

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Watch List in 2018.<sup>1</sup>

**Executive Summary:** Thailand was recently lowered to the Watch List partly in recognition of recent reforms undertaken by the Royal Thai Government intended to help Thailand meet the challenges of the digital age, including amendments to the Computer Crime Act (CCA) that include an administrative, no-fault remedy to disable access to infringing content. While the practical implementation of the procedure has so far been disappointing, IIPA is in principle encouraged by this development as well as other recent measures introduced by the Royal Thai Government that indicate it is beginning to recognize the seriousness of its growing online piracy problem and the importance of a thriving creative industry. Thailand, however, must still update its legislative framework to bring it in line with international norms.

Thailand should not rest on its laurels, but instead build on recent reforms to address a host of serious problems that are damaging the creative industries. Worsening online and mobile piracy threatens the sustainability of legitimate digital platforms in Thailand. The movie industry estimates that there are ten times more page views to top piracy websites than visits to the top legitimate platforms in Thailand. As in much of the region, Illicit Streaming Devices (ISDs) are proliferating. Physical piracy (mostly in malls and tourist areas) remains harmful, particularly because Thailand is one of the few remaining markets in Asia in which physical sales of legitimate works provide substantial revenues. Unauthorized camcording of films (especially audio feeds) continues to damage the market for films, and the government has not taken any action to address the continued operation of rogue collective management organizations (CMOs), which undermine the market for music, negatively impacting both users and music rights holders, and contribute to crime, corruption, and the erosion of public order.

More needs to be done to address these mounting concerns. Thailand should ensure the CCA remedy is effectively implemented and use all available tools to take action against online piracy. Thailand must initiate more upstream investigations that target criminal organizations at the root of much of the piracy; eliminate irregularities in enforcement; and ensure courts impose deterrent penalties against infringers. IIPA urges Thailand, as it proceeds with its current copyright law revision process, to provide adequate incentives for online intermediaries to cooperate with rights holders to address online infringement; and implement best practices to combat infringement, such as requiring Internet Service Providers (ISPs) to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content. Thailand should also introduce a measure addressing the establishment and governance of CMOs to bring order to the chaotic panoply of music collecting societies that are distorting the market. Finally, to further its ambition to accede to the WIPO Internet Treaties, Thailand must ensure that it adequately protects against the circumvention of technological protection measures (TPMs) and that it adequately protects rights management information (RMI).

## PRIORITY ACTIONS REQUESTED IN 2018

### Enforcement

- Ensure proper implementation and application of the CCA regarding actions to combat pirate websites, including ensuring expeditious and non-burdensome procedures.

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<sup>1</sup>For more details on Thailand's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Thailand's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



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

## Legislative

- Address shortfalls to Copyright Act in order to:
  - Ensure that the proposed provisions on intermediary liability provide adequate incentives for online intermediaries to cooperate with rights holders to address online infringement, and implements international best practices to combat infringement, such as requiring ISPs to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.
  - Ensure provisions on TPMs include coverage of access controls, prohibit trafficking in circumvention technologies, devices, components, and services, and that both the TPM and RMI provisions do not permit overly broad exceptions.
  - Ensure (through revision of the existing camcording provisions) that measures addressing camcording effectively prohibit possession of an audiovisual recording device in an exhibition facility with the intent to make or transmit an audiovisual work, in whole or in part, and that exhibition facilities are given standing to bring complaints.
  - Ensure that any exception does not run afoul of international standards, including the Berne Convention and TRIPS "three-step test."
  - Enact a landlord liability provision, such that there will be adequate civil, administrative, and criminal remedies against those whose premises are used to engage in commercial infringement of copyright.
  - Ensure copyright offenses are non-compoundable.
  - Extend the term of copyright protection consistent with the global trend to 70 years from the death of the author, or for sound recordings (and performances) at least 70 years from publication.
  - Bring order to the multitude of CMOs currently active in the market to protect rights holders and users from rogue CMOs, including by adding a measure addressing the establishment and governance of CMOs.
- DIP should take measures to ensure the accuracy of its copyright registration system, such as by developing a Copyright Registration Database System allowing examination of the accuracy of copyright owners and registered content to ensure accuracy and protect consumers from rogue CMOs.

