

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Watch List in 2019.<sup>1</sup>

**Executive Summary:** In the past few years, the IPR situation has improved in Thailand. Thailand was recently lowered to the Watch List partly in recognition of 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) to establish an administrative, no-fault remedy to disable access to infringing copyright content. However, Thailand continues to struggle with online piracy. Mostly Thai-language sites continue to dominate the piracy landscape, and the growth of piracy devices and apps continues to harm the legitimate over-the-top (OTT) landscape. Piracy facilitated by social media platforms has also increased. The enactment of the CCA in late 2016 (which went into force in July 2017) led to the first applications to disable access to copyright infringing sites. While the process seems fairly well defined, some orders remain to be properly implemented. Unauthorized camcording of motion pictures (especially through audio feeds) continues to damage the market for audiovisual works. Unfortunately, the government has not taken any action to address the continued operation of rogue collective management organizations (CMOs) that undermine music rights holders and users, and contribute to crime and the erosion of public order. Thailand should introduce a measure addressing the establishment and governance of CMOs to bring order to music collecting societies that are distorting the market.

There is hope that pending amendments to the Copyright Act may pave the way toward greater online platform accountability and a strengthened site blocking remedy under the copyright law, as well as proper implementation of protections against unlawful circumvention of technological protection measures (TPMs). Thailand also appears poised to join the WIPO Copyright Treaty (WCT), which would result in the recognition of the basic standards for online copyright, although it is also critical for Thailand to further update its laws to be compatible with the WIPO Performances and Phonograms Treaty (WPPT), while recognizing that sound recordings are protected as copyright works in Thailand. Several key criminal referrals of major piracy services remain pending, and time will tell if the Royal Thai authorities can successfully curb piracy and pave the way toward deterrent criminal remedies in the future.

### PRIORITY ACTIONS REQUESTED IN 2019

#### Enforcement

- Ensure proper implementation and application of the CCA regarding actions to combat pirate websites, including ensuring expeditious and non-burdensome procedures, and full and fast compliance by the ISPs in Thailand.
- Successfully address large-scale pirate operators in Thailand; ensure that these services stay offline and the defendant/operators are properly dealt with under the law.
- Bring effective enforcement actions against illegal distribution of copyright materials over online social media platforms, including live streaming, against piracy devices and apps which riddle the marketplace and make it impossible for legitimate services to compete, and against illegal camcording activities.

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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/2019/02/2019SPEC301HISTORICALCHART.pdf>.



## Legislative

- Address shortfalls to Copyright Act in order to:
  - Ensure that the proposed provisions on intermediary liability provide adequate incentives for neutral online intermediaries to cooperate with rights holders to address online infringement, and implement 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 infringing content.
  - Ensure provisions on TPMs include protection against the act of circumvention, 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 Agreement “three-step test.”
  - 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.
  - Reduce the number of and 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.

## 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 2018. Rights holders continued to have good cooperation with Royal Thai authorities, who assisted with rights protection, and conducted many trainings and IP-related events throughout the year.<sup>3</sup>

**Online 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> Access to the Internet, including through both fixed and mobile Internet access, continues to increase, and smartphone use in Thailand remains very high.

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. Legitimate services are simply unable to

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<sup>2</sup>See, e.g., IIPA, *Thailand*, 2018 Special 301 Report, February 8, 2018, at <https://iipa.org/files/uploads/2018/02/2018SPEC301THAILAND.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.

compete with often free-to-end user pirate offers. 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 Piracy Devices. Many websites serve as portals that allow users to download apps that provide access to pirated content, including the latest theatrical run motion pictures, television content, sporting events, and live streamed PPV events and concerts. 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>5</sup> The latest report shows that social networking is very popular, and that Facebook Video is number two for downstream traffic.<sup>6</sup>

Services and programs that allow users to illegally convert streams into unlicensed downloads from platforms such as YouTube (i.e., stream-ripping) are an increasing form of music 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 *TubeMate Youtube Downloader* on Android. Some of these services have been subject to website blocking orders or other litigation in some jurisdictions, yet, no action has been taken in Thailand.

