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ACTION EAP-00

INFO	LOG-00	EEB-00	AF-00	AID-00	CEA-01	CIAE-00	CTME-00
	INL-00	DNI-00	DINT-00	DODE-00	ITCE-00	DOTE-00	ANHR-00
	DHSE-00	EXME-00	E-00	FAAE-00	UTED-00	VCI-00	DIAS-00
	FRB-00	H-00	TEDE-00	INR-00	IO-00	JUSE-00	LAB-01
	LOC-01	L-00	ARMY-00	VCIE-00	NSAE-00	ISN-00	NSCE-00
	OES-00	OMB-00	NIMA-00	EPAU-00	PA-00	PER-00	GIWI-00
	PRS-00	MA-00	ISNE-00	DOHS-00	SP-00	IRM-00	STR-00
	NCTC-00	FMP-00	CBP-00	BBG-00	EPAE-00	IIP-00	DRL-00
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FM AMEMBASSY BANGKOK

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INFO DEPT OF COMMERCE WASHINGTON DC IMMEDIATE

DEPT OF AGRICULTURE WASHINGTON DC IMMEDIATE

DEPT OF TREASURY WASHINGTON DC IMMEDIATE

DEPT OF LABOR WASHINGTON DC IMMEDIATE

ASSOCIATION OF SOUTHEAST ASIAN NATIONS IMMEDIATE

AMCONSUL CHIANG MAI IMMEDIATE

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STATE FOR EAP/MLS, EEB/TPP/IPE FOR URBAN, MCGOWAN  
STATE PASS TO USTR FOR GROVES, BAE, WEISEL AND KLEIN  
COMMERCE FOR EAP/MAC/OKSA  
COMMERCE PASS TO USPTO  
SINGAPORE FOR FINATT BLEWEIS

SENSITIVE

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E.O. 12958:N/A

TAGS: ECON, ETRD, KIPR, TH

SUBJECT: THAILAND: 2010 SPECIAL 301 REVIEW

- REF: A. STATE 3361 (2010 SPECIAL 301 REVIEW)
- B. 09 BANGKOK 3272 (IPR OWNERS DISCUSS CONCERNS)
- C. 09 BANGKOK 2984 (FOCUSED ON SPECIAL 301)
- D. 09 BANGKOK 2848 (PREPARING FOR LOCKE-ALONGKORN MEETING)
- E. 09 BANGKOK 2768 (PRIME MINISTER MEETS APCAC)
- F. 09 BANGKOK 1338 (NEW INTELLECTUAL PROPERTY STRATEGY)
- G. 09 BANGKOK 1203 (PATPONG RAID)
- F. 09 BANGKOK 379 (RIGHT MOVES ON IPR)

1. (SBU) SUMMARY: The current Thai government came to power with a high-profile focus on the protection and promotion of intellectual

property (IP). There have been serious efforts to enforce laws protecting IP and to put Thailand more in line with international intellectual property-related accords. Thailand joined the Patent Cooperation Treaty, thereby allowing U.S. companies to use a U.S. or other foreign patent application as a vehicle to obtain protection in Thailand. The government proposed copyright and trademark amendments to penalize landlords who profit from their tenants' sales of counterfeit and pirated goods on their premises. Recognizing the fundamental problem of a lack of public appreciation for the value and importance of intellectual property, the government promoted "Creative Economy" as a major policy initiative for economic growth and to give Thai citizens a greater stake in intellectual property rights. The Prime Minister now appears in spot ads urging warning against IPR pirating in the previews at movie theaters.

2. (SBU) SUMMARY (cont'd): Despite the priority placed on IPR by the Abhisit government, including the placement of dedicated IPR professionals in key positions, Thailand in early 2010 still remains a significant source and destination of pirated and counterfeit goods with too few takedowns of major pirating rackets. The police generally do not place high priority on IPR enforcement, leaving many U.S. IPR holders to struggle to defend their rights. Thousands of low level arrests choke Thailand's IP courts and complicate relations between the courts and rights holders seeking legal tools and redress. The current government has issued no compulsory licenses; nevertheless, the international pharmaceutical industry continues to struggle with issues such as patent reform, government procurement, and pharmaceutical marketing and sales practices. END SUMMARY.