## Market Access and Related Issues

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

## PIRACY AND ENFORCEMENT UPDATES IN THAILAND

Prior IIPA reports on Thailand contain a more detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>2</sup> Overall, piracy in Thailand, especially online piracy, continued to cause damage to legitimate rights holders and licensees in 2017. Rights holders continued good cooperation with willing Royal Thai authorities, who assisted with rights protection, and offered and participated in many trainings and IP-related events throughout the year.<sup>3</sup>

**Worsening Internet and Mobile Piracy:** As broadband and mobile 3G and 4G services become more widely available, with faster speeds, growing infrastructure, and lower Internet subscription fees, there are opportunities for growth of a legitimate online and mobile marketplace for copyright works in Thailand.<sup>4</sup> Almost 44 million people use fixed Internet in Thailand.<sup>5</sup> Access to the Internet, including through both fixed and mobile Internet access, continues to increase.<sup>6</sup> Smartphone use in Thailand is very high, and Thailand's Internet users spend among the highest number of hours online compared to users around the world.<sup>7</sup>

Notwithstanding the expanding availability of legitimate services for music and audiovisual materials, the increasing access to broadband Internet, particularly on mobile devices, has led to escalating piracy of recorded music, television content, video games, published materials, and broadcasts. As noted above, the movie industry estimates that there are ten times as many page views to top piracy services as there are page views to the top legitimate services in Thailand, ranking among the worst in Asia.<sup>8</sup> Legitimate services are simply unable to compete. The use of social media is on the rise, and has become a popular platform for distributing and accessing pirated content. Streaming unauthorized content is the most popular form of piracy, whether through social media and streaming websites, apps, or ISDs. The Thai site *IpPlayBox.tv* (later rebranded as *Doo4k*), and related sites,<sup>9</sup> which were among the websites cited by IIPA members in their "notorious markets" Out-of-Cycle Review (OCR) filings to the U.S. Trade Representative in the fall of 2017, are portals that allow users to download apps that provide access to pirated content, including the latest run motion pictures, television content, sporting events, and live streamed PPV events and concerts.<sup>10</sup> Free programs that allow users to download infringing content from YouTube (i.e., stream ripping) are an increasing source of piracy. These include *YouTube Downloader YYTD*, *Keepvid*, *Flyto.biz*, *Flyv2mp3.org*, and *Convert2mp3.net*, as well as mobile apps such as *Video Downloader Lite Super – Vdownload* on iOS and *TubeMateYoutube Downloader* on Android. BitTorrent index and tracker sites, cyberlockers, and BBS/forums also remain problematic, although the popularity of peer-to-peer (P2P) networks, including BitTorrent, has declined mainly due to the increase in stream ripping. Internet Protocol Television (IP TV) has also become a popular platform for digital piracy.<sup>11</sup>

The motion picture industry has reported that many piracy websites are among the top 500 most accessed sites in Thailand, according to Alexa rankings. These sites specifically target Thai Internet users, and include Thai as

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<sup>2</sup>See, e.g., IIPA, *Thailand*, 2017 Special 301 Report, February 9, 2017, at <https://iipa.org/files/uploads/2017/12/2017SPEC301THAILAND.pdf>.

<sup>3</sup>For example, the motion picture industry participated in several events and trainings, most relating to the challenges of combatting digital piracy.

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

<sup>5</sup>The number of Internet users in Thailand in 2016 is available at [http://ttid.nbt.go.th/internet\\_db.html](http://ttid.nbt.go.th/internet_db.html).

<sup>6</sup>The percentage of individuals using the Internet in Thailand increased from 39.3% in 2015 to 47.5% in 2016, and active mobile broadband subscriptions are now almost 95 per 100 inhabitants, according to *Measuring the Information Society Report 2017*, International Telecommunications Union, at p. 145, available at [https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017\\_Volume1.pdf](https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017_Volume1.pdf).

<sup>7</sup>As of March 2016, smartphone use was over 50% of all mobile phone users in Thailand according to emarketer. See <http://www.emarketer.com/Chart/Smartphone-vs-Total-Mobile-Phone-User-Penetration-Thailand-by-Region-March-2016-of-population/203960>. For an overview of digital trends in Thailand, see <http://my-thai.org/digital-southeast-asia-thailand-2017-overview/>.

<sup>8</sup>Studies have shown that such websites containing copyright piracy materials also peddle in high-risk advertising, including malware or click-fraud schemes.

<sup>9</sup>Related sites that can be accessed with a subscription to *Doo4k* include: *HDPlayBox.com*, *IPSportClub.com*, *4KPlaybox.com*, and *ConnexIPTV.com*.

<sup>10</sup>The site, which is extremely popular, requires users to pay a monthly subscription fee and is estimated to have 300,000 active subscribers and draw revenues of US\$2.3 million a month.

