. Thus, once the amendments are in place, there will be three bases for halting the production and export of counterfeit books: copyright infringement (piracy), trademark counterfeiting, and circumvention of a TPM.

²⁶ IIPA notes that the government is obliged to pass legislation to comply with the Japan-Thailand FTA, which went into effect on October 30, 2008. Included in the IP provisions of that FTA is the obligation to provide a WCT and WPPT-compatible “making available” right (according to Japan-Thai FTA Article 133(1)), protection against circumvention of TPMs (Article 133(2)), and protection against violations involving RMI (Article 133(3)).

²⁷ The National Telecommunication Business Commission (NTBC), responsible for implementing the provisions of the Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business, still has not been established more than eight years after enactment of the Act. Currently, ISPs operate their business under agreements made with the Communications Authority of Thailand (CAT). ISPs must comply with

effect on July 18, 2007, have not been that helpful in curtailing online infringements.²⁸ To the contrary, right holders have indicated the Computer Crime Act is now being invoked by ISPs as a shield to protect data from being disclosed to copyright owners – data which right holders need in order for them to obtain a search warrant from court.²⁹

Narrow Exceptions Involving Copying of Academic Materials: IIPA continues to call for clarification of Article 32 of the copyright law, which provides for certain exceptions to copyright protection. In light of interpretations of this Article, especially paragraphs (6) and (7) that have been interpreted to allow wholesale copying of academic materials. Thailand must take steps to narrow the relevant provisions to ensure compliance with international norms.

Organized Crime Prevention Legislation: IP violations have still not been included in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA).³⁰ Unfortunately, while the government had intended to include copyright piracy as a predicate offense in draft amendments, the Law Drafting Committee of the Council of State concluded that copyright should be removed as a predicate offense.³¹ IIPA urges the Cabinet to add copyright piracy back as a predicate offense for the enforcement of the MLPSA. The Royal Thai government should address the issue of organized criminal syndicate involvement in piracy and counterfeiting operations, by adopting anti-organized crime legislation, and legislation on asset freezing, which would include intellectual property rights violations as predicate offenses.³²

Remaining Problems with the Optical Disc Manufacture Act: IIPA has previously discussed and analyzed the Optical Disc Manufacture Act which went into effect on August 29, 2005.³³ IIPA finds several deficiencies which should be fixed in amendments to the law:

- **“Copyright Owner’s Code” Creates Burden on Rights Holders:** The Act should be amended to remove the onerous and unprecedented obligation in Sections 8 and 12 that right holders acquire a “copyright owner’s code” before any replication of legitimate CDs. By requiring an application for and affixation of a code to all legitimate discs, Thailand may have inadvertently created a formality that violates Thailand’s international obligations.³⁴ Other provisions which refer to the copyright owner’s code should also be subject to corresponding amendments, to delete mentions of “copyright owner’s code.”³⁵

contractual agreements with CAT, requiring the ISPs to control, verify, or warn their customers not to use their services in ways that contradict any laws. It does not appear that ISPs are at present obligated to immediately remove or take down an infringing website, but police and copyright owners may request an ISP to remove an infringing website from its system when there is evidence of infringement. The police may also request ISPs to provide information regarding the identity of the persons operating a website when such information is required for investigation or when there is evidence of infringement. Nonetheless, as noted above, it would be important for both a cooperative mechanism including notice and takedown, and the informational requirement regarding infringers’ identities, to be made clear and in writing in the copyright law being revised.

²⁸ The Computer Crime Act, while essentially an anti-cybercrime statute, was thought to enable right holders to protect copyright in the online environment in limited circumstances. For example, Section 14 of the Act makes it a crime to use a computer system to disseminate illegal, fraudulent or obscene data. The law also covers limited cases of circumvention, i.e., it makes it illegal to circumvent an access control measure to avail oneself of a specific computer system, or to “uncover” or disclose a circumvention method. The law places potential liability on ISPs for contributing to such computer crimes as well.

²⁹ Further to the issue of identifying information of suspected infringers, we understand that the Royal Thai Cabinet has approved a draft data protection bill and is under second review by Council of State. IIPA has not reviewed this legislation, so cannot say whether it would have any adverse effect on Internet enforcement of copyright.

³⁰ Under the MLPSA, generally it is a crime to transfer, convert or receive the transfer of funds or property arising from certain criminal acts including hiding or concealing the source of funds. Violators are liable to imprisonment of a maximum of ten years and a fine of up to BT200,000 (about US\$58,000).

³¹ Nont Horayangura and Say Sujintaya, *Committee Rejects IP Offences on Public Interest Grounds*, September 28 2004, at <http://www.worldcopyrightlawreport.com/Article/?r=435&c=3003050>.

³² DIP was entrusted in April 2008 to revise the Prime Minister’s Office Decree on the Enforcement of IPR Related Laws such as the Revenue Code, Factory Law, Drug Law and Import-Export Law so that more agencies will cooperate in IP investigations. It is unclear how the change in government has affected the DIP mandate to revise the Decree, but such revisions could be helpful in establishing links between piracy and other punishable offenses.

³³ Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).

³⁴ This kind of copyright owners’ code application process is a flaw that could, if it results in interference with the exercise of copyright, call into question compliance with the Berne Convention’s “no formality” principle. The industries find the code burdensome and problematic and call for its deletion from the law.

³⁵ IIPA proposes deletion of all provisions that place burdens on copyright owners to apply for a copyright owner’s code, which includes amendments to Section 3 (Definition of Copyright Owner Code), Section 5, Paragraph 2 and 3 (Duty of the Copyright Owner to inform the DIP official in prior of making optical disc), Section 8 (How to embed Copyright Owner Code on the Disc), Section 12 (Duty of the Copyright Owner to make the Copyright Owner Code), Section 23 (Penalty for copyright owner who fails to inform the DIP official in prior of making the Disc), and Section 27 (Penalty for copyright owner who fails to make the Copyright

- **No Licensing Regime:** The Act should be amended to require a license for a plant to begin producing optical discs and a license term and renewal process should be established (and the exception to the notification requirement in Section 5 for “production or a commission to produce for an educational purpose, for the public interest, or for the conservation of culture” should be deleted from the current Act).
- **No Timely Monitoring of Export of ODs and Imports/Exports of Machines, Stampers/Masters and Raw Materials:** The Act should be amended so that there is a before-the-fact automatic permit for export of discs and import/export or machines, stampers/masters and polycarbonate.
- **No Express Seizure, Forfeiture, and/or Destruction of ODs, Stampers/Masters, and Machinery:** The Act should be amended (or regulations issued) to provide for seizure, forfeiture, and/or destruction of discs, stampers/masters, or machinery found in violation of the statute infringing copyright or trademark.
- **No Mandatory Minimum Criminal Penalties:** The Act should be amended to provide for mandatory minimum fines and imprisonment.

Fair Use Guidelines: The DIP issued three guidelines on fair use in recent years, namely, the “Fair Use Guidelines for New Report,” the “Fair Use Guidelines for Education,” and the “Fair Use Guidelines for Software.” The DIP has indicated that these guidelines are intended to serve as manuals for users of copyright works, e.g., the education guidelines are intended “to reduce risk of copyright infringement in books and other copyright works.” IIPA appreciates the good intent of DIP, and only requests that the affected stakeholders, such as the publishers and software industry, be permitted to weigh in the formation of such guidelines, given their experiences in creating similar rules in other countries.

Legislation to Address Cable Piracy: A law dealing with cable piracy would be a welcome addition to the anti-piracy laws. The DIP Report in February 2009 indicates that a Television and Broadcasting Draft law was proposed so as to provide framework for radio and television broadcasting business operations with or without the use of frequencies, as well as the qualifications of licensed operators and the duties and functions of the National Broadcasting and Telecommunication Commission. This draft law is intended to enable the authorities to effectively control illegal broadcasting of copyrighted works and prevent copyright violations on cable television. Any such government proposals should empower the commission with the authority to temporarily or permanently suspend or revoke the licenses of the operators involved in unauthorized broadcasting, without requiring a final judicial decision.

