

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Watch List in 2020.<sup>1</sup>

**Executive Summary:** Thailand has historically struggled with combatting physical and digital piracy, but the IPR situation there has improved somewhat in recent years. In 2018, Thailand was 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. Discussions about reform proposals continued in 2019. Unfortunately, the most recent draft amendments to the Copyright Act do not contain needed improvements, including key provisions related to online intermediary liability and enforcement and technical protection measures (TPMs). Moreover, certain 2019 amendments to the copyright law in the name of Marrakesh Treaty implementation created new problems by the unwarranted and erroneous inclusion of sound recordings in the scope of certain exceptions.

Thailand continues to struggle mightily with online piracy, including non-compliance by Internet service providers (ISPs) with copyright website blocking orders as well as the failure to use the existing remedies and procedures to act against streaming sites, torrent sites, stream-ripping sites and apps and cyberlocker-related services. In a key positive development in 2019, the Department of Special Investigations (DSI) took enforcement action resulting in the cessation of operations of *movie2free.com*, and in the arrest of the site administrator. In the meantime, there remain a large number of Thai-language sites offering pirate content, 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 Computer Crime Act (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 and it appears that ISPs do not comply with them and no fines are issued to ISPs in such situations (these situations contrast markedly with compliance in cases of blocking on *lèse majesté* grounds, for example). Further, Thailand continues to represent a risk for illicit camcording in the region.

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. Proposed amendments to the Copyright Act also do not address the CMO issue. Thailand should introduce a measure addressing the establishment and governance of CMOs to bring order to music collecting societies that are distorting the market.

Reform efforts to the Copyright Act are largely not promising, and the IIPA would strongly encourage the government to revert to the draft published in 2018 on both TPMs and intermediary accountability issues, and make other modernizing changes (such as extending copyright term). The National Assembly has approved accession to the WIPO Copyright Treaty (WCT) and reverting to the 2018 draft Copyright Act amendments would ensure that Thailand immediately meets its obligations under the WCT. It is also critical for Thailand to further update its laws to be compatible with the WIPO Performances and Phonograms Treaty (WPPT) as soon as possible, while recognizing that sound recordings are protected as copyright works in Thailand.

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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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2020**

### **Enforcement**

- Successfully address large-scale pirate operators in Thailand; ensure that these services stay offline and that deterrent sentences are imposed.
- Take action against rogue CMOs and combine this enforcement action with regulatory reforms to change the criteria for CMO registration (see below).
- 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.
- Bring effective enforcement actions against illegal distribution of copyright materials over social media platforms, including live streaming; piracy devices and apps which riddle the marketplace and make it impossible for legitimate services to compete; and, against illegal camcording activities.

### **Legislative**

- Address shortfalls to the Copyright Act:
  - Reintroduce the proposed provisions on intermediary liability to provide adequate incentives for neutral online intermediaries to cooperate with rights holders and implement international best practices to combat infringement, such as disabling access to infringing content.
  - Reintroduce the proposed TPM provisions to include protection against the act of circumvention, prohibit trafficking in circumvention technologies, devices, components, and services, and ensure that the TPM and Rights Management Information (RMI) provisions do not permit overly broad exceptions.
  - Revise the existing camcording provisions to effectively prohibit possession of an audiovisual recording device in an exhibition facility with the intent to make or transmit an audiovisual work and provide that exhibition facilities have standing to bring complaints.
  - Ensure that any exception is consistent with the “three-step test.”
  - Ensure copyright offenses are non-compoundable.
  - Extend the term of copyright protection consistent with international best practices 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:
  - Deleting Section 9(5) (and the related Section 68) of the 2008 Motion Picture and Video Act (MPVA) which on paper allows the Film Board to establish ratios and quotas against foreign films, and amending the MPVA to avoid onerous film censorship and classification provisions.
  - Removing the Office of the National Broadcasting and Telecommunications Commission (NBTC) approved “must carry” provisions, since they could, if improperly interpreted or misunderstood, restrict the companies’ contractual freedom to license.
  - Avoiding onerous OTT regulations, e.g., that could require streaming operators to set up a local presence or to require foreign e-commerce services to register for VAT payments.
  - Easing foreign ownership and television advertising restrictions that impede legitimate distribution channels.