The motion picture industry has reported that many piracy websites are among the top 500 most accessed sites in Thailand, according to Alexa rankings, with the most popular sites being in Thai language. These sites specifically target Thai Internet users, and include Thai as well as foreign motion picture and television content. These include *Movie2Free.com*, *037HD*, *Mastermovie-HD.com*, *MovieHD-Free.com*, *Siambit*, *TT-Torrent*, *Nanamovies*, *onlinemini-hd*, *duckload*, *nungnew-hd*, and *Kod-HD*. Industry has informed the government of the severity of piracy on all of these sites, and the government is supportive of addressing industry's concerns. For the music industry, the main infringing site by audience size is *Joox*, but sites such as *2sh4sh.com*, *4shworld.com*, *kakzmuzik.com* and *olozmp3.net* are also problematic. 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. 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. 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.

The local motion picture industry succeeded in March 2018 with the first-ever site blocking order under the CCA, blocking a piracy site called *nungmovies*. Subsequently, sports rights holders and the music industry have obtained additional orders, but compliance has been spotty. For example, in the case of several sports sites, ISPs are not blocking encrypted requests to the site despite the fact they know the court orders will be ineffective if they fail to do so. While CCA Section 27, provides for penalties for non-compliance, it has not been enforced. In all, stronger action is needed against piracy sites in and 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, the amended CCA, which entered into force in July 2017, permits disabling of access to infringing websites. As noted, the first test case was successful in March 2018 against *nungmovies*, although some rights holders report some difficulties with the bureaucratic nature of the process.<sup>7</sup> In April 2018, music rights holders then obtained a blocking order from the criminal court under the CCA provisions related to pirate site *4shworld.com*. As of January 2019, TECA had reported some difficulties in enforcing the order, particularly in relation to a secure version of the site which is using

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<sup>5</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.

<sup>6</sup>Sandvine, *The Global Internet Phenomena Report* (October 2018).

<sup>7</sup>Since August 2017, TECA has filed 25 cases and so far obtained only 6 blocking orders. The rest are either pending at the Digital Economy and Society Ministry or only partially handled by the new government unit Coptics which removed the specific infringing URLs but not the domain.

https protocol. Similarly, court orders to block pirate sites *kakzmuzik.com*, *hdprime.tv*, and *hd2liveplus.com* (all using https protocol) were obtained, but the blocks are not implemented. As of January 2019, more than 12 other cases reported by the music industry are pending consideration at the Digital Economy and Society Ministry, most of which have been pending for more than 6 months, and one for more than 16 months. Proper training to the government authorities as well as government follow up with ISPs, or court proceedings, are needed to ensure that blocking orders can be properly implemented.

In late 2018, a major set of raids and criminal referrals resulted in the disruption of several key Thai piracy sites, including *Doo4K* which provided subscription piracy VOD to Thai users. The case was handled by the Department of Special Investigation (DSI). The site unfortunately remains up and the case is ongoing. Other referrals include the most popular infringing websites in Thailand, such as *Movie2free* and *037hd*. These criminal cases remain pending.

Another positive development in 2018 was the creation of Thailand's new anti-piracy agency, *Coptics*, which is a partnership between the Royal Thai Police and DIP with the aim to accelerate the process for blocking illegal websites and to target online piracy.

DIP has been instructed to take the lead on inter-agency coordination of IPR enforcement efforts, and to date, has held meetings to further cooperation between rights holders and intermediaries to address infringement on their services, which would include ISPs, payment processors, domain registers, advertising services (e.g., DAAT), and search engines. We hope these efforts at inter-agency coordination can encourage improved standards in investigations for computer forensics and electronic evidence gathering so that investigations are not delayed. IIPA encourages further training and education for law enforcement authorities in handling online piracy cases, particularly to improve understanding of the CCA, the process for seeking to disable access to infringing websites, and the need to address newer technologies such as stream-ripping apps and services.

**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 for some industries, harming local and foreign creators alike. Such piracy still finds its place in the malls and on the streets in Thailand, particularly in tourist areas. Areas notorious for piracy include, in Bangkok: Panthip Plaza; Klong Thom; Saphan Lek; Baan Mor Shopping Area; Patpong; Kao-Sarn Road (where reports showed Bruno Mars finding his pirated records on sale blatantly and openly while on tour in March 2014); Silom; Mah Boon Krong (MBK) Center; 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 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.