<sup>11</sup>IP TV allows streaming of television content over the Internet, and the illegal content is typically distributed using BitTorrent while collecting a monthly fee from subscribers. The television content may be streamed through a stand-alone server streaming the content to subscribers through a proprietary website that is typically difficult for enforcement authorities to trace, or through caching in a cloud service, such as Google Drive or openload.co, which are very difficult for enforcement authorities to trace.

well as foreign motion picture and television content. These include *Movie2Free.com*, *037HD*, *Mastermovie-HD.com*, *MovieHD-Free.com*, *Siambit*, *ThailandTorrent*, *NungMovies-HD*, *Nanamovies*, and *BitDed*. For the music industry, the infringing site *olozmp3.net*, which attracts more traffic than any licensed music service, is a significant problem. Illegal apps on smartphones, readily available from Apple iTunes and the Google Play Store, are increasingly popular among Thai users to access vast amount of pirated content either for free or at a very low cost. This rampant piracy continues to take its toll on the market for legitimate creative content.<sup>12</sup> Increasingly, piracy websites are using content delivery networks and cloud services such as Google Drive, making identification of website operators and server locations very difficult. For the motion picture industry, cooperation with ISPs, especially with global social media platforms, has been good (the takedown rate is 93%), but, once taken down, infringing links pop up immediately. From the music industry's perspective, cooperation with ISPs has been lacking, with a takedown rate of only around 50% from January to September 2017, and, again, once content is taken down, links to the same infringing content reappear immediately. Stronger action is needed against non-hosted infringement and piracy sites hosted outside of Thailand.

IIPA is encouraged by actions the government has taken in an effort to improve the copyright ecosystem in the online and mobile environments such that it is able to support legitimate business models. In particular, recent amendments to the CCA, which entered into force in May 2017, permit disabling of access to infringing websites. Test cases are currently in process, and early indications are that the procedures are very slow, lack transparency, and are overly burdensome. Enforcement authorities need to establish procedures and issue practical guidelines as soon as possible to ensure cases are processed promptly and effectively.<sup>13</sup> In June 2017, the Royal Thai Police Economic Crimes Suppression Division conducted a raid of the suspected operator of *newmovie-hd.com*, a pirate video streaming site popular in Thailand and around the world, and took down the site.<sup>14</sup> Additional criminal cases against operators of sites that infringe the copyrights of music rights holders are still pending. Notwithstanding some meetings organized by the Internal Security Operations Command, rights holders do not yet have an agreement in place with intermediaries to address infringement on their services. DIP is urged to not only make further efforts to facilitate discussions between rights holders and intermediaries, including ISPs, payment processors, domain registers, advertising services (e.g., DAAT), and search engines, but also to take more proactive steps and apply more pressure on intermediaries to address infringement on their services.

DIP has introduced an intellectual property roadmap, including a call to intensify efforts to combat piracy. To further this goal, the Internal Security Operations Command should proactively spearhead more digital piracy investigations, with an emphasis on upstream criminal organizations.<sup>15</sup> The new Suppression of Intellectual Property Infringement Subcommittee should also encourage improved standards in investigations for computer forensics and electronic evidence gathering so that investigations are not delayed pending court orders for digital forensics request from third parties such as ISPs or payment processors. Further training and education for law enforcement authorities in handling digital piracy cases, particularly to improve understanding of newer technologies such as stream ripping and content delivery networks, is also needed. Coordination with other jurisdictions must also be improved because Internet piracy crosses borders.

**Retail and Hard Goods Piracy Still Prevalent:** Physical piracy is decreasing mainly due to the shift to online and mobile platforms. Nonetheless, physical piracy remains a significant concern, harming local and foreign

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<sup>12</sup>For example, the music market total revenues in Thailand decreased by nearly 21% in 2016, including a 15% decline in digital sales, continuing an alarming trend of year-on-year decreases in Thailand's music market.

<sup>13</sup>In 2017 TECA filed three test cases with the Technology Crime Suppression Division (TCSD) and the Economic Crime Suppression Division (ECSD). The cases are still pending as the TCSD and ECSD are revising and refining the forms and procedures. The process has been burdensome, lacks transparency, is very slow and has been hampered by a lack of coordination with different divisions in the government.

<sup>14</sup>*Newmovie-hd.com* has a global Alexa rank of 2,494 and a ranking in Thailand of 17. There were an estimated 1,127 on the site, which, according to SimilarWeb, attracted 21.5 million visitors in the month of January 2017 (an increase of 16% from December 2016). The website enables streaming of embedded videos from Google Drive in either HD or SD quality. The site was also using a U.S.-based Content Delivery Network service to hide its hosting location. A mirror website (*moviehd-master.com*) was also taken down. An arrest warrant has been issued against the operator of the site, and the police should follow through with the arrest while the public prosecutor moves forward with the prosecution.