## 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 2019. Rights holders continued to have good cooperation with Thai authorities, who assisted with rights protection

**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>3</sup> Access to the Internet 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, motion pictures and television content, video games, published materials, and broadcasts. Legitimate services find it difficult or impossible to compete with often free-to-end-user pirate offers. The use of social media continues to rise, and is a popular platform for distributing and accessing pirated content. Streaming unauthorized content is the most popular form of piracy, whether through social media, streaming websites, apps, and/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 pay-per-view (PPV) events and concerts. BitTorrent index and tracker sites, cyberlockers, and BBS/forums also remain problematic. The popularity of peer-to-peer (P2P) networks, including BitTorrent (e.g. *thepiratebay.org*), has declined for piracy of music but has been replaced by a considerable increase in stream-ripping. Popular stream-ripping services include *savefrom.net*, *y2mate.com* and *ytmp3.cc*. 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 of the top 500 most accessed sites in Thailand are piracy sites, according to Alexa rankings. These sites specifically target Thai Internet users, and include Thai as well as foreign motion picture and television content. These include *037HDD.com*, *Mastermovie-HD.com*, *MovieHD-Free.com*, *imovie-hd.com*, *Siambit.me*, *movie2z.com*, *TT-Torrent*, *Nanamovies.com*, *onlinemini-hd*, *duckload*, *nungnew-hd*, and *Kod-HD*. In November 2019, the Department of Special Investigations (DSI) took enforcement action resulting in the notorious Thailand piracy site *movie2free.com*, which was ranked the 20th most accessed website in Thailand, ceasing operations and the site administrator being placed under arrest. *Movie2free.com* was launched in 2014 and was reported to have had 10 million page views per day with up to a million different IP addresses connected daily to the site, and was globally ranked at 1,700 with 27 million monthly visits. This action was possible due to industry efforts working with the DSI. The DSI is continuing its investigation into a network of individuals associated with the operation of the site. Industry has informed the government of the severity of piracy on all of the other 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. 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. This said, 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 Video-on-Demand (VOD) to Thai users. The case was handled by DSI. The site unfortunately remains up and the case is ongoing. Other referrals include some of the most popular infringing websites in Thailand,

<sup>2</sup>See, e.g., IIPA, *Thailand*, 2019 Special 301 Report, February 7, 2019, at <https://iipa.org/files/uploads/2019/02/2019SPEC301THAILAND.pdf>; 2018 Special 301 Report, February 8, 2018, at <https://iipa.org/files/uploads/2018/02/2018SPEC301THAILAND.pdf>.

<sup>3</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.

such as *Movie2free.com* which was finally closed in 2019 as noted above, and *037hd*. Most of the criminal investigations launched out of these cases remain pending

IIPA is encouraged by actions the government has taken in an effort to improve the copyright ecosystem in the online and mobile environments to support legitimate entertainment services. In particular, the amended CCA, which entered into force in July 2017, permits disabling of access to infringing websites. 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*, and succeeding in getting the first variant blocked as well, although the Thai system does not have a dynamic blocking mechanism. 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*, however they noted bureaucratic problems in the process, and as of January 2020, that site is redirecting to new domains. Similarly, court orders to block pirate sites *kakzmuzik.com*, *hdprime.tv*, and *hd2liveplus.com* (all using https protocol) were obtained, but the blocks were either not implemented or the sites began redirecting to new domains. As of January 2020, the Thai Entertainment Content Trade Association (TECA) has filed about 40 blocking cases and 23 of those cases have resulted in court orders to block access to infringing material. However, only six of the 23 sites ordered blocked are actually unable to be accessed in Thailand as of January 2020. There remain substantial issues with the lack of transparency in the procedure, the slow process, the re-opening of blocked sites, and the costs charged to some industries by the government/police for site blocking applications. Proper training for government authorities as well as government follow-up with ISPs, or court proceedings, are needed to ensure that blocking orders can be properly implemented.