3. (SBU) ASSESSMENT: Thailand is at an awkward stage where its economy is sufficiently large and sophisticated that IP pirates can do serious damage to the intellectual property rights of both local and international companies, but its social and political systems are still characteristic of developing countries lacking widespread public appreciation of the importance of IPR. In this daunting environment, the current Abhisit government has changed the face of IPR in Thailand. The commitment to improve, though not always manifested in the ways that would be most satisfying to us, has been clear from the government's efforts to send high-level officials to Washington on several occasions to discuss these issues with both government and industry, including this year with its participation (the only country in Asia to do so, we understand) in USTR's public hearing. Unquestionably, much important work remains to be done, and it is critical that the momentum that has been created be sustained.

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### IPR on the National Agenda

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4. (SBU) Shortly after he took the oath of office in December 2008, Prime Minister Abhisit Vejjajiva directed his Cabinet to improve Thailand's IPR record. While Abhisit chairs the new national IPR committee himself and has recorded a firm anti-pirating video ad that runs in Thai theaters with the movie previews, his fellow Democrat Party leader, Alongkorn Ponlaboot, became the most dedicated promoter of the government's new IPR initiatives. As Deputy Minister of Commerce, Alongkorn has made some serious efforts at law enforcement, but the going has been tough. In one large-scale raid in a popular "red zone" shopping district, a melee ensued when retail store owners physically fought efforts by police to confiscate pirated goods, claiming that the police were taking legitimate goods as well. Stepping back a bit from such confrontational methods, Alongkorn developed the government's "Creative Economy" strategy, a plan to increase the contribution of

the country's creative and innovative industries from 12 to 20 percent of Thailand's GDP. While "Creative Economy" is not an IPR campaign per se, the government is using funds from an economic stimulus package to motivate and support Thai citizens to branch into new areas of entrepreneurship in the arts and technology in hopes of propelling the economy forward. The parallel agenda, about which Alongkorn has been very public, is to create understanding and support for intellectual property rights by giving Thai citizens a greater stake in them.

5. (SBU) Alongkorn and the Department of Intellectual Property (DIP) staff at the Ministry of Commerce also laid out a new interagency strategy to make IPR a national policy priority, a plan approved by the Cabinet in July. The plan focuses on six areas: law enforcement, judicial processes, patent processes, internet piracy, legal amendments, and improved cooperation with the private sector. The plan outlines specific activities in each area, many of which have already been completed.

6. (SBU) Management of DIP is now in the hands of an IP veteran. In an unusual personnel shift, Pajchima Tanasanti, who most recently served as the Deputy Director General for Enforcement at DIP, was hand-picked by Alongkorn to become Director General. According to several contacts, Alongkorn strongly pushed for Pajchima's candidacy, even though under Ministry of Commerce traditions a deputy director general is rarely promoted to become the director general of the same department. Foreign and Thai rights holders are pleased with Pajchima's promotion to Director General. Pajchima, who has spent the majority of her career at the Department of Intellectual Property, began as an examiner more than 20 years ago

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and has since served as the Director of the Copyright Office, the Director of the Trademark Office, and most recently, the head of DIP's enforcement operations. Her appointment has gone a long way towards the goal of improving cooperation with the private sector, because she immediately reached out to rights-holder groups and quickly took action on book piracy, a camcording law, and other items that had languished under her predecessor.

#### Legal Improvements

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7. (SBU) For many years, the government has talked of major revisions to its IP laws, but 2009 was the first year where there was active drafting of amendments and new laws. While industry representatives are encouraged by these developments, the proposed legislation has yet to reach the Parliament. Following approval by the Cabinet, the amendments are now being reviewed by the Council of State, the government's legal advisory body, a required, but usually non-controversial step before consideration by Parliament. However, because unfamiliar new technology and international legal advances are at issue, DIP is concerned that the process may go slowly.