Owner Code). The following are the major suggested redline deletions, with other changes being corresponding redlines to remove references to “copyright owner’s code”:

The following should be deleted from Section 3:

~~“Copyright code” means a sign and a code issued by the Director General to identify the copyrighted work produced.~~

The following should be deleted from Section 5 (with corresponding changes):

~~Any copyright owner who intends to operate the production or to commission others to produce optical discs must notify the competent official before starting the production each time unless it is a production or a commission to produce for an educational purpose, for the public interest, or for the conservation of culture.~~

The following should be deleted from Section 12:

~~Section 12. The copyright owner shall have a duty to produce the copyright code in compliance with Section 8 paragraph two.~~

The following should be deleted from Section 23:

~~Section 23. Whoever fails to comply with the provision in Section 5 paragraph two shall be subject to a fine not exceeding two hundred thousand baht.~~

The following should be deleted from Section 27:

~~Section 27. Whoever fails to comply with the provision in Section 12 shall be subject to a fine not exceeding two hundred thousand baht.~~

The law must also not impose undue restrictions on the ability of legitimate broadcasters and content owners to freely contract, i.e., it must not force them to negotiate with the cable pirates or grant those previously engaged in cable piracy with non-exclusive licenses.

Customs Act Revision Should be Enacted: According to the latest reporting from the Royal Thai government,³⁶ an amendment to the Customs Act that would empower customs officers with the authority to inspect and confiscate goods entering the country for transit and transshipment has been submitted to the Ministry of Finance, and will then proceed to the Cabinet and Council of State for consideration. IIPA fully supports these changes to the Customs Act and hopes they will increase the effectiveness of customs officials in tracking and preventing copyright infringements.

MARKET ACCESS ISSUES IN THAILAND

Thailand currently imposes some restrictions on market entry that, in addition to piracy, form barriers to entry of legitimate business and unduly prejudice foreign rights holders. The Royal Thai government should take steps in 2009 to eliminate or reduce such restrictions, while resisting the urge to impose new restrictions.

Onerous Restrictions on Technology Choice: On December 14, 2009, according to press reports,³⁷ Prime Minister Abhisit Vejjajiva instructed the Ministry of Information and Communications Technology (MICT) to conclude plans for measures focusing on promoting open source software. Indeed, IIPA has become aware that the Software Industry Promotion Association (SIPA) is the government entity under MICT openly promoting open source software to other government agencies and enterprises as a solution to curb piracy. As one example of implementation of this policy, the Ministry of Education reportedly has plans to purchase 1.4 million computers for schools using a budget allocated from the 'Strong Thailand' project and is considering bundling the computers with open source software in order to achieve cost savings. The government says the new policy purports to promote protection of intellectual property as well as achieve cost savings. IIPA has no issue with such policy goals, and fully supports the goal to legalize software usage consistent with APEC economies' agreement that central government agencies should use only legal software and other copyrighted materials. However, the implementation of this goal, e.g., by MOE being pressured to bundle computers with software not of their choosing, clearly flies in the face of the market, and harms companies that rely on software copyright for their livelihoods, since it denies such legitimate companies access to that education market. As such, it fails to build respect for intellectual property rights and limits the ability of government or public-sector customers to choose the best solutions to meet the needs of their organizations and the Thai people. It also amounts to a significant market access barrier for the software industry.

It should be noted that the "Principles for Technology Choice Pathfinder," adopted by APEC in 2006 (furthering the 2002 "Statement to Implement APEC Policies on Trade and the Digital Economy"), recognize that procurement preferences can close markets and stifle innovation and economic development. By implementing this government procurement preference policy, the Royal Thai government is not adopting an effective approach to drive down piracy rates, but rather, is creating an additional trade barrier and denying fair and equitable market access to software companies worldwide, which is inconsistent with the APEC Principles. Rather than start down this path away from innovation, and to further promote respect for copyright, the government should abandon this approach and follow a realistic policy framework that includes adequate education and effective enforcement of IP rights and fosters non-discrimination in business choice, software development, and licensing models. We strongly urge USTR to consider the implications that Thailand's open source preference policy has on IP protection and access to Thailand's market for U.S. goods and services.

³⁶ See the Royal Thai Embassy's February 13, 2009 report, *Thailand's Recent Developments on Protection and Enforcement of IPRs*, supra note 14.

³⁷ Rungthep Turakij, *Abhisit Wants 3G Details Ready in 6 Months*, Thai-language daily, December 15, 2009; Thai Rath, *ICT Backs Opensource Software*, Thai-language daily, October 16, 2009 (both on file with IIPA).

Problematic Film Act Imposes Screen Quota and Uncertain Censorship and Ratings System: The Motion Pictures and Video Act B.E. 2550 (2008) went into force July 1, 2008, imposing quotas and potentially onerous censorship and ratings provisions. Reportedly, Section 9(5) allows the Film Board to establish a ratio between the number of local and foreign films, film/screen time quotas, at a time when there are 704 screens in Thailand, more than enough to have free flowing films of all kinds, and at a time when most other countries are removing quotas, not putting them into place. Clearly, the new quotas will harm foreign rights holders. The Act also imposes onerous rating requirements on films, music videos and live performances, and censorship requirements³⁸ on films, audiovisual products, music used for karaoke, and videogames.³⁹ The concerns over this ratings and censorship regime include: 1) the time frame for obtaining ratings or censorship approval, which is too long (15 days), allowing pirates (who of course do not adhere to the law's requirements) to gain a head start; 2) the costs associated with rating or censorship, again, giving pirates an additional cost advantage in the market; and 3) the severe consequences for failure to comply with the ratings and censorship system, of criminal liability including both jail time and a fine; 4) the fixation requirement, i.e., that the relevant rating or censorship code be "fixed" onto the container of films or audiovisual products as well as on the packages, and that the right holder "embed" the rating or censorship code into the content of films and audiovisual products so that the rating or censorship code appears on the screen or any media when broadcasted or displayed. The government should reevaluate this ill-conceived and outmoded legislation.

One further part of the Film Act places responsibility on Internet cafés, distributors (shops or stalls) of films and audiovisual products, theaters, as well as Karaoke operators, to acquire a "license to operate the business" in advance, with violators subject to criminal liability of up to BT1 million (US\$30,000) or up to two years in jail. Industry has noted that optimistically that the new law could be able to curb piracy in street stalls, shopping malls and complexes and even in Internet café in parallel with Copyright Law.

Television Advertising Restrictions: Advertising is now permitted under the Act on Broadcasting and Television Operation Business, enacted in 2008, but is limited to a daily average of five minutes per hour for each channel, or a quota of six per minutes in any single hour.

GENERALIZED SYSTEM OF PREFERENCES

Thailand currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides "adequate and effective protection of intellectual property rights." Thailand receives among the largest benefits through the GSP program of any nation. During 2008, more than \$3.5 billion worth of products came into the United States duty-free from Thailand, or just over 16% of its total imports to the U.S. In 2009, almost \$2.9 billion in goods entered the United States from Thailand duty-free, or 15.2% of its total imports to the U.S. enjoyed duty-free status under the GSP code. Thailand must meet the discretionary criteria in this U.S. law if it is to continue enjoying favorable treatment for these imported goods.

³⁸ In previous reports, IIPA has noted that "strict censorship guidelines in home video products have an adverse effect on the importation of DVDs, due to the costly nature of having to delete such scenes from the DVD master simply for the Thai market."

³⁹ The changes in the Film Act come at a time when Thai filmmakers, directors and producers are seeking greater deregulation, i.e., the switch from the strict censorship regime to a more audience- and filmmaker-friendly ratings system, and are seeking to cut import taxes on film stock, cameras and other equipment, which must be imported, and for which the duties are extremely high.