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

creators alike. Such piracy still finds its place in the malls and on the streets in Thailand, particularly in tourist areas. Areas notorious for piracy include, in Bangkok: Panthip Plaza; Klong Thom; Saphan Lek; Baan Mor Shopping Area; Patpong; Kao-Sarn Road (where reports showed Bruno Mars finding his pirated records on sale blatantly and openly while on tour in March 2014); Silom; Mah Boon Krong (MBK) Center; Sukhumvit Road; and Bobae Market (a wholesale market that sells to street vendors). Also noted for piracy are Rong Klua Market, Sakaew, Samui Island, Hua Hin, Phuket, Pattaya, and Chiangmai. The Royal Thai Government has itself designated many of these markets "Red Zones" and "Yellow Zones" to indicate that it views these markets as vulnerable to piracy activities. Pirated films (including Thai-dubbed versions of blockbuster titles), music, video games, and published materials remain available. The "IT" malls conduct hard disk loading of content onto any device. Further, there are indications that infringers have moved to newly emerged Sunday and night markets.

To address hard goods piracy, industry reports that Royal Thai Government authorities have conducted raids. Unfortunately, those raids have generally not been followed by upstream investigations to target the criminal organizations at the root of this piracy. To the extent mall owners are uncooperative, the government has on prior occasions indicated that, even in the absence of landlord liability in the law (which was not included in the amendments to the Copyright Act), criminal action can be brought against mall owners; however, we are unaware of any actions to date. Unfortunately, hard goods piracy takes place at certain government-supported activities or events, such as Silom Walking Street on Sunday. The Royal Thai Government should review the effectiveness of its anti-piracy efforts (including the designations of "Red Zones" and "Yellow Zones"), and seek improvements.

**Illicit Streaming Device (ISD) Piracy Growing:** ISDs are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes around the world, and they have become an increasing problem in Thailand. China is a hub for the manufacture of these devices. ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The devices are either pre-installed with apps that facilitate infringement or include instructions for users to easily obtain apps to access unauthorized motion picture and television content. These apps allow users to connect to a supporting over-the-top (OTT) online infrastructure, including foreign piracy sites (usually hosted in mainland China), that provide users with instant access to infringing audiovisual content. ISDs sell on e-commerce websites such as *Lazada.co.th*, but are also made available through traditional retailers found in popular malls across Bangkok, and are often promoted and/or advertised to enable infringement of copyright or other illegal activities. Consequently, Royal Thai authorities must increase enforcement efforts, including cracking down on piracy apps and on vendors who preload the devices with apps that facilitate infringement, and taking action against key distribution points for devices that are being used illegally. Thailand should also amend its legal framework to specifically address this problem.

**Camcorder Piracy Traced to Thailand Continues to Harm Film Market:** The problem of camcording of films in movie theaters in Thailand remains a concern of the movie industry in 2017. Pirate syndicates continue to minimize risk by focusing almost exclusively on Thai audio captures, which are then added to video camcords found on the Internet. In 2017, nine illicit recordings of MPAA member films were traced to Thai theaters, down from 23 in 2016. While this trend is encouraging, continued vigilance is needed to make these gains sustainable. Local Thai films are camcordered within days of their release in the movie theater. Increasing broadband Internet and 3G connections in Thailand mean faster uploads to the Internet of movies illegally camcordered there. These titles are then made available to the world through various Internet piracy rings, becoming pirated hard goods within a matter of days. In addition, the rise of live streaming content over the Internet has contributed to the growing camcording problem. If strongly implemented, the Copyright Act provision that deems camcording an infringement of copyright

could help.<sup>16</sup> While the movie industry conducted four training sessions for 221 cinema managers and staff in 2017, enforcement remains weak. Only one perpetrator was arrested in 2017.

**Book Piracy Problems Remain:** The growth of the book and journal publishing industry is hampered by unauthorized commercial photocopying in and around university campuses and book piracy. Pirated materials include academic journals, chapters of reference books, language dictionaries, travel guides, and history books, and typically occur on a print or copy “to order” basis. Pursuing litigation against producers of counterfeit/pirated books remains problematic, as the process is typically plagued by delays.

**Pay-TV Piracy (Cable and Satellite) and Public Performance Piracy:** Piracy of cable and satellite broadcasting signals in Thailand, which involves the unauthorized transmission or retransmission of U.S. programming over systems from original cable or satellite transmissions, remains a problem in Thailand, especially outside of Bangkok. While the National Broadcasting and Telecommunications Commission (NBTC) was established in September 2011, and established a Broadcasting Committee to handle regulation of the broadcasting industry, there is not yet effective government supervision of pay-TV content. In recent years, unlicensed new operators of satellite channels (showing DVDs of recent films not yet released in Thailand) have entered the industry with business models based on stolen content, and have achieved substantial business success without any interference by Royal Thai Government authorities. These channels make stolen content available not only in Thailand but to other countries covered by satellite transponder signals as well.<sup>17</sup> Pay-TV content also continues to be freely stolen and re-sold by many provincial cable operators.<sup>18</sup> Public performance piracy also continues to be a problem, with many hotels outside Bangkok retransmitting unauthorized videos over in-house movie systems, and with bars in tourist areas openly exhibiting films without authorization. Bars and restaurants have added “private” rooms to screen motion pictures illegally.