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Notwithstanding the above, many enforcement deficiencies remain. While the Royal Thai Government appears to be making intellectual property rights protection more of a priority, much more needs to be done to improve the efficiency and capability of law enforcement, and to increase the awareness and understanding of intellectual property rights in general. While both the DSI and Royal Thai Police are able to investigate IP related crimes, enforcement against piracy operators remains very challenging given the scale of the problem, officers' general lack of familiarity in investigating and handling digital forensic evidence, and the ease with which pirates use anonymizing software and infrastructure to continually evade detection. Deterrent level punishment for online piracy operators remains lacking.<sup>4</sup>

The Center of Operational Policing for Thailand against Intellectual Property Violations and Crimes on the Internet Suppression (COPTICS), which had been established in 2018 to provide an alternative to site blocking under the CCA, was dissolved after having been in operation for only eight months. While it was operational, it had not proven particularly effective at blocking notorious pirate sites, including those providing live streaming of sports.

**Camcorder Piracy Traced to Thailand Continues to Harm Motion Picture Market:** Thailand continues to represent a risk for illicit camcording in the region. In 2019, three new video sources and 16 audio sources were forensically matched to theatre locations in Thailand (up from zero video matches and 14 audio matches in 2018). Local Thai films are camcordered within days of their release in movie theaters. Increasing broadband Internet and 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

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<sup>4</sup>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. IIPA hopes 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. We understand that DIP, in 2020, has begun to play a helpful role in coordinating various governmental bodies to ensure that criminal court orders are enforced to protect music holders rights.

strongly implemented (and ultimately improved), the Copyright Act provision that deems camcording an infringement of copyright could help.

**Television/Public Performance Piracy:** Cable piracy, predominantly the illegal retransmission of broadcast signals, remains a notable problem outside Thailand's main cities. In addition, "public performance" piracy continues to be a problem. Many hotels outside Bangkok retransmit unauthorized videos over in-house movie systems.

**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. The Royal Thai Government has 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. Further, there are indications that infringers have moved to newly emerged Sunday and night markets, such as Silom Walking Street on Sunday. To address hard goods piracy, the Royal Thai Government should follow raids by upstream investigations to target criminal organizations at the root of this piracy. 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.

**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 pre-load 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. The Royal Thai Government has taken some action against an Internet Protocol Television (IPTV)/Piracy Device service called *ThaiExpat.tv*, and in December 2019, the Central Intellectual Property and International Trade (IP&IT) Court ordered damages of THB 15 million (US\$480,000) and suspended sentences against two key operators in Thailand.

**Book Piracy Problems Remain:** Unauthorized commercial photocopying in and around university campuses remains a significant concern. 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.

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**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 in the first place, DIP’s regulatory action such as requiring CMOs to register their songs in the government database and, in the long-run, amendments to the Copyright Act to reduce the number of CMOs permitted to operate in the market by reference to internationally accepted criteria (such as the volume of rights in active use and the backing of all major, including international, rights holders) and setting out certain principal conditions for CMOs to operate in Thailand, such as complying with a code of conduct of an international body that requires good governance, transparency, fair and accurate distribution, and, of course, actually representing the rights holders they claim to 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 IP&IT 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:** On September 10, 2019, DIP issued revised draft amendments for public comment. As of January 2020, those amendments now sit with the State Council. The amendments, like those seen in previous drafts, focus mainly on online intermediary liability and TPMs. Thailand’s National Assembly has already approved WCT accession which now depends on appropriate Copyright Act amendments also being promulgated, with accession to the WPPT planned thereafter within the next five years. However, IIPA is very concerned that the government has deleted a number of comprehensive amendments it had proposed in 2018.<sup>5</sup> The following are critical issues with the Copyright Act and the draft amendments that should be addressed to ensure that the Royal Thai Government achieves its stated goals of modernizing its copyright law, complying with its international obligations, and implementing and adhering to the WCT and WPPT.