THE PHILIPPINES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the Philippines be elevated to the Priority Watch List and that USTR conduct an Out-Of-Cycle Review (OCR).¹ IIPA commends the government of the Philippines for its work in addressing computer software piracy. Nonetheless, our recommendation that the Philippines be elevated is made in light of the continuing, and mounting, problems faced by other copyright industries. The OCR would be to assess whether progress has been made in reducing piracy and passing pending legislative initiatives.

Background to Recommendation: The Philippines is currently undergoing an Out-Of-Cycle Review (OCR) to determine whether it should remain on the Watch List or be elevated to the Priority Watch List. On November 9, 2009, IIPA reported that, while there is potential for positive change, piracy remains dominant in the market, and the situation in the Philippines has not improved significantly since IIPA's February 2009 Special 301 report. Therefore, IIPA recommended that the Philippines be placed on the Special 301 Priority Watch List. Our view has not changed. IIPA recommends conducting a review to determine whether the Philippines qualifies for benefits under the Generalized System of Preferences trade program, under which more than \$733.6 million of Philippine goods, or 10.8% of the Philippines' total imports to the U.S. in 2009, enjoyed duty-free access to the U.S. market.

Executive Summary: The 2010 election cycle in the Philippines nears, with the election to be held May 10, 2010. In the area of copyright protection, much has been left unfinished by the current Administration and Congress. The agenda includes passage of copyright amendments, the original drafts of which were introduced in the Congress more than a decade ago, and signing into law legislation to ban illegal camcording of movies in theaters. The agenda also includes dealing with specific piracy phenomena and streamlining the enforcement system, through the issuance of search warrants without fear of quashing the warrant, coordinated raids including *ex officio* actions, and deterrence-building criminal prosecutions. At the same time, key posts in the government are being or have already been vacated, including departures of the prior Chairman of the IPO Philippines, the prior Chairman of the Optical Media Board, and the IP Department of the National Bureau of Investigation (NBI). Thus, a new leadership comes on the job with major tasks ahead of it.

Copyright piracy remains a significant barrier to legitimate trade in copyright materials in the Philippines, causing losses to all the industries.² Piracy phenomena abound, including growing Internet piracy, software end-user piracy in businesses, mobile device piracy, book and journal piracy, illegal camcording of movies in theaters (which turn up as DVDs on the streets or on the Internet), retail shop and mall piracy, Pay TV theft, and some remaining pirate optical disc production being imported or exported. To combat these problems, industry works with the Philippine National Police (PNP), the National Bureau of Investigations (NBI), the Optical Media Board (OMB), all of which comprise the Philippine Anti-Piracy Team (PAPT). All these agencies provided some support for anti-piracy activities in 2009, including raids on retail piracy and companies engaged in end-user piracy of business software. The IPO Philippines reported seizures out of raids through June 2009 which matched the entire seizure numbers for

¹ For more details on the Philippines' Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² For example, business software piracy losses increased from US\$121 million in 2008 to US\$126.4 million in 2009, while business software piracy levels increased during the same period from 69% to 71%. This represented increased losses due to business software piracy for the fifth straight year, while the piracy level remains above the regional average. Music and record industry piracy losses and levels have always been high in the Philippines, at US\$112.1 million in 2009, slightly down from US\$117 million in 2008. The piracy level remained steady in both years at 83%. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at www.iipa.com/pdf/2010spec301methodology.pdf. BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in the Philippines. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.



2008. While such seizure numbers are commendable, problems in the enforcement system remain, including difficulty in obtaining search warrants in cases of known or suspected piracy activities, and the ease of them being quashed; and the failure to establish IP courts, which in part may be responsible for the paucity of cases resulting in criminal convictions.

Priority Actions Requested in 2010: IIPA requests the following actions in the Philippines, which, if taken, would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Ensure search warrants are obtainable on a reasonable and timely basis consistent with international law and that they are not easily quashed.
- Remedy enforcement bottlenecks, including inquests and preliminary investigations by the Department of Justice by streamlining signing procedures.
- Develop IP expertise in judges and prosecutors and re-establish specialized IP courts, with the goals of increasing speeds of dockets and enabling a significant number of cases, including criminal cases, to move forward in the system.
- Maintain raiding on suspected business software end-user piracy targets; run surprise and transparent inspections on all (licensed or unlicensed) optical disc plants and CD-R burning operations in cooperation with industry; take enforcement against piracy activities in the malls and against pirate book and photocopy shop operations both on and off university campuses; prosecute cases involving illegal camcording of movies in the movie theaters; and shut down some of the estimated 800 pirate cable systems, revoking their licenses or permits.
- Investigate and eradicate P2P and other Internet-based piracy, implement and improve current laws (like the E-Commerce Law), and draft and enact legislation to facilitate removal of infringing material or services from the Internet through fostering ISP cooperation and implementing an effective notice and takedown system.
- Issue implementing rules for the penal provisions of R.A. 8792, particularly on piracy.
- Provide funding for OMB verification visits, and allow right holders to participate in OMB plant visits and other investigations and accompany inspectors.
- Permit voluntary music collective management organizations (CMOs) to commercially operate without interference from the government.
- Launch measures to reward good and honest government work and work to eradicate corruption and compromises in IP enforcement (and take action to punish offenders).

Legislation

- Pass as a matter of first priority an IP Code amendment Bill (SB880) aimed at implementing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and making other positive changes.
- Finalize national legislation (HB5699, which passed third reading in February 2009, and SB3529 which passed third reading in January 2010) to halt illegal camcording of motion pictures, and promote and support implementation of the law and city ordinances through training for PAPT officers.

PIRACY AND ENFORCEMENT CHALLENGES IN THE PHILIPPINES

Criminal Court System Remains Dysfunctional and Non-Deterrent; Special IP Courts Needed: Starting with the criminal inquest procedure at the Department of Justice, and ending with criminal trials, criminal cases in the Philippines on copyright matters almost never conclude successfully. The inquest procedure can take many months, delayed by bureaucratic hurdles (the need for multiple signatures from too few designated officials), with little assistance by prosecutors (e.g., putting together evidence, obtaining witness testimony, and obtaining business records). Cases listed for trial proceed on non-consecutive days with multiple adjournments of several months at a time. For example, a ten-day trial with three month adjournments would typically take at least two and a

half years. During the extended trial period, many problems often arise, including the transfer of prosecutors and judges, eliminating any institutional memory of the case; the use of delay tactics by defendants' counsel challenging search warrants or seeking further delays due to technicalities; and even the disappearance of key witnesses, the defendants themselves (the Philippine National Police have shown no sustained inclination or interest in searching for defendants), or key evidence needed to properly adjudicate the case. Challenges by defendants' counsel (even those without merit) usually result in automatic consideration, leading to further months of delay before such technicalities are adjudicated. As a result, the criminal system offers no deterrence to copyright piracy. The expense and delay of seeking a judicial remedy, coupled with the recent warrant quashals, discourages private right holders from bringing civil cases. Defendants understand this and therefore also stand in a strong position when it comes to any criminal proceeding or settlement discussion.

No criminal copyright convictions were secured prior to 2002 for copyright piracy, and since 2002, there have only been five convictions under the Copyright Act.³ To our knowledge there were no criminal convictions in 2009 for copyright piracy. Out of 132 raids run against motion picture piracy and business software end-user piracy in 2009, there were 89 pending criminal cases by the end of the year with no results. The largest criminal fine ever imposed in the Philippines for copyright piracy was a modest P200,000 (approximately US\$4,300). While two defendants were sentenced to one year in prison or more, in the case involving blatant and massive book piracy, the defendant absconded and remains at large. Unfortunately, law enforcement agencies/police have little interest in locating and apprehending the defendant who absconded. One major step which IIPA believes will make a difference would be the establishment of the long promised specialized IP courts in the Philippines, including criminal trial courts, in line with the President's call for such a court. IIPA would hope that, as a result of the establishment of these new courts, greater numbers of criminal prosecutions would ensue. IIPA understands that the Intellectual Property Office held a public hearing for stakeholders on August 10, 2009 to discuss the establishment of new rules to govern IP litigation, with the proposed rules also addressing the creation of two or three pilot IP courts with national jurisdiction. The proposed rules were presented by IPO to the Chief Justice of the Philippine Supreme Court at the 2009 IP Colloquium for the Judiciary on October 23, 2009. As of mid-February 2010, to IIPA's knowledge, the special rules have yet to be approved by the Supreme Court. Though the timetable is uncertain, the courts should be made functional as soon as possible.