**Lack of Overall Effective Civil Remedies or Criminal Penalties in the Courts:** While the establishment of the Thai IP&IT Court in 1998 encouraged great hope for a sustained workable judicial system to protect copyright, in recent years, both civil judgments and criminal convictions have failed to meaningfully deter further infringements for most of the copyright industries. Civil judicial remedies are no longer effective for most industries because civil damage awards are far lower than costs and attorney’s fees associated with bringing the case. Further, neither additional damages, punitive damages, nor pre-established (statutory) damages are available. Civil procedures are extremely lengthy with an average pendency of three years from filing to judgment. The burdens of proof in Thailand, from proving copyright ownership to losses and damages, do not appropriately take into account presumptions and are extremely burdensome, especially since damages awarded in civil cases are so low. Provisional measures are very costly and require evidence that is overly burdensome to produce.<sup>19</sup> Also, because upstream investigations are rare, most infringers appearing before the court are pirate vendors at the lower end of an organized criminal enterprise. In criminal cases, convictions almost always lead to suspended sentences. Sentencing guidelines should be issued, adopting minimum sentences that provide a real deterrent to infringement. The practice of rotating out IP&IT court judges with judges from the provincial courts has eroded the specialized expertise of the IP&IT Court. As a result, copyright cases are often heard by judges with little understanding of copyright law or the copyright industries. We recommend the IP&IT Court build expertise by retaining specialized judges trained in adjudicating IP cases.

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<sup>16</sup>Unfortunately, as set forth below, the provision is not as helpful as it could be because it requires a link between the camcording act and a copyright infringement instead of establishing a “time-and-place” violation as all other countries adopting laws in this area have done.

<sup>17</sup>These unauthorized channels are well known to the government and also harm the local pay television industry; thus, there should be sufficient incentive to act against these illegal operators.

<sup>18</sup>The industry association Cable and Satellite Broadcasting Association of Asia (CASBAA) has attempted to ensure that in broadcast regulations, an explicit condition for a broadcast license includes that “the operator must not commit, permit or suffer any conduct which is an infringement of any intellectual property right,” but to our knowledge, thus far, no such conditionality has been accepted.

<sup>19</sup>Section 65 of the Thai Copyright Law states, “In case there is an explicit evidence that a person is doing or about to do any act which is an infringement of copyright or performer’s rights, the owner of copyright or performer’s rights may seek the injunction from the court to order the person to stop or refrain from such act.” Unfortunately, the measure is not effective and has created burdensome and costly hurdles to copyright owners applying for provisional measures.

The Money Laundering Prevention and Suppression Act (2013) now includes IP crimes as a predicate act for money laundering investigations, potentially leading to significant criminal fines, imprisonments, and asset seizure. It could be a useful tool, but due to the high evidentiary burden, this law has not been used to effectively combat copyright infringement. IIPA hopes that prosecutors and judges are able to find ways to more effectively use this tool in the future to build key cases involving copyright infringement.

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

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

**CCA Amendment:** In a significant development, the 2016 Amendment to the Computer Crime Act B.E. 2550 (2007) added IP infringement as a predicate crime in Section 20, permitting injunctive relief against ISPs to disable access to infringing websites hosted outside of Thailand. The Amendment entered into force on May 25, 2017, and as indicated above, test cases for this provision are underway. IIPA looks forward to working with the Royal Thai Government to ensure this provision is implemented in a prompt and transparent manner to provide an effective remedy against foreign piracy sites.

**Copyright Act Revisions:** Last year’s submission noted several deficiencies in Thailand’s recently amended Copyright Act, including failure to effectively address online piracy; lack of adequate prohibitions against circumvention of TPMs and protections for RMI, important benchmarks to implementation of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), neither of which Thailand has yet acceded to or ratified; and failure to effectively address unauthorized camcording of an audiovisual work in a movie theater. The Copyright Act also unfortunately contains an overly broad exception for disabled persons, and does not include a needed landlord liability provision. IIPA is aware that the Royal Thai Government is considering revisions to the Copyright Act and encourages the government to adequately address these deficiencies. IIPA understands that Thailand has just recently publicly released certain draft amendments to the Copyright Law, and looks forward to reviewing the amendments as soon as possible.