- **Infringement a Non-Compoundable Offense:** IIPA urges the Royal Thai Government to amend the Copyright Act to ensure that intellectual property infringement becomes a non-compoundable state offense, thus enabling the police to act on their own initiative without any requirement of a formal complaint from rights holders. In the age of online piracy, this ability for authorities to take ownership of investigations and cases is critically important.
- **Service Provider Liability Amendments:** The current draft amendments have retained from previous drafts the four types of online intermediaries that may be eligible for the copyright infringement liability limitation privileges (Section 43/1), but the provisions in relation to the conditions and eligibility, as well as the notice procedures, have been substantially cut down. It appears from the current draft that these details will be moved to the administrative

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<sup>5</sup>In those amendments, the government had made a number of constructive proposals, including proposed strong protections against the act of circumventing, and the trafficking in, devices and technologies (including hacking code/software and false authentication code) intended to circumvent technological protection measures used by rights holders in the digital and online environment to protect their content from unauthorized access, copying and distribution. Those amendments, put forward in 2018, would have immediately prepared Thailand to join the WIPO Copyright Treaty. We would strongly encourage the government to revert to the draft published in 2018 and enact provisions that grant safe harbor exemptions that are in keeping with international norms, i.e., that service providers would be excluded from liability for monetary relief only, and not exemption of all liability for copyright infringement.

regulations, which are to be promulgated after the amendments of the Copyright Act have been passed—a move which is concerning to rights holders. In particular, there are scant stipulations regarding the eligibility of liability limitation privileges (as the so-called “safe harbors”). The notice and takedown procedures in Sections 43/2 to 43/4, which apply to hosting and location services intermediaries, would also not effectively curb online infringement. Although the details are to be supplemented in the regulations, the Copyright Act should at least contain the following:

- 1) Any limitation of liability of online intermediaries must be premised on there being a clear basis for the liability of such services absent the application of such liability privileges; if there is no clear basis for liability, there is no justification for having liability privileges at all. However, the basis for liability is not clear in the Copyright Act or the proposed amendments, and the liability of such “intermediaries” needs to be clarified.
  - 2) In respect of services that do qualify for the safe harbor, section 43/2 of the draft amendments only requires such services to remove infringing content or suspend the access to such content upon receiving a notice from the copyright owner. IIPA urges the Government of Thailand to adopt 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.
- **Technological Protection Measures:** TPMs are critical for the success of services that are providing legal content to users in Thailand today, and they need to be protected. The amendments will improve the law to cover access controls and prohibit trafficking. Specifically, Section 53/6 explicitly outlaws the provision of services to circumvent TPMs and trafficking in circumvention devices, technologies, components, and services (including hacking code/software and false authentication code). IIPA understands that Thailand intends to join the WCT once the bill has received Royal Assent, which would be a positive step. However, certain exceptions are overly broad and should be narrowed. Most critically, the TPM provisions should close the loophole of permitting circumvention of a TPM for the purpose of benefiting from a specified copyright exception (Section 53/5(1)). In addition, the blanket exclusion in Section 53/3(2) and (3) of educational institutes, archives, libraries and non-profit sound and video broadcasting organizations is inappropriate and unjustified. Similarly, Section 53/5(7) broadly exempts these entities, instead of certain specific and narrow acts, from liability for TPM infringement. This is inconsistent with treaty requirements.
  - **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 because it restates 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 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 CMOs 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 set out an action plan of the measures it intends to take to ensure the accuracy of its CMO registration system, such as by developing an effective Copyright Registration Database to allow 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:** Copyright Act Number 4 B.E.2561 (2018) was published in November 2018 and went 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 has issued 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. That exception 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. This exception should be amended or implemented in such a way that it does not conflict with the Berne Convention and WTO 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, including the provision of Piracy Devices or the after-sale provision of infringing apps or content to purchasers. 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. Unfortunately the amendment to section 21 in the current draft of proposed amendments does not change the term of protection, which remains at 50 years. There are now 67 countries worldwide providing for a term of protection of 70 years or more. Further, if the term of protection is not extended in time, some Thai classics from the 1970s—the classics of Soontaraporn, Suraphol Sombatcharorn and Paiboon