8. (SBU) At least three sets of copyright amendments are in the pipeline. The first set of provisions would provide for landlord liability for sales of infringing goods on their premises. The second set of provisions would implement certain obligations under the World Intellectual Property Organization Copyright and Performances and Phonograms Treaties. A third set of amendments is intended to create a government-regulated collecting society to administer rights in musical works and sound recordings. These amendments have been very controversial, because they would require a change of business practices for Thailand's two largest music enterprises, RS and GMM Grammy. According to DIP, however, the Council of State recently asked DIP to resubmit all of the amendments in a single package to better understand the various proposed changes. Trademark amendments that mirror the copyright landlord liability provisions have also been proposed.

9. (SBU) The government also began to draft patent amendments with a fairly broad scope, but with regard to medicines, there are differing views. The Thai Ministry of Public Health wanted to limit the scope of patentability for medicines, introduce additional opposition proceedings, and expand the government entities that could issue compulsory licenses. DIP, however, reported that it intended only to make technical corrections necessary for Patent Cooperation Treaty and Doha Paragraph 6 implementation. Patent owners would like to have more influence in the drafting process; only one representative of the local pharmaceutical industry was included. DIP initially reported that the Council of State would start to review these provisions in the second or third quarter of

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2010. Recently, however, the patent amendment process was suspended by Deputy Minister of Commerce Alongkorn in order to encourage officials to focus on legislation such as an anti-camcording law, which he understands to be the highest priority for the motion picture industry. The Department of Intellectual Property has not provided a new schedule for the patent amendment process.

### Anti-Camcording Law

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10. (SBU) After several years of advocacy by the USG and the Motion Picture Association of America (MPAA), the Thai government is now drafting legislation that would criminalize the act of illegal camcording of films. According to MPAA investigations, in 2008, Thailand was reported to be the source of 32 illegal video camcords of Hollywood films. However, in 2009, only 1 such case was reported. Nevertheless, MPAA remains concerned that Thai language audio recordings in theaters in Thailand could be married to videos from other sources. While the number of video camcords of Hollywood titles appears to have dropped significantly, nearly 70 percent of all Thai film titles released were reported to have been camcordered, packaged, and sold in pirated goods markets in Thailand. An anti-camcording law, when passed and implemented, will be a major achievement for the Thai government.

### Adopting International Standards

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11. (SBU) Of the 12 significant IP treaties that the U.S. promotes bilaterally, Thailand had been a member of only two, behind ASEAN neighbors Indonesia, the Philippines, and Vietnam. However, the government in 2009 took steps to improve its international treaty record and has now implemented four. On September 24, Deputy Minister Alongkorn personally deposited Thailand's instrument of accession to the Patent Cooperation Treaty (PCT) during a trip to Geneva. Thai and foreign patent owners have long sought Thailand's accession to the PCT as it saves the patent filers money and time when submitting their applications. Thailand's membership in the PCT will also greatly improve the ability of a Thai inventor to seek patent protection around the world. The Department of Intellectual Property opened its PCT Receiving Office on December 24.

12. (SBU) Deputy Minister Alongkorn announced Thailand's intention to accede next to the Madrid Protocol, which is a mechanism for a trademark owner to seek protection in multiple countries by filing one application directly with the national trademark office. Thailand's potential accession will face domestic pressure from the legal community, as it may lead to a significant loss of revenue for the law firms who file trademarks for domestic and international

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owners. Thailand has joined the Paris Convention, but has not yet met all of its Paris obligations.

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Positive Steps Toward Greater Enforcement  
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13. (SBU) A number of rights-holder groups have noted increased cooperation with Thai authorities. DIP Director General Pajchima brought both the Department of Special Investigations and the Economic Crimes Division of the Royal Thai Police together with the American Association of Publishers, and investigations of six cases of book piracy are underway as a result of that meeting. Another area of progress has been the cooperation that the Business Software Alliance has received from the police, which assisted them in a letter-writing campaign to companies suspected of using pirated software. Although BSA and the police have yet to conduct any raids following the letter campaign, BSA reports increased inquiries from corporations wishing to legitimize their software portfolios. Software companies also successfully sued two defendants civilly in 2009, for the first time ever receiving a significant civil damages award in an IP case.