Effective Search Warrant Procedure in Copyright Cases Needed to Avoid Unjustifiable Quashals:

One of the most problematic aspects of the Philippine court system has been the *de facto* unavailability of search warrants in copyright cases due to constitutional challenges by defendants' counsel. The latest example was the 2008 case against the Powermac Centre Company, concerning the unauthorized pre-loading of mp3 music files on to iPods by Powermac's retail stores. In this case, the judge quashed his own search warrant issued in January 2008, making the seized product no longer admissible in court. Previous cases included the Telmarc Cable case,⁴ coming on the heels of the search warrant quashal in the Solid Laguna decision,⁵ which was affirmed by the Supreme Court in 2007. In the Telmarc case, the Supreme Court indicated that for an affidavit to properly support a search warrant, the "oath required must refer to the truth of the facts within *the personal knowledge* of the applicant for search warrant and/or his witnesses, not of the facts merely reported by a person whom one considers to be reliable"

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THE PHILIPPINES: CRIMINAL COPYRIGHT CASES RESULTING IN CONVICTION 2002-2007	
TITLE	DATE OF DECISION/LAW
PP v. Abdul Alonto et al.	09 January 2007 (RA 9239: Optical Media Act of 2003)
PP v. Manny Marasigan	05 June 2006 (Copyright infringement)
PP v. Nestor C. Yao; PP v. Nestor C. Yao alias "Jao Jee Hung"	13 July 2006 (Copyright infringement)
PP v. Macacuna Gandarosa Y Basherón & Alinor Pangcatan Y Abobakar	13 November 2006 (RA 9239: Optical Media Act of 2003)
PP v. Asmawe Tantowa, Abdulah Mama, Maraquee Orot, Pandaw Orot, Oding Baro	20 December 2006 (RA 9239: Optical Media Act of 2003)
PP v. Eugene Li	10 February 2005 (Copyright and Trademark infringement and Unfair competition)
PP v. Catherine Marquez	22 June 2004 (Copyright infringement)
PP v. Harold Chua	03 October 2002 (Copyright Infringement)

⁴ *Telmarc Cable v. Hon. Antonio M. Eugenio, Jr.*, CA-G.R. SP. No. 96767 May 31, 2007. See IIPA's 2008 Special 301 report on the Philippines for further discussion, at <http://www.iipa.com/rbc/2008/2008SPEC301PHILIPPINES.pdf>.

⁵ *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al*, G.R. No 156804, March 14, 2005.

[emphasis added]. Notwithstanding the fact that the claimants took the police officer to the site of the infringement to personally witness the acts being committed, the warrants were quashed.

These decisions are inconsistent with the Supreme Court's own decision in the Columbia case,⁶ which held that affidavit evidence is sufficient to uphold the requirement of "probable cause" to obtain a search warrant and which the government has stated on numerous occasions is controlling precedent. Without the availability of a search warrant remedy – a TRIPS requirement – progress cannot be made in piracy cases in the Philippines. Search warrants, raids and follow up prosecutions should be obtainable on a transparent, reasonable and timely basis, and should not be quashed without full transparency and notice to rights holders. It is also increasingly important to get the courts to issue multiple warrants needed to conduct a thorough search of rows of retail stores selling pirated discs, where the violation of the law is obvious. Judges have hesitated to issue multiple warrants.

Camcording Piracy: The Philippines has become a regional hotspot for illegal camcording of movies at cinemas. The number of instances of illegal camcording forensically matched to the Philippines in 2009 was 21 while there were 44 additional instances in 2008. Philippine movie pirates engaging in this activity typically choose films that release earlier than, or day-and-date with, the United States, and notably, a day-and-date release in the Philippines is still more than half a day earlier than a U.S. release.⁷ Infringing copies of U.S. motion pictures forensically linked to illegal copies made by camcorders in Philippine cinemas are distributed globally. Pirate versions sourced from illegal camcording are often available just two or three days after the theatrical release in the Philippines. This piracy has had a devastating impact on the life cycle of many U.S. motion pictures, eroding their viability not just in the Philippines and other Asia Pacific markets, but also in the United States. Camcorder piracy in the Philippines has also had a profound negative effect on the local movie theater business in the Philippines.

In terms of enforcement, the local Metro Manila and Quezon City governments, and some government officials (e.g., the former head of the OMB) were early to recognize the scope of harm caused by illegal camcording, and IIPA recognizes their efforts to curtail it through targeted enforcement, and the issuance in Manila and Quezon City of local ordinances in 2008 making it illegal to use an audiovisual recording device in a movie theater. Legislation to ban camcording in theaters passed a third reading in the Philippine House of Representatives in February 2009 and in the Philippine Senate in January 2010. The bills must now be reconciled and forwarded to President Macapagal-Arroyo for signature. It would be highly disappointing if this bill did not become law. Swift and immediate enforcement actions should ensue against illegal camcording in 2010; we are aware of eight interdictions resulting in five arrests in 2009. We are not aware of the status of any prosecutions, however. IIPA also welcomes NBI's effort to create a complaint mechanism for illegal camcording. IIPA appreciates these efforts by the government, and views passage of the camcording bill as indispensable as it would, if enacted, specifically define the acts constituting unauthorized possession, use and/or control of audiovisual recording devices; and ease judicial enforcement easier since it would obviate the need to prove copyright infringement or provide evidence as to the subsistence or ownership of copyright.

Business Software End-User Piracy: The rampant use of unlicensed software in the workplace by businesses continued to cause the greatest revenue losses to the software industry in 2009, thereby stunting the growth of the information technology sector. The piracy rate, estimated to be 71% in 2009, remained high compared to the regional median for Asia (which was 61% in 2008). Studies have shown that reducing the piracy level by ten percentage points in the Philippines will lead to job creation, likely in the thousands, the generation of significant tax revenues and greater contribution by the software industry to economic growth in the Philippines.⁸

⁶ See *Columbia Pictures Entertainment, Inc. v. Honorable Court of Appeals, 14th Division and Jose B. Jingco of Showtime Enterprises., Inc.*, G.R. No. 111267, September 20, 1996 (J. Romero, Second Division).

⁷ For example, in 2008, *Rambo* and *Indiana Jones and the Kingdom of the Crystal Skull* were illegally camcordered in the Philippines and uploaded to the Internet the same day as their U.S. theatrical release. The movie *Jumper* was illegally camcordered in the Philippines and available on the Internet four days *before* its U.S. theatrical release.

⁸ See *The Economic Benefits of Reducing PC Software Piracy A Report by IDC*, January 2008, at http://www.bsa.org/idcstudy.aspx?sc_lang=en.

The business software industry continued to receive good cooperation from PAPT in 2009, as PAPT conducted a number of end-user raids in 2009 which were successful in terms of items and value of illegal software seized. In addition, the OMB made visits to thirty companies suspected of using unlicensed Business Software Alliance-member software. The visits were not confined to Metro Manila and these efforts benefited software companies in terms of legalization of software usage inside businesses. One minor problem BSA encountered is that the Philippine National Police (PNP) has a lengthy approval process to apply for search warrants, depending on the availability of superior officers to sign the clearance. The establishment of IP courts will make this process easier. The Intellectual Property Rights Department (IPRD) of the NBI has new officials, namely, Atty. Dante Bonoan (Chief, IPRD) and Atty. Joel Tovera (Executive Officer, IPRD). The appointments of these two officials is a welcome development and their performance will be closely monitored by stakeholders in the coming months. The BSA has done two corporate end-user raids with the IPRD under Attorneys Bonoan and Tovera and the results are encouraging. IIPA hopes that with the appointment of a new OMB Chairman, Ronnie Ricketts, and these new NBI-IPRD officials that BSA will receive continuous support in 2010.