Buth—will soon fall out of copyright protection, despite the fact that they are still widely consumed by the public. This will have a negative effect on local artists' income, especially those who have retired and rely on the royalties for a living.

- **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.
- **Organized Crime:** 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 burdens, 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
- **Section 32 and Fair Use Guidelines:** IIPA also continues to call for a narrowing or clarification of Articles 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 that affected publishers and stakeholders are afforded the opportunity to provide input into the guidelines.

## **MARKET ACCESS ISSUE UPDATES IN THAILAND**

**Screen Quota and Film Classification:** Section 9(5) of the 2008 Motion Picture and Video Act (MPVA) allows the Film Board to establish ratios and quotas against foreign films. If implemented, such restrictions would create new barriers to foreign films distribution, discourage cinema infrastructure investments and reduce consumer choice. Since 2017, the Ministry of Culture has been in the process of considering amendments to the MPVA. The motion picture industry continues to urge the Ministry to delete Section 9(5) and the related Section 68, as such limitations, if implemented, could adversely affect Thai distributors and exhibitors, impede the development of the local film industry, limit the variety of entertainment available to Thai consumers, and exacerbate piracy.

The MPVA also imposes onerous classification (ratings) requirements on films, music videos and live performances as well as censorship requirements on films, audiovisual products and video games. Thailand should remove onerous ratings requirements, including the 15-day period for obtaining ratings and censorship approval, the associated high costs for film ratings and the severe penalties for failure to comply. As countries today are moving towards self-classification for audiovisual products across all distribution formats, IIPA encourages Thailand to do the same. In a positive development in 2019, the film industry was encouraged when the Film Ratings Office (FRO) removed the requirement for submissions of Digital Cinema Packages (DCPs) with open encryption keys (KDMs) which would have otherwise raised significant content security risks.

**Must Carry Requirements:** In 2012, the NBTC hastily approved “must carry” provisions requiring all platforms to carry public and commercial free-to-air television channels nationally, on an equal basis, by all platforms. The regulations, which have not been clearly drafted, raise important intellectual property rights issues, i.e., they call into question the ability of rights holders to enter into exclusive distribution arrangements in Thailand.

**OTT Regulations:** The NBTC is in the process of considering policies on OTT services, including requiring streaming operators to set up a local presence to respond to government requests around content that the government finds objectionable (a form of mandatory content filtering). Thailand is also proposing amendments to its Revenue Code that will require foreign e-commerce services to register for VAT payment. A tax rate of 10% 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 in 1992, any person or entity supplying goods or providing services in Thailand with an annual turnover exceeding 1.8 million baht (US\$55,000) is subject to VAT. Such content control and taxation proposals, if extended to OTT services, would impose burdensome requirements on foreign

content providers, stifle innovation and raise costs, particularly in the absence of a robust content protection regime to protect digital delivery of content.

**Ban on Investment/Ownership in Terrestrial Broadcast Networks:** Foreign ownership of terrestrial broadcast networks is prohibited in Thailand. In January 2015, the NBTC issued rules governing media mergers, acquisitions and cross-media ownership. The rules require prior NBTC approval when a television license holder seeks to invest more than 25% directly or more than 50% indirectly in another licensed company. This rule severely limits investment and creates unnecessary barriers to entry for U.S. companies.

**Television Advertising Restrictions:** Advertising is permitted under the Act on Broadcasting and Television Operation Business (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, including Articles 41, 42, 45, and 61.