14. (SBU) Overall, Thai government figures show a rise in both quantity and quality of enforcement actions. The Department of Intellectual Property released statistics showing seizures of 5,151,887 infringing goods and 7,271 arrests of IPR offenders in 2009. This represents a 36 percent increase over 2008. One significant raid conducted on Christmas Day netted two DVD-replicating lines, a color printer, and pirated DVDs of U.S. titles such as "Imagine That" and "Final Destination 4." Following three months of investigations by the MPA, representatives from the

MPA's Thailand program and thirty officers from the Economic Crimes Division of the Royal Thai Police raided a pirate factory in Patumthani province. The seized machines are estimated to have been capable of producing as many as seven million pirated DVDs per year. Although no one was present on the premises at the time of the raid, Motion Picture Association and Royal Thai Police investigators are conducting further inquiries into the pirate syndicate, which is alleged to have supplied pirated DVDs to retail outlets in Bangkok.

15. (SBU) The Royal Thai Police's Economic Crime Division is the lead police agency investigating IPR violations. Most investigations are still conducted primarily by rights holders, who hand over evidence to the police to conduct a raid. Although the police are usually willing to carry out the raids, rights holders say their requests are sometimes turned down and they generally must pay the expenses when the raid does happen, making it cost-prohibitive when the locations are far from Bangkok. (Note: The need to subsidize

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police actions is not unique to IPR violations, but is common practice for many crimes. End note.) UNCLASSIFIED

16. (SBU) Thai Customs continues to cooperate well with rights holders on enforcement and takes ex officio action to seize shipments of pirated and counterfeit merchandise. In 2009, Customs reported 615 cases with 346,527 items seized, an 18 percent increase in the number of cases from 2008. The bulk of seizures are from imported shipments, but Customs has also increased its inspections of exports. Customs officials do not have the authority to inspect transshipments or goods in transit, but legislation has been proposed to grant that authority. (Note: Even if Customs were to have such authority, the expense and time involved in inspecting containers that remain on-board ships make it unlikely for this legislation to have any meaningful effect. End note.) The Customs Department has set up its own small museum of seized counterfeit goods.

#### Enforcement Without Deterrence?

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17. (SBU) While the law enforcement numbers seem impressive, rights holders say they still struggle to get police cooperation for larger, higher value raids and to obtain timely search warrants from the courts. Despite the raids against wholesale operations noted above, rights holders say they are generally left carrying out smaller raids on retail areas. These thousands of small raids have done little to dismantle wholesale pirating operations and may have the perverse effect of inundating Thailand's Intellectual Property Court with a high volume of small cases.

18. (SBU) Some rights holders in the music, motion picture, and pharmaceutical industries, as well as several lawyers representing a broad array of foreign IP owners, reported that from their perspective the efficacy of law enforcement declined in 2009 compared with 2008, despite government data showing increasing numbers. Rights owners explained that because of the financial crisis in the U.S. and consequent limited corporate resources, they initiated fewer cases. Thus, from the rights holders' perspective, the increase indicated by government data does not reflect law enforcement of most value to them because the police actions were not targeted at their concerns. According to a recent assessment by the Economist Intelligence Unit, Thailand also lags behind other countries in the region in its commitment to IP protections for new investors.

19. (SBU) According to data provided by the Court, nine people were jailed for IP-related offenses in 2007, two in 2008, and five in 2009. Fines, rather than jail sentences, are preferred by the courts as being more appropriate for low-level street vendors, the vast

majority of offenders they see. A respected local law firm with a large IP practice provided statistics demonstrating that 94 percent of fines meted out by the Court are below 50,000 Baht (approximately 1,500 USD). Industry reps also remarked that the court will rarely, if ever, grant preliminary injunctions against infringing activities. Judges noted, however, that the fines may appear low, but low-income defendants often serve jail time for failure to pay, resulting in 153 imprisonments in 2007, 128 in 2008, and 52 through November of 2009.

20. (SBU) There are continuing frustrations with getting the IP courts to issue search warrants. According to industry sources,

judges will refuse requests on any number of bases having little to do with the quality of the evidence before them. On the other hand, the court complains that many rights holders settle cases out of court and use the court's search warrants to shake down infringers as an alternative source of revenue. Other IP observers confirm that some rights holders provide powers of attorney to raid teams who then use them to enforce on their behalf. These teams conduct raids in cooperation with the police, but rather than making seizures and arrests, raid teams simply demand cash on the spot. (Note: U.S. music, software, and motion picture companies have long pledged not to settle retail hard goods piracy cases out of court and push for criminal sentences in all cases. End note.) The chief judge is reportedly considering guidelines on the court's standards for issuing warrants.