Internet Piracy: Internet usage in the Philippines continued to explode in 2009. The Philippines was fourth in the world in growth of broadband connections (12%) between the second and third quarters 2009, according to Point-Topic, adding over 500,000 broadband subscriptions in the year ending October 1, 2009 (growth of 12.32%), to reach a total of almost 1.5 million broadband subscribers.⁹ A recent study by Universal McCann noted there were 37 million regular social networking users in the Philippines.¹⁰ It is therefore not surprising that Internet piracy worsened significantly in 2009, predominantly through peer-to-peer (P2P) services and involving all kinds of copyright content (for example, in 2008, illegal downloading of e-books increased, as did the sale online of scanned versions of textbooks, reference books and trade books placed onto CD-Rs). Previously, a high percentage of Internet access to infringing sites occurred through the use of Internet cafés; thus, piracy activities online were limited geographically and to certain demographics. Now, high-speed Internet direct-to-home connections and connections through a wireless LAN have become popular, as have inexpensive plug-in USB LAN devices. In addition, the proliferation of low-cost notebook computers and “wi-fi” hot spots has resulted in more people gaining access to the Internet in the Philippines.

The music industry experienced a 19% decrease in legitimate physical sales, which can be attributed at least in part to Internet piracy, and which was not replaced by legitimate Internet sales. It is also somewhat ironic that physical piracy of music (e.g., on CDs) has declined due to rising Internet piracy. From a commercial standpoint, the physical market still exists, but the focus of pirate product in physical disc format is on older established acts, meaning younger acts are being illegally downloaded on the Internet, which in turn makes it more difficult or impossible for them to break into the legitimate market. In addition, the Internet has become the source of choice for mobile device pirates and for burning onto recordable discs, and conversely, camcording pirates use the Internet to upload their pirate motion picture captures.

The legal framework and enforcement infrastructure to deal with Internet piracy in the Philippines rapidly needs to catch up with the technology. The E-Commerce Law establishes important legal principles for liability (i.e., contributory and vicarious liability are codified in the law), but there is no statutory notice and takedown (without relying on court-issued relief) in that law or the Philippine IP Code. Such a mechanism, as well as fostering cooperation with service providers to effectively deal with infringing websites and services and P2P piracy activities including effective and fair termination policies for repeat infringers, should be added. As it stands, those in the Philippines who offer broadband all freely allow P2P downloading.

In the meantime, existing enforcement authorities should launch a campaign aimed at stopping Internet infringements. The CICT (Commission on Information and Communications Technology) states among its declared policies the establishment of “a strong and effective regulatory system that fosters competition and protects

⁹ See Fiona Vanier, *World Broadband Statistics Q3 2009*, PointTopic, December 2009, at 19, 25.

¹⁰ Lawrence Casiraya, *RP Has Highest Percentage of Social Network Users – study*, May 8, 2008, available at <http://newsinfo.inquirer.net/breakingnews/infotech/view/20080508-135336/RP-has-highest-percentage-of-social-network-users----study>.

intellectual property rights.” IIPA members would welcome the CICT’s involvement in combating Internet-based copyright infringements. While industry notes that many of the infringing sites or services are hosted and registered outside of the Philippines, it remains incumbent on the government to act. A proactive approach, including takedowns and blocking sites engaged in blatant and serious piracy activities, has been successful in other markets in curtailing online infringing activities. In addition to enforcement against Internet-based infringements such as P2P file sharing, attention should be paid to enforcement against blatant commercial pirates who advertise hard goods or downloading for loading onto devices (including mobile devices).

Mobile Device Piracy: Mobile device piracy similarly exploded in the Philippines in 2009, as it now estimated that there are over 68.1 million mobile phone subscriptions, representing a 75.9% penetration rate.¹¹ Vendors in the Philippines have dedicated booths and stalls within shopping malls (like notorious shopping areas such as Metrowalk, Makati Cinema Square, and Quiapo) and pre-load, load after the sale, or “download for a fee” pirate content (music, published materials, especially medical and nursing titles and trade books, etc.) onto mobile telephones, MP3 devices, flash drives, recordable optical discs, and even computer hard drives. There are also increasingly infringing wireless application providers (WAP) which provide pirate content directly through wireless communications onto mobile phones/devices. There has been very little enforcement taken against mobile device piracy in the Philippines. The Philippine government must formulate an anti-piracy enforcement plan targeting piracy activities over mobile networks. While the copyright industries in the Philippines have legitimate business with all three major telecommunication companies, it has been difficult to convince telecommunication companies to block access to pirate sites on a voluntary basis. IIPA recommends empowering the National Telecommunication Commission (NTC) or the CICT to act on piracy and other copyright issues over mobile networks, or enhancing anti-piracy enforcement work carried out by OMB by including mobile device piracy within their purview.

Book and Journal Piracy: Illegal commercial-scale photocopying and the scanning and conversion of entire books into digital files are the predominant piracy problems facing the publishing industry in the Philippines. The industry is also seeing an increase in online piracy, particularly of medical textbooks, professional books, and trade books. Photocopy shops continue to operate with impunity in and around college, medical, and nursing school campuses due to a lack of action by law enforcement authorities. The large number of college and graduate students in the Philippines results in high demand for university textbooks, technical books, and professional medical and nursing books. Unfortunately, much of this demand is being met through illegal photocopying, and increasingly through downloads of unauthorized digital copies of books onto mobile devices. Pirates also burn CD-Rs with up to 100-200 titles on each disc. The “university belt” in Metro Manila is a notorious venue for illegal photocopying activities. Copy shops also operate in and around hospitals, and near government regulatory agencies. Vendors of pirated books have also taken to selling the infringing products door-to-door at doctors’ offices, medical establishments, and trade fairs. Many shops now operate on a “print-to-order” basis, thus avoiding stockpiles of infringing goods in their establishments and thereby complicating investigations and enforcement actions. The Department of Education and, in particular the Commission on Higher Education should take a more active role in encouraging institutions of higher learning to adopt appropriate copyright policies and encourage the use of legitimate materials at colleges and universities.

OD Replication for Export: The Philippines is somewhat unusual in its pirate consumption habits since it both imports pirate discs (mainly from China) as well as having excess production capacity in the country. In 2008, exports from the Philippines of pirate CDs, DVDs, and CD-ROMs were once again detected. Local production reportedly makes up an estimated 40% to 50% of hard goods found in the domestic market. The total number of licensed plants already has a production capacity which exceeds legitimate demand, and the Philippine government should conduct verification checks on licensed premises. The number of underground plants and their total capacity is unknown. Only one underground plant was reported to have been raided in 2009, but due to legal maneuverings and a rift between the OMB and the President’s Anti-Smuggling Group (PASG), the machines found at the raid site

¹¹ Point-Topic, *The Philippine Broadband Overview*, October 7, 2009, at <http://point-topic.com/content/operatorSource/profiles2/philippines-broadband-overview.htm>.

were returned to the owners by the Court without the knowledge of OMB. The owners were not even required by the Court to obtain a license to possess, let alone operate, machines, both of which require OMB licenses. The Courts should keep the OMB involved where there are replicating machines, and in this case, should not have released the machines since the OMB had not granted the Respondents a proper license. This has been overlooked by the Courts in the past, which have returned seized machines to unlicensed enterprises without informing the OMB.

In terms of enforcement, IIPA commended President Macapagal-Arroyo for her November 2006 memorandum on IP enforcement, which directed her agencies to “[i]ntensify regular and effective ... raids and ‘spot’ inspections on factories that produce illegal optical discs, trademarked and copyrighted goods, ... seizure and destruction of pirated and counterfeited goods and equipment used to produce them, and ... arrests and prosecutions leading to deterrent level sentences served.” To effectuate the President’s direction to raid and inspect factories, the government should properly fund OMB’s verification visits. IIPA urges OMB to provide transparency as to information related to the licensed facilities. IIPA also urges OMB to pay surprise visits to all optical disc plants in the presence of witnesses from the private sector. According to industry, there are plants which have not been visited for more than a year. Some plants have been reported by OMB to be non-operational and in the process of being sold, however, there is no evidence to suggest that these “non-operational” factories which have been up for sale for some time have actually taken concrete steps to sell the factories. In one case, a plant continues to occupy its rented factory space, and recently renewed its three-year lease agreement with its lessor.