**Piracy Devices and Apps Represent a Growing Problem:** Piracy Devices include 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, and they have become an increasing problem in Thailand. China is

a hub for the manufacture of these devices and the deployment of middleware and apps used to access infringing materials. Piracy Devices 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 online infrastructure, including foreign piracy sites that provide users with instant access to infringing audiovisual content. Piracy Devices are sold 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 should increase enforcement efforts, including cracking down on Piracy Device vendors or those that market piracy apps, or preload the devices with apps that facilitate infringement or offer them as an aftersales service, and take action against key distribution points for devices and apps 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 Motion Picture Market:** The problem of unauthorized camcording of motion pictures in movie theaters in Thailand remains a concern of the industry. 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 2018, 15 illicit recordings of MPAA member films were traced to Thai theaters, up from eight in 2017. Local Thai films are camcordered within days of their release in the movie theater. Increasing broadband Internet higher-speed mobile connections in Thailand mean faster uploads to the Internet of motion pictures illegally camcordered. 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.

**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.

**Court Reforms:** The establishment of the Thai IP & IT Court in 1998 encouraged great hope for a sustained workable judicial system to protect copyright, and in 2018, those efforts bore fruit with the IP & IT Court issuing the first-ever site blocking order under the CCA. In addition, the criminal courts issued orders for blocking additional sites of concern to the music industry and sports broadcast rights holders.

Notwithstanding such progress, civil damage awards are far lower than the cost and attorney's fees associated with bringing cases. Independent rights holders are particularly hard pressed to afford civil litigation as a means of enforcement and deterrence to pirates. Further, it remains to be seen whether the latest criminal raids against major piracy sites in late 2018 will yield deterrent sentences in the criminal courts. Some improvements could be offered, such as providing for additional damages, punitive damages, or pre-established (statutory) damages in the law. Sentencing guidelines should be issued, adopting minimum sentences that provide a real deterrent to infringement.

An endemic problem within the Royal Thai Government as a whole is the relocation of staff. Expertise, including among the judiciary, is often wasted when judges are rotated out. The relocation to other departments of officers who become familiar with techniques to track and enforce against online piracy leaves a gap in online investigation knowledge among the remaining officers. We recommend the courts (including the IP & IT Court) and the officers of the various enforcement arms be retained so as to build upon the expertise they have obtained by experience.

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 is concerned 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 in July 2017, and as indicated above, test cases for this provision have already been successfully concluded. As of November 2018, DIP had received 62 requests for blocking or disabling access to IPR infringing contents or activities, and 48 of those requests were forwarded to the Digital Economy Ministry (MDES) for further action. The Central Intellectual Property and International Trade Court and the Criminal Court have issued 26 court orders to block or disable access to copyright infringing contents, totaling 634 URLs (however, in most of these cases, the orders were to disable access to specific content identified in the URLs, not entire websites). IIPA encourages the Court to finally adjudicate the remaining cases, so that it can be determined whether the CCA is having the desired effect of reducing online infringement in Thailand.

**Copyright Act Revisions Approved by Cabinet, Now With State Council:** Broad amendments to the Copyright Act have been approved by the Royal Thai Cabinet, and now sit with the State Council. The bill introduces new safe harbor provisions, provides for site blocking as a copyright remedy, and proposes amendments to other provisions in the Copyright Act, including those related to TPMs.<sup>8</sup> One result of the bill’s assent will be that Thailand will join the WCT, although joining the WPPT should be confirmed as well.

The following are critical issues with the Copyright Act and the draft amendments 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 that brings Thailand closer into compliance with its international obligations and implements the WCT and WPPT:

- **Service Provider Liability Amendments:** The amendments to the Copyright Act would repeal Section 32/3 of the Copyright Act, and add Sections 43/1 to 43/14 for notice and takedown which would be an improvement on the existing law in several respects, including: (i) not requiring rights holders to obtain a court order before ISPs take down content (although they do have to file a court action within 15 days of notification); (ii) requiring ISPs to have a repeat infringer policy; and (iii) requiring that ISPs must not interfere with TPMs. The proposed safe harbor provisions are largely based on Section 512 of the Digital Millennium Copyright Act (DMCA). Notwithstanding these relative improvements, the amendments are problematic in several respects and in need of further improvement. Specifically, IIPA recommends the following: (i) implementing reasonable measures to prevent infringement in addition to taking down the infringing material; (ii) stipulating that only ISPs of a technical, automatic and passive nature may be covered by safe harbors; (iii) stipulating that ISPs that do not meet all the conditions

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<sup>8</sup>The bill would also expand protection of photographic works to the lifetime of the author plus 50 years.

will not be protected by the safe harbor provisions, which is not clear in the current text; (iv) amendments to the notification requirements to make them less burdensome on rights holders; and (v) extending the period rights holders have to file an action to at least 30 days.