The following are critical issues with the Copyright Act that should be addressed as part of Thailand’s ongoing Copyright Act amendment process to ensure that Thailand achieves its stated goal of a modernized copyright law<sup>20</sup> that brings Thailand closer into compliance with its international obligations and implements the WCT and WPPT:

- **Service Provider Liability Is Ineffective:** Section 32/3 of the Copyright Act, which requires service providers subject to a court order to stop infringing acts or to remove infringing works, functions as little more than a court-ordered notice and takedown (if that).<sup>21</sup> ISPs must remove infringing works or stop infringement upon a rights

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<sup>20</sup>During the previous amendment process, the drafters had discussed repealing Section 66 of the Copyright Act to ensure that copyright offenses are non-compoundable. The Royal Thai Government should take this step.

<sup>21</sup>Unlike most countries in the world and contrary to global best practices, this provision has not allowed for a notice and takedown approach. This approach, however, could permit a remedy against non-hosted infringement if a court were to order an ISP to stop infringing acts, which could be executed through disabling access to infringing content. It provides for liability for Internet Service Providers (ISPs) that directly infringe, but in cases in which the ISP does not

holder obtaining a court order, and the evidentiary burden for rights holders has proven to be substantial.<sup>22</sup> IIPA understands that DIP is currently revising this section, and hopes that new intermediary liability provisions will include adequate incentives for ISPs to cooperate with rights holders to effectively address online infringement, rather than putting the onus entirely on rights holders. The amendment should account for the evolution of infringing behavior due to technological advancements and implement best practices to combat infringement, such as requiring ISPs to implement reasonable measures to prevent infringement in addition to taking down the infringing material. The amendment must also authorize the judiciary to issue injunctive relief orders that direct ISPs to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content. Furthermore, the safe harbors must not interfere with remedies available to rights holders under the CCA. IIPA urges DIP to enact intermediary liability provisions that will ensure an effective remedy to address the problem of online infringement.<sup>23</sup>

- **Technological Protection Measures Provision Should Cover Access Controls and Trafficking, and Should Not Permit Expansive Exceptions:** TPMs are key enablers of new legitimate business models for content distribution in the digital and online environments. Accordingly, their proper protection is necessary to shape a healthy digital marketplace for Thailand. The current Copyright Act unfortunately falls short of providing adequate protection and fails to meet the obligations of the WCT and WPPT in critical ways, and it is hoped that the new amendments will address these deficiencies. IIPA understands that Thailand intends to join the WCT and WPPT, which would be a positive step, but Thailand must first address the following shortcomings to ensure proper implementation:
  - **Access Controls:** First, Section 53/4 outlaws circumvention of a TPM only when carried out by someone “knowing that such act may induce or cause the infringement of copyright or performer’s rights.” Technical amendments are needed to add the phrase **“or may result in unauthorized access to a work or object of related rights”**. Otherwise, the intention of the drafters to cover access controls in the definition in Section 3 is for naught.
  - **Trafficking:** Second, Section 53/4 of the amendments appears to cover only the act of circumvention (“avoidance”) of TPMs, and does not explicitly outlaw trafficking in circumvention devices, technologies, and components.<sup>24</sup> The trafficking offense should be confirmed in implementing regulations, through adopting a sufficiently broad definition of “avoidance”; otherwise, technical amendments should be passed to ensure trafficking is covered. Coverage of trafficking violations is found in U.S. law and is necessary for “adequate” and “effective” measures to protect TPMs, which is required by the WCT and WPPT.
  - **Exceptions:** Some of the enumerated exceptions in Section 53/5 may be acceptably narrow, but others must be eliminated or reworked to preserve the adequacy and effectiveness of protection. For example, Section 53/5(1), allowing circumvention for any exception to copyright under the law, is overly broad and undermines needed protections, especially for access controls. The exception in Section 53/5(7) also risks

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control, initiate or order the infringement, the ISP is essentially shielded from liability, even in the case of constructive knowledge of infringing activities on its service. Furthermore, the definition of “service provider” includes the qualification “whether the services [to access the Internet] are provided on its behalf,” raising questions regarding whether the exemption of liability applies only to passive intermediaries.

<sup>22</sup>For example, copyright owners must present the court with evidence like sworn affidavits of copyright ownership, evidence of infringement, and guarantees for any collateral damages; then an *ex parte* preliminary trial ensues until the court is satisfied with the copyright owners’ claim. ISPs in the meantime have no responsibility except to wait for an order from the court. Industry is already finding this evidentiary requirement too burdensome. The movie industry reports difficulties in seeking a court order for ISPs to take down infringing content, with one request granted and two requests denied for insufficient evidence. Unfortunately, some ISPs subject to the granted order have not complied because they claim the infringing content is not hosted on their system. It is critical for Thailand to ensure that the process for obtaining court orders for ISPs to remove infringing content is efficient and effective.