Industry appreciates the new OMB Chairman’s interest in combating piracy and looks forward to working with him to chart a course for effective inspections and then enforcement against any irregular activities detected. A critical aspect of this process which has been missing is adequate funding for OMB to operate effectively. The Philippine Congress has never taken the important step of properly funding the OMB, but should now do so to provide the new Chairman with the tools for effective enforcement.¹²

Retail and Mall Piracy: Although it was noted above that the rise in Internet piracy has led to a reduction in physical piracy for some industry sectors, several areas of the country are still plagued by retail pirate trade. For example, Manila’s Quiapo district remains a center for OD pirate trade, Davao’s pirate trade has largely been untouched, and Cebu City remains a major hub in the operations of pirates in the Visayas. The sale of pirate and counterfeit optical media also remains unchecked in Antipolo, Dasmariñas, and Cagayan de Oro. In addition, retail piracy of software and games can still be observed in Makati Cinema Square (Makati City) Metrowalk (Pasig City), and practically every mall in metropolitan Manila. Market intelligence also suggests an increase of locally burned pirated discs (including a recent proliferation of pirate DVD-Rs) from Quiapo Barter Trade complex. Also, it should be noted that while in 2008, industry saw the beginnings of movement of mall piracy out of public view at some of the piracy hotspots like Virra Mall, Greenhills Shopping Center in San Juan, and Circle C Mall in Project 8, Quezon City, pirate DVDs remain at those sites, but are now sold in a clandestine fashion through the use of runners, while music, software and games are openly sold on discs or offered for downloading.

With regard to enforcement, due to the fact that industry is not often invited to participate in investigations (end-user piracy investigations are an exception to this), IIPA has little information except what has been provided by the government. On June 23, 2009, the IPO of the Philippines reported enforcement statistics for January to June 2009 on its website, including over three billion pesos (about US\$65 million) worth of “counterfeit goods and paraphernalia” seized between January and June 2009. This includes, according to IPO, “three replicating machines, with a total estimated value of P200 million (about US\$4.3 million) which was intercepted during an operation jointly undertaken by the Bureau of Customs (BoC) and Optical Media Board (OMB) in May 2009.” The PNP reportedly had the greatest haul (over two billion pesos) followed by OMB, BoC, and the NBI.

¹² For example, the OMB’s total budget for 2008 was P27 million (US\$585,000), including funds for salaries, capital outlays and Maintenance and Other Operating Expenses (MOOE), with the MOOE budget set aside for investigations and raids making up P11 million or US\$238,000. These amounts are wholly insufficient to effectively conduct anti-piracy operations throughout the entire country, and since the MOOE budget is also supposed to cover overhead including rental (which requires P5 million or US\$108,000), electricity, travel, communications, and office supplies, it is clear OMB (which now has only around 20 approved positions) faces a difficult task.

Unfortunately, some questions are left unanswered by these statistics, including the true value of the seizures given the lack of transparency. In addition, product seized is not broken down by category so it is impossible to tell what percentage is counterfeit (trademark) goods versus pirated goods. Nor do the statistics indicate the size and scope of the overall piracy market, nor the sources from which any pirate product was seized, i.e., small distributors versus source piracy operations. Further, since there is no reporting on any cases commenced out of the seizures or previous seizures, it is impossible to conclude whether these enforcement actions have had any deterrent effect on piracy operations. Without such follow-up, it is impossible to ascertain, for example, how many of those engaging in such piracy activities have been apprehended or whether they remain free to continue to engage in piracy activities.

Specifically with respect to mall piracy, IIPA recommends the adoption in the Philippines of a landlord liability law. Then, mall owners and retail mall merchants should be warned that they will be held accountable for failing to stop piracy in the malls. They should follow President Macapagal-Arroyo's 2006 letter memorandum which called upon the government to "enforce criminal, civil or administrative liability of owners of buildings, such as malls and the like, that lease space to establishments selling pirated and counterfeited goods, or ensure implementation of contracts of lease that prohibit tenants from selling pirated goods in the premises of the lessor," and to "[c]onsider, and as appropriate, implement measures that include suspension, revocation or denial of pertinent national and local government permits or licenses of individuals, firms or establishments that engage in, allow or tolerate the production, importation or sale of pirated and counterfeited goods."

Finally, as noted, judges should issue multiple warrants in order to conduct thorough searches of the hundreds of retail stores that currently sell pirated discs where violations of the law are obvious.

Mechanical License Piracy (Karaoke): Karaoke is quite popular in the Philippines, and in a recently reported phenomenon, various machine brands are sold in Raon, Quiapo with accompanying discs containing as many as 5,000 karaoke tracks. These tracks consist of both local and international repertoire. Some brands come preloaded with karaoke recordings of legitimate record companies. Roughly ten brands have sought licenses from music publishers, but there are still many that do not, thus violating the Philippine IP Code for failure to pay proper royalties. Exacerbating the problem are a few manufacturing companies which slap USB ports onto their karaoke machines which allow them or the owners of the machines to add unauthorized copies of tracks, including from the manufacturer's websites.

Pay TV (Cable and Satellite) Piracy: There remain an estimated 800 pirate (unlicensed) cable systems broadcasting copyright content without consent from the channels or the content owners in the programming of those channels. The Cable and Satellite Broadcasting Association of Asia (CASBAA) estimated that revenue losses are declining somewhat due to investment in digital technology by the leading cable provider but that there remain over 900,000 illegitimate Pay TV connections in the Philippines, and in addition, under-declaration by Pay TV operators continues to sink legitimate revenues.

In 2009, very little progress was made against Pay TV piracy in the Philippines, and court processes in the cases going forward have revealed flaws in the judicial system. Past complaints of cable piracy laid with the National Telecommunications Commission (NTC) ran into difficulties, raising doubts as to whether the NTC could properly handle such copyright complaints. In 2007, a Memorandum of Agreement (MOA) between the Intellectual Property Office and the NTC sought to clarify the situation with the NTC agreeing to first determine issues of copyright infringement. Seeking to capitalize on this new procedure in late 2007, the Motion Picture Association of America, on behalf of two of its member companies, filed complaints of copyright infringement against Cable Link. It is disappointing that the complaints still remain with the IPO Philippines, and that the substantive issues of copyright infringement have not yet been addressed. Rather, the right holders have had to spend most of their time to date complying with onerous procedural requirements. It was hoped that the MOA would have led NTC to invoke its

authority to revoke licenses of operators that utilize pirate programming. However, to our knowledge, NTC has done little to stop rogue operators.

In another case, *Juliano-Tamano et al v. Discovery Communications, Europe et al*, an initial decision by the Secretary of the Department of Justice that there was no broadcast right in the IP Code of the Philippines, was reversed in October 2007.¹³ Unfortunately, the Court in Cotabato City has refused to set a hearing for the case, although it is positive that in December 2008, the Supreme Court rejected the defendant's appeal to reinstate the DOJ Secretary's initial decision. Other cases are being explored using the IP Philippines' Bureau of Legal Affairs, which has the power to undertake administrative action on IP complaints, but to date, there have been no final decisions reached by IPO in any pay TV piracy cases (although there has been a successful private outcome in one case).