- **Technological Protection Measures:** TPMs are key enablers of new legitimate business models for content distribution in the digital and online environments. Accordingly, their proper protection is necessary to shape a healthy digital marketplace for Thailand. The amendments will improve the law to cover access controls and prohibit trafficking. IIPA understands that Thailand intends to join the WCT once the bill has received Royal Assent, which would be a positive step.
  - **Trafficking:** Section 53/6 explicitly outlaws provision of services to circumvent technological protection measures and trafficking in circumvention devices, technologies, and components.
  - **Exceptions:** Some of the enumerated exceptions in Section 53/5 may be acceptably narrow, but others must be eliminated or reworked to preserve the adequacy and effectiveness of protection. For example, Section 53/5(1), allowing circumvention for any exception to copyright under the law, is overly broad and undermines needed protections, especially for access controls. The exception in Section 53/5(7) also risks undermining necessary protections because it appears to allow circumvention by educational, archival, library, or public broadcasting entities in fairly broad circumstances.
- **The Exception for Rights Management Information (“RMI”) Should Be Narrowed:** The exceptions to the protections for RMI appear to be extremely overbroad, which risks undermining important protections for rights holders and raises serious questions regarding consistency with the three-step test governing exceptions and limitations under the WCT and WPPT treaties. 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 falls 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 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 EU Collective Rights Management Directive, reflected also in the WIPO Collective Management Organizations Toolkit, 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:** In November 2018, Copyright Act Number 4 B.E.2561 (2018) was published and will go into effect in March 2019. The act permits persons with disabilities who do not have access to copyrighted work due to impairment in vision, hearing, movement, intellect or learning or other deficiencies to have equal opportunities to other persons to access, make copies, modify, or distribute the copyrighted work. DIP will issue a Ministerial Regulation on the details of authorized or recognized entities and how such copies may be distributed. The Thai exception goes well beyond the mandate of *The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* which creates 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. From the music industry's perspective, sound recordings should not be covered by the exception at all, and in the alternative, the exception should be properly defined and restricted in scope to apply solely to specific acts in respect to specific works, for the benefit of specific individuals, with adequate safeguards, and with equitable remuneration payable to rights holders. Industry understands that the Royal Thai Government intends to exclude film and television productions from the export provisions in the Marrakesh Treaty. 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."
- **Absence of Landlord Liability Provision:** In the recent amendment process, it is 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. 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.

## **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 2018) 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 the growing infrastructure, local Thai productions, and foreign film distribution in Thailand, limiting the variety of entertainment available to Thai consumers, and exacerbating piracy.

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 time and cost advantage in the market; 3) the severe consequences (including criminal liability) for failure to comply with the ratings and censorship system; and 4) the onerous requirement that the relevant rating or censorship code must be "fixed" onto the container of films or audiovisual products and on the packages, and that rights holders "embed" the code into the content of films and audiovisual products to appear on the screen or any media when broadcasted or displayed. In December 2018, the Film Ratings Office (FRO) proposed changes to rating submissions procedures that would require submissions of Digital Cinema Packages (DCPs) with open encryption keys (KDMs). Such a request is against international norms and poses significant security risks. Although the FRO has agreed to accept a low-resolution screener version with watermarks for archive purposes, and allow DCPs to be returned on the same day, the Royal Thai Government should reevaluate this ill-conceived and outmoded legislation which causes confusion in the local Thai marketplace as distributors try to comply with changing requirements.

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.

**OTT Taxation:** NBTC is in the process of considering policies on OTT services. Thailand is also proposing amendments to its Revenue Code that will require overseas e-commerce services to register for VAT payment. A tax rate of ten percent is being proposed on non-resident business operators who employ electronic payment for e-commerce services including digital online services. Under the existing VAT guidelines implemented since 1992, any person or entity supplying goods or providing services in Thailand and that has an annual turnover exceeding 1.8 million baht (US\$55,000) is subject to VAT. IIPA encourages NBTC to adopt a robust content protection regime to protect digital delivery of content as well as a non-discriminatory tax system.

## **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.