21. (SBU) Although police often cooperate effectively with rights holders to carry out raids and seize infringing product, too little effort is made to follow up on information obtained during raids to arrest the "big fish" who run the piracy trade. For retail pirate operators, the risk of the occasional raid is a cost of doing business and has little impact on the bottom line. At any rate, the continued wide availability of pirated goods in Bangkok indicates that law enforcement actions still appear to have little deterrent effect.

'Red Zone' Markets  
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22. (SBU) Thai IPR authorities previously labeled certain areas of Bangkok and other parts of Thailand as "red zones" where infringing product is most readily available. In Bangkok, the red zones are Klong Thom, Saphan Lek and Baan Mor shopping areas, Patpong and Silom shopping areas, Mah Boon Krong (MBK) Center, the Sukhumvit Road area (Soi 3-19), and perhaps the most notorious, Panthip Plaza, a five-story mall with dozens of pirate stalls selling the latest DVDs and software. In Thailand's second major city, Chiang Mai, the



Night Market shopping area, Computer Plaza, Icon, and Rimkam Market are considered red zones. In the rest of Thailand, red zones include four markets in Songhkla province, and tourist markets in the beach towns of the provinces of Phuket, Surattani, Chonburi, and Krabi. Even since the listing of these well-known markets as red zones, the occasional efforts to rid them of piracy and counterfeiting have not been sustained.

#### Internet Piracy Concerns

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23. (SBU) Film and music representatives are concerned about the growing threat of internet-based piracy in Thailand. Thailand's telecommunications environment is slowly being upgraded and increased bandwidth and access will likely result in increased internet piracy. Although Internet service providers (ISP) say they act on rights holders complaints and take down infringing sites upon request, such cooperation is voluntary and often depends on personal relationships. The Thai Entertainment Content Trade Association (TECA) reported that ISPs took down infringing materials in 645 out of 749 cases, for an overall compliance rate of 86 percent. Trademark rights holders believe that a number of pirate outfits selling counterfeit apparel and handbags via the Internet are based in Thailand, although the websites are typically hosted outside the country and are difficult to trace.

#### Continuing Difficulties for Pharmaceuticals

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24. (SBU) There have been no compulsory licenses issued in Thailand since the Abhisit government came to power in December 2008. As Thailand continues to wrestle with policy regarding public access to medicines, we have urged the government to dialogue with the pharmaceutical sector for the expertise experienced companies could bring to the table in the provision of health care services under Thailand's universal health care system. Though the government is under no obligation to do so, it has included some foreign company representation in policy deliberations, but not enough to demonstrate a genuine interest in taking their potential contributions seriously, according to industry sources.

25. (SBU) Industry hopes that implementation of the Patent Cooperation Treaty will help speed patent processing. For the present, obtaining a patent on a pharmaceutical in Thailand remains difficult. The process sometimes stretches beyond ten years and some Bangkok lawyers advise their clients that patent protection is simply unavailable. Industry representatives report that Thailand does not provide pharmaceutical test data exclusivity. Thailand does not have a system to prevent a generic drug maker from using

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original innovator clinical testing data in obtaining marketing approval from the Thai Food and Drug Administration (FDA). Industry reports that the Thai FDA also does not review a particular drug's patent status before granting marketing approval to a follow-on generic manufacturer. Pharmaceutical companies must sue the generic manufacturer for patent infringement, a long process that typically neither restores the market for the innovative product nor compensates the innovator for lost sales.

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26. (SBU) The pharmaceutical industry and several Thai law enforcement agencies signed an MOU to cooperate in tackling counterfeit medicines in 2008. Some industry sources, however, believe that Thai FDA cooperation on enforcement has been lackluster. Anecdotal evidence indicates that the volume of counterfeit pharmaceuticals available from Bangkok street vendors is on the increase.

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