Several Steps Are Needed to Make Enforcement Practices More Efficient: Right holders in the Philippines unfortunately face some unnecessary hurdles that result in inefficient enforcement and ease the way for pirates to escape accountability. First, right holder inquests and preliminary investigations by the Department of Justice are often delayed by purely bureaucratic signing procedures, as the Chief Prosecutor apparently has to sign off on every resolution issued by all prosecutors – not just members of the IP unit. Such processes should be streamlined and accelerated, as should processes involved in the filing of cases subsequent to a raid and during the litigation phase. In addition, a major hurdle in the Philippine enforcement system remains the fact that the PNP cannot act on an *ex officio* basis but must always act in conjunction with the Optical Media Board or on a right holder complaint. This should be remedied, and the authority should extend to PNP being able to initiate actions and seize infringing items on an *ex officio* basis. Finally, it remains the case that with certain exceptions (notably, the BSA reports they do participate in investigations with PAPT officials), copyright owners are not often permitted or invited to participate in investigations. As an example of this, in 2008, the OMB agreed to accredit PARI, the local music and record industry association, to help the PNP investigate violations committed by registered producers. However, nine months later, PARI's authority was suspended. Apparently, according to PARI, pirate producers have been releasing record albums without paying royalties and sell their products at very low prices (US\$1 versus the legitimate price of US\$4 or \$5).

Deal With Compromises in IP Enforcement Through Rewards for Good Governance: Stemming dishonest practices related to enforcement of IP (e.g., leaks in advance of raids, irregularities in investigation or post-raid procedures) has always proved to be a difficult task in the Philippines. IIPA recommends long-term solutions such as education and increasing compensation of government employees engaged in enforcement of IP. One short-term suggestion would be to introduce a reward and recognition program for those government employees who honestly do their jobs and for those who report irregularities.

COPYRIGHT LAW AND RELATED ISSUES

Enact WIPO Treaties Implementation Bill and Other Needed Amendments: Copyright protection is governed under Republic Act 8293, the Intellectual Property Code (IPC) of the Philippines (in force January 1, 1998). The government of the Philippines joined the WCT and WPPT in 2002 but has never completed the implementation process. The latest attempts are contained in Senate Bill 880 (sponsored by Senator Edgardo J. Angara in July 2007) and the House Bill 3741 from the 13th Congress, which are virtually identical to bills proposed in previous Philippine Congresses. IIPA supports many provisions of these bills,¹⁴ with only a couple of modifications.¹⁵ One of

¹³ In *Juliano-Tamano et al v. Discovery Communications, Europe et al*, I.S. No. 2006-002, Secy. of Dept. of Justice Chambers, July 5, 2007 (Cotabato City Court), the Attorney General ruled that broadcasters do not have standing to sue since they are not the requisite holders of the programming, and ruling that there was no broadcast right enumerated in the IP law. The decision was reversed as incorrect in *Juliano-Tamano et al v. Discovery Communications, Europe et al*, Resolution, October 10, 2007.

¹⁴ The Senate Bill would establish a world-class copyright legislation, both in areas of substantive protection and enforcement. The Bill's improvements include (a) increasing the term of protection for works and sound recordings in line with international trends, (b) providing an importation right, (c) narrowing certain exceptions, (d) providing for Berne and TRIPS-compatible protection for pre-existing works, (e) providing criteria for secondary liability (e.g., creating liability for landlords who lease stalls to pirates in malls), (f) criminalizing end-user piracy of business software, (g) providing for a Berne and TRIPS-compatible presumption

the principal achievements of the Bill is that it would result in full and proper implementation of the WCT and WPPT. The Bill would update and expand the scope of copyright protections for the digital and online world. In particular, the legislation would expand the scope of the reproduction right to include temporary copies and would explicitly broaden the right to control all communications to the public, including by providing an interactive “making available” right for the digital world. The Bill also provides critical protections against circumvention of “technological protection measures” and protections against unlawful tampering or use of “rights management information.” The Bill would make other necessary changes to accommodate changing substantive and enforcement concerns, such as the addition of statutory damages and a codification into Philippine law of mall-owner liability.¹⁶ However, most unfortunately, the Bill does not contain any amendments addressing ISP liability issues, including even notice and takedown.

The latest updates indicate a dim outlook for passage of the House and Senate bills since the 2010 election season has now commenced. The House version of the Bill was approved at the House Subcommittee level on August 11, 2009, after hearings. As of late 2009, the situation was not as good in the Senate where the Bill was stalled since its first reading in September 2007. It would be truly unfortunate if the Philippine Congress missed yet another opportunity to pass world-class legislation as was contained in the House and Senate bills.¹⁷

Make Adjustments to E-Commerce Law, E.g., Adding Statutory Notice and Takedown and Incentives to Cooperate Against Repeat Infringers: The E-Commerce Law 2000 (Republic Act No. 8792) establishes that service providers can be liable for direct infringement, for inducing or causing another person or party to commit any infringement or other unlawful act, or vicarious infringement, i.e., knowingly receiving a financial benefit directly attributable to the unlawful or infringing activity. It also provides in turn a limitation on liability for service providers who “merely provide access” to an “electronic data message or electronic document” that infringes copyright, provided that the service provider does not have actual knowledge of infringement, or is not aware of the facts or circumstances from which infringement is apparent. These provisions are helpful in setting forth important copyright liability principles. However, the law does not provide for a statutory notice and takedown system (e.g., in the

of ownership to ease burdens on right holders when enforcing their rights, (h) strengthening border measures, (i) providing for *ex parte* civil searches as required by TRIPS, (j) providing for disclosure of information to right holders to assist in investigations of infringement, (k) allowing “sampling” to efficiently deal with massive seizures of pirated materials, and (l) lengthening the statute of limitations so it is not tied to the vagaries of the court timetable but rather is tied to the initiation of the case by the right holder/claimant. All of these improvements together, if passed and implemented, would result in one of the most modern copyright laws in the world. President Macapagal-Arroyo’s 2006 letter memorandum to enforcement agencies implored the legislature to pass modernizing legislation: “[c]ontinue to provide the Executive and the Legislative with policy and legislative proposals in order to update the country’s intellectual property laws, ensuring that these are in compliance with the country’s existing international obligations embodied in treaties and other agreements.” Philippine creators and society stand to gain much from the passage of a strong copyright law and adequate copyright enforcement. Indeed, Philippine President Gloria Macapagal-Macapagal-Arroyo has said as much in a speech in 2006 to mark the U.S. Trade Representative’s recognition of the Philippines’ improved standing on IPR, stating:

“[W]hile we appreciate the U.S. government’s recognition of our efforts to protect intellectual property rights, we mustn’t lose sight of the fact that protection of IPR is first and foremost in the interest of the Filipino people.”

¹⁵ The proposed modifications to SB 880 are:

- First, IIPA proposes a systematic approach to exceptions and limitations in the IP Code, which would consist, on the one hand, in the extension of the application of the “three-step test” to all limitations on and exceptions to copyright provided for in Chapter VIII, and, on the other hand, in extending, in a *mutatis mutandis* manner, the application of copyright limitations and exceptions to related rights (applying the technique of Article 17 of the WPPT). Such modifications would offer a fuller guarantee for compliance with international norms.
- Second, one provision in need of clarification concerns the exclusivity of the “making available” right for related rights so that it is clear that the right of remuneration in Section 209 of the current IP Code does not and will not apply to acts of “making available” a sound recording or performance. The easiest way to accomplish this is to modify Section 209 to expressly provide that it shall not disturb the exclusivity in the “making available” right (proposed Section 208.4 and existing Section 203.5). Another way to approach the problem is by amending Section 202.9 (the definition of “communication to the public” in the context of related rights) to add to the end of the first sentence of Subsection 202.9: “and other than making them available to the public... .”

¹⁶ In respect of the addition to the copyright bill which would impose mall liability, we understand that Senator Manny Villar (now a Presidential candidate) has been opposed to this provision. IIPA notes that President Macapagal-Arroyo issued a memorandum in 2006, and a directive for 2008 instructing the IPO to pass mall owner liability. IIPA representatives would be pleased to sit down with Senator Villar to address any concerns he may have with the mall owner liability provision, which simply confirms liability for indirect infringement when the mall owner knows about and materially contributes to infringing activity.