<sup>23</sup>IIPA encourages Thailand to look at how Europe has addressed this problem, in particular, through Article 8.3 of the European Information Society Directive, which permits injunctive relief against intermediaries to remove access to infringing content.

<sup>24</sup>Preferably, this Section would outlaw anyone who manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components which 1) are promoted, advertised or marketed for the purpose of circumvention, or 2) have only a limited commercially significant purpose or use other than to circumvent, or 3) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of a technological protection measure (TPM).



undermining necessary protections because it appears to allow circumvention by educational, archival, library, or public broadcasting entities in fairly broad circumstances.

- **The Exception for Rights Management Information (“RMI”) Should Be Narrowed:** The exceptions to the protections for RMI appear to be extremely overbroad, which risks undermining important protections for rights holders and raises serious questions regarding consistency with the three-step test governing exceptions and limitations under the WCT and WPPT treaties.<sup>25</sup> IIPA urges the Royal Thai Government to narrow or, if necessary, eliminate these exceptions to bring them in line with international standards.
- **Camcording Provision Should Be Revised:** The provisions intended to outlaw unauthorized camcording of motion pictures in Thailand unfortunately fall well short of model approaches provided to the Royal Thai Government on numerous occasions because they restate what is already true: namely, that the reproduction of an audiovisual work in a movie theater is a copyright infringement. Notwithstanding this significant shortcoming, IIPA is still hopeful the law can be strongly implemented to provide an avenue to eradicate all acts of reproduction or transmission (or attempts at the same) of all or part of a movie, whether audio or video, or both. Preferably, these provisions will be revised to ensure that the possession of an audiovisual recording device in an exhibition facility with the intent to copy or transmit a whole or part of an audiovisual work (including the video, the soundtrack, or both) is prohibited, and that exhibition facilities are given standing to bring complaints. Those engaging in the act proscribed should be subject to interdiction by cinema employees and the police, immediate seizure and forfeiture of the equipment used in violating the law and any unlawful copies made, as well as civil and criminal penalties.
- **Collective Management Provisions:** The current collective management and collection system for music is unwieldy and remains unclear, with many collecting bodies operating in the market. Clarification in the law and implementing regulations for clear, fair, market-based, and transparent collection rules are overdue. We strongly suggest that the Copyright Act be revised in this regard. In particular, legislation should address the establishment and governance of CMOs to provide at least that (i) only entities whose ownership or membership comprises rights holders or bodies representing them may operate as CMOs, (ii) rights holders or bodies representing them must be represented in the governing bodies of the CMOs, and must have fair and balanced representation in the supervisory bodies of the CMOs, and (iii) the management, including collection and distribution practices, of the CMO must be transparent and accountable. The Royal Thai Government should implement international best practices in this area, such as those embodied in the WIPO Collective Management Organizations Toolkit or the EU Collective Rights Management Directive, not least to address the problem of rogue entities masquerading as legitimate CMOs, which is damaging to users and music rights holders alike. In addition, DIP should take measures to ensure the accuracy of its copyright registration system, such as by developing a Copyright Registration Database System allowing examination of the accuracy of copyright owners and registered content to ensure accuracy and protect consumers from rogue CMOs.
- **Exception for the Visually, Hearing, Intellectually, or Learning Impaired:** The Copyright Law includes an exception allowing the “reproduction or adaptation” of a work for the visually, hearing, intellectually, or learning impaired. The international community at WIPO, in June 2013, adopted *The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* to create a limitation and exception for the benefit of the blind, visually impaired and otherwise print disabled, which will be mandatory for individual WIPO members that ratify the Treaty. The Thai exception goes well beyond the Marrakesh Treaty’s mandate. DIP has revised this provision to include allowing beneficiaries to communicate works to the public underscoring concerns regarding the scope of the exception. This exception needs further scrutiny, and in any event, should not be implemented in such a way that it would conflict with the Berne Convention and TRIPS “three-step test.”

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<sup>25</sup>Section 53/3(2) allows deletion or modification to the rights management information (RMI) by any educational institutes, archives, libraries or public sound and video broadcasting organizations with no profit-taking purpose. Section 53/3(3) further allows communication to the public of works in which the RMI is deleted and modified under section 53/3(2).

