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RELEASED IN PART E6
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ACTION EAP-00

INFO	LOG-00	EEB-00	AF-00	VCI-00	AID-00	GHFS-00	RPPR-00
	CA-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	AVC-00
	E-00	FAAE-00	UTED-00	SIPD-00	DIAS-00	FRB-00	H-00
	TEDE-00	INR-00	AGRE-01	LAB-01	LOC-01	L-00	VCIE-00
	NSAE-00	ISN-00	NSCE-00	OES-00	OMB-00	NIMA-00	PA-00
	MCC-00	GIWI-00	PRS-00	MA-00	SGAC-00	ISNE-00	DOHS-00
	SP-00	IRM-00	SSO-00	SS-00	STR-00	EVR-00	NCTC-00
	FMP-00	CBP-00	BBG-00	R-00	IIP-00	DRL-00	G-00
	NFAT-00	SAS-00	DTT-00	FA-00	PESU-00	SEEE-00	SANA-00

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INFO ASEAN MEMBER COLLECTIVE IMMEDIATE
DEPT OF JUSTICE WASHINGTON DC IMMEDIATE
DEPT OF COMMERCE WASHINGTON DC IMMEDIATE
DEPT OF LABOR WASHINGTON DC IMMEDIATE
AMCONSUL CHIANG MAI IMMEDIATE
DEPT OF TREASURY WASHINGTON DC IMMEDIATE

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SENSITIVE

SIPDIS

STATE FOR EAP/MLS, EEB/TPP/IPE FOR JURBAN, DDRINKARD
STATE PASS TO USTR FOR BWEISEL, KEHLERS, JRAGLAND
COMMERCE FOR EAP/MAC/OKSA FOR JKELLY

E.O. 13526: N/A

TAGS: ECON, ETRD, KIPR, USTR, TH
SUBJECT: Thailand: Special 301 Input

REF: A) 11 STATE 4306;

1. (SBU) SUMMARY: The Thai government continued to demonstrate increased political commitment to intellectual property rights (IPR) protection and enforcement in 2010. Government leaders hoped their efforts would lead to the removal of the country from the U.S. Trade Representative's Special 301 Priority Watch List, where Thailand has been since 2007. Foreign and domestic rights holders applauded the government's Creative Economy initiative, the placement of dedicated IPR officials in key leadership positions, and the government's legislative agenda to improve Thailand's intellectual property legal protections. However, despite this unprecedented political will and attention, the government was

hamstrung by an inability to turn its political commitments into concrete, measurable results. Proposed amendments to the copyright, trademark, and patent laws were met by bureaucratic hurdles and political disagreements. Enforcement efforts were lackluster, with many rights holders reporting that the pirating and counterfeiting situation worsened in 2010. The motion picture industry, for example, noted that there was a 48 percent increase in the illegal camcording of films in Thailand. The government's enforcement efforts were hindered by endemic government corruption; a lack of deterrent sentences for IPR offenders; and a continued inability of law enforcement officials to effectively target and build cases against manufacturers, distributors, or anyone above street-level vendors of counterfeit and pirated goods. The U.S. pharmaceutical industry also continued to complain about its lack of participation and engagement in the ongoing health policy and intellectual property discussions at the Ministry of Public Health. END SUMMARY.

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3. (SBU) The Thai government's Creative Economy initiative, first announced in 2009, took shape in 2010 with the unveiling of numerous public awareness and education projects. While not an IPR campaign per se, we believe that the Creative Economy initiative has increased public appreciation and support for intellectual property rights in Thailand. In 2010, the government distributed funds from two economic stimulus packages to support Thai citizens and businesses to move into new areas of entrepreneurship in the arts and technology. Education officials drafted creative economy and IPR curriculum and courses for secondary schools and universities. In November, the Ministry of Commerce hosted the Thailand International Creative Economy Forum, which included the participation of international experts on creative economy policies and IPR. In addition to the awareness raising activities, the Cabinet established the National Committee on Creative Economy and a new government agency housed within the Prime Minister's Office to oversee the government's efforts. While formally established, the Creative Economy Agency is not fully operational; the Department of Intellectual Property at the Ministry of Commerce has

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continued to oversee most of the creative economy programs thus far. An unfortunate result of this new responsibility is that the Department of Intellectual Property has had less time to focus on its core duties during this high profile campaign.

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4. (SBU) Government officials began promoting their creative economy efforts overseas, too, spurring conversations about "Creative ASEAN" and "Creative APEC" at multiple international meetings. Building on these discussions, the U.S. Embassy pledged its support for the government's efforts in July 2010, when Under Secretary William Burns announced the Thai-U.S. Creative Partnership, a new bilateral initiative to forge public-private partnerships between Thai and American universities and businesses in the creative and innovative sectors. This initiative will underscore the importance of intellectual property to our two economies and encourage Thailand to improve its legal and law enforcement mechanisms to protect IPR.

Status of Proposed Legal Improvements

5. (SBU) As part of its commitments, the Thai government pledged to revise its major intellectual property laws to bring them in line with international norms, but moving these legislative changes through the Cabinet, the Council of State, and Parliament in 2010 proved more difficult than officials predicted. Since 2011 will likely be an election year, there may be further delays. The legislation would require a newly elected government to continue push for Cabinet, Council of State, and parliamentary action. Below are specific updates on the government's IPR legislative priorities.

6. (SBU) Anti-Camcording Law: According to Motion Picture Association investigations, Thailand was the source of 34 illegal camcords in 2010 (20 audio camcords and 