¹⁷ IIPA takes this opportunity also to note that the Philippines should enact an organized crime statute such as that in Hong Kong (the Organized and Serious Crimes Ordinance), or other models, including a mechanism by which to trace and seize assets tied to various crimes, including crimes involving copyright or other IP.

absence of court ordered relief) or policies to effectively and fairly address repeat infringers. Instead, service providers must only abide by “injunctive relief issued by a court ... requiring that the service provider take or refrain from actions necessary to remove, block or deny access to any material, or to preserve evidence of a violation of law.”

A systematic and effective approach to address the problem of Internet piracy should be adopted in the Philippines as to intermediaries such as ISPs as well as websites or people providing or facilitating distribution or access to pirate materials. Such a legal system should include a notice and takedown system similar to that in effect in many countries, whereby service providers take down or block access to infringing material or activities or block access to users engaging in infringement: if they know of infringement; are aware of circumstances from which infringement is apparent; or are notified of alleged infringing activity. It should also, as discussed, provide incentives for ISPs to cooperate in investigations into newer forms of online piracy, such as P2P file sharing, torrent sites, cyber lockers, and should likewise ensure that ISPs have in place effective and fair policies to be applied to deal effectively with cases of repeat infringers.

Government Legalization: Regarding government acquisition of legitimate software, Executive Order No. 262, 2000 entitled “Providing Policies, Guidelines, Rules and Regulations for the Procurement of Goods/Supplies by the National Government” was promulgated. The EO prohibits government from purchasing illegal software and allows only suppliers of legitimate software to participate in government bidding, but the EO has yet to be fully implemented. The State budgets allocated for government procurement of IT products simply does not enable the bundling of legitimate software. The government should fully enforce this Order and avoid contrary proposals that have reportedly been considered which would restrict or create preferences as to technology choices by government agencies.

Enact Anti-Camcording Legislation: House Bill 5669, the Anti-Camcording Bill, which would prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited, passed the House in a third reading in February 2009. While illegal copying is of course already a violation of the Philippines IP Code, the added protection against unauthorized use of the equipment in the theater will obviate the need to prove infringement in order to combat this highly damaging activity. The corresponding Bill SB 3529 made its way through the Senate following a third reading and final reading in January 2010. The House and Senate versions of the legislation will be reconciled before being forwarded to President Macapagal-Arroyo for signature. IIPA urges swift signing of the Bill into law once reconciled and publication of the law in the official gazette which will have a very positive effect against illegal camcording in the Philippines and will set a positive example for the region and worldwide.

Enact Cybercrime Prevention Act: In January 2010, the House of Representatives passed on third and final reading House Bill 6794, known as the Cybercrime Prevention Act of 2009. It seeks to address crimes committed via the Internet such as child pornography, illegal hacking of websites, phishing, data fraud, and the like by imposing corresponding penalties.¹⁸ It is unknown whether this Act includes a provision on intellectual property similar to that contained in the Council of Europe Cybercrime Convention, but hopefully, the law will afford protection consistent with the COE Cybercrime Convention which contains a prohibition on transmitting copyright material on the Internet without authorization.

Ensure Transparency in the Consultations Regarding Any Moves Toward Collective Licensing or Implementation of Fair Use Guidelines as Regards Published Materials: In 2008, the Philippine government announced the formation of FILCOLS to act as a collecting society for publishers and authors. Though there appear to have been some discussions, efforts toward establishing a collective licensing model in the Philippines must at a minimum include an open and transparent consultation process with all affected foreign and domestic right holders regarding the parameters for such an organization. The collecting society's practices should conform to certain

¹⁸ Tom Noda, *Posts Tagged ' House Bill (HB) 6794 '*, January 21, 2010, at <http://computerworld.com.ph/tag/house-bill-hb-6794/>.

criteria, including that collective licensing must be voluntary, must not interfere with market forces and must permit adequate, appropriate and fair remuneration to publishers and authors, must not set arbitrary percentages for licensed uses (e.g., 10% of a chapter or book), and should not result in condoning the practices of copy shops engaged in unauthorized copying of books. The Philippine government should also engage in a transparent consultation process regarding the adoption of fair use guidelines. Despite protestations alleging lack of U.S. publisher interest and cooperation, it remains the case that U.S. publishers have yet to receive adequate information from FILCOLS as to the organization's structure and proposed licensing practices to allow publishers to objectively assess its viability as a reprographic rights organization.

Avoid Burdensome Restrictions on Collective Management of Music Rights, and Allow Collective Management Organizations to Operate Freely in a Commercial Manner: Unfortunately, in 2009, the Philippine government continued to take steps to get in the way of free contractual relations between music companies and collective management organizations (CMOs) which collect public performance royalties on the broadcast or communication to the public of sound recordings. Specifically, in 2008, IPO Philippines held consultations regarding the control of CMOs and forced them to stop their commercial operations. The chief record producers' licensing entity (MVP) has as a result been prohibited from conducting its licensing activities on behalf of record companies since October 2008. CMOs should be permitted to operate in a commercial manner, free from interference from the government.¹⁹

Other Draft Legislation: The Congress of the Philippines went on recess on February 5, 2010. Prior to that, there were several other copyright-related bills being watched by IIPA. IIPA states in general its support for Senate Bill 1572, An Act Strengthening the Enforcement of the Copyright Protection of Intellectual Property Right Owners of Computer Programs Creating For This Purpose the Business Software Copyright Piracy Enforcement Unit etc. IIPA also states its support for Senate Bill 684, An Act Requiring the Teaching of Intellectual Property Ownership Particularly Copyright Law as Part of the Curriculum of All Primary, Secondary and Tertiary Schools In the Country, and For Other Purposes. IIPA was concerned regarding reports of consideration of a Free Open Source Software bill which would require government offices to use open source software. Passage of that bill would deny technology choice regarding software usage and ultimately would stunt the growth of the IT industry in the Philippines.

MARKET ACCESS ISSUES

Restrictions on Advertising: Under Presidential Decree 1986, advertising on pay television is currently limited to ten minutes per hour of programming. Restricting advertisement placement tends to reduce the utility of advertising, leading to a reduction in advertising-based revenue and further impeding the development of the television industry in the Philippines.

TRAINING AND PUBLIC AWARENESS

IIPA members continued to provide and participate in various public awareness and training activities in the Philippines in 2009. Past trainings have included sessions on illegal camcording, bringing successful prosecutions in the Philippine courts, and adequate software asset management. The Motion Picture Association continued anti-camcording training for cinemas in the metro Manila area in 2009. BSA regularly conducts capacity-building seminars for judges, prosecutors and law enforcement. BSA has also recommends these judges, prosecutors and law enforcers to attend seminars abroad sponsored by other organizations. The BSA in cooperation with the American Chamber of Commerce and the IP Coalition held a capacity-building seminar and workshop on February 2009 which included participation by law-enforcement officials and Department of Justice Prosecutors, and involved a workshop to identify problems encountered during preliminary investigation proceedings by stakeholders. The prosecutors in

¹⁹ There was a set of Draft Guidelines for the Accreditation of Collective Management Organizations issued by the IP Office back in 2008. Those Draft Guidelines should be scrapped as having potentially been detrimental to existing licensing mechanisms for music.

turn also identified problem areas which must be addressed by law enforcers and stakeholders to ensure a smooth preliminary investigation process.

GENERALIZED SYSTEM OF PREFERENCES

The Philippines currently participates in the U.S. GSP program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that the Philippines meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” In 2008, more than \$913 million of goods, or almost 10.5% of all goods imported in the United States from the Philippines, enjoyed duty-free treatment under the GSP code. As noted, in 2009, more than \$733.6 million of Philippine goods, or 10.8% of the Philippines’ total imports to the U.S. enjoyed duty-free treatment under the GSP code. IIPA is considering recommending a review to determine whether the Philippines meets the discretionary criteria in this U.S. law. The Philippine government has recognized the significance of the GSP program to its economy and the need to improve its IPR record in order to claim eligibility under the program.