- **Absence of Landlord Liability Provision:** In the recent amendment process, it is highly unfortunate that the Royal Thai Government did not take the opportunity to enact a landlord liability provision to provide adequate civil, administrative, and criminal remedies against property owners who lend their premises to those who engage in commercial infringement of copyright. While a previous draft of the recent copyright law amendments included a landlord liability provision imposing criminal liability on one who “provides physical or digital spaces for infringing activities,” in 2011, DIP was apparently informed by the Thai Trade Representative that the provision was “redundant with the existing contributory offense of the Criminal Code.” DIP then commissioned a research team to conduct an in-depth study on this issue. The authorities indicated they may opt for existing provisions under the Penal Code to prosecute landlords who facilitate infringement activities if there is enough evidence of the landlords supporting the wrongdoing.<sup>26</sup> A test case under the existing law would be extremely helpful, but should not ultimately substitute for a strong landlord liability provision, which is necessary to crack down on piracy in the malls and should be considered in the current revision process.
- **Inadequate Term of Protection:** Thailand should extend its term of copyright protection to be in line with the international trend of 70 years after the death of the author, or, in cases in which term is calculated based on publication, to at least 70 years.

**Evidence Law:** IIPA recommends that the Royal Thai Government amend the Evidence Law to allow the hearing and testimony of digital evidence. Conforming changes should be made to any procedural rules of evidence in the various enforcement authorities so that they too will have clarity with respect to digital evidence.

**Section 32 and Fair Use Guidelines:** IIPA also continues to call for a narrowing or clarification of Article 32(6) and (7) of the Copyright Act, and to ensure administrative guidance on fair use is kept within the legal bounds of existing exceptions and affected publishers and stakeholders are afforded the opportunity to provide input into the guidelines.<sup>27</sup>

## MARKET ACCESS ISSUE UPDATES IN THAILAND

**Film Act Remains Problematic:** The Motion Pictures and Video Act B.E. 2550 (2008) (not yet implemented) potentially imposes quotas and onerous censorship and ratings provisions. Section 9(5) allows the Film Board to establish a ratio between the number of local and foreign films, and film/screen time quotas. The number of screens in Thailand (nearing 1,000 as of the end of 2014) is more than enough to have a free market for theatrical releases. At a time when most other countries are removing quotas, these restrictions could, if imposed, have a significant negative effect on foreign film distribution in Thailand.

The Act would also impose onerous ratings requirements on films, music videos and live performances, and censorship requirements on films, audiovisual products, music used for karaoke, and video games. The concerns over this ratings and censorship regime include: 1) the long time frame (15 days) for obtaining ratings or censorship approval, allowing pirates (who do not adhere to the law's requirements) to gain a head start; 2) the high costs associated with rating or censorship approval, giving pirates an additional cost advantage in the market; 3) the severe consequences (including criminal liability) for failure to comply with the ratings and censorship system; and 4) the onerous requirement that the relevant rating or censorship code must be “fixed” onto the container of films or audiovisual products and on the packages, and that rights holders “embed” the code into the content of films and

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<sup>26</sup>The Royal Thai Government, in its February 2012 Special 301 submission to USTR, indicated that the Office of the Attorney General had concluded that “criminal prosecution is possible if there is enough evidence of the landlords supporting the wrongdoing.” See *Thailand's Implementation on Intellectual Property Rights (February 2011-2012)*, para. 3.2.2. The report indicated DIP would be working alongside the Royal Thai Police and Department of Special Investigation (DSI) to bring an appropriate test case in a place where “tenants are large-scale infringers, and offences are committed repeatedly to prove negligence and illicit facilitation on the part of the landlords.”

<sup>27</sup>See IIPA 2017 at 139.

audiovisual products to appear on the screen or any media when broadcasted or displayed. The Royal Thai Government should reevaluate this ill-conceived and outmoded legislation.<sup>28</sup>

One positive aspect of the Film Act is it would place responsibility on Internet cafés, distributors (shops or stalls) of films and audiovisual products, theaters, and karaoke operators to acquire a “license to operate the business” in advance, with violators subject to criminal liability of up to BHT1 million (US\$28,536) or up to two years in jail. Industry has noted optimistically that the new law could be used in parallel with the Copyright Law to curb piracy in street stalls, shopping malls, complexes, and Internet cafés.

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

**Television Advertising Restrictions:** Advertising is now permitted under the Act on Broadcasting and Television Operation Business enacted in 2008, but is limited to a daily average of five minutes per hour for each channel, or a quota of six minutes in any single hour. This restriction undermines the economic viability of licensing of content for broadcast, and should be lifted.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

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

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<sup>28</sup>The local motion picture industry participated in a public hearing on this issue in August 2017, but IIPA is not aware of any changes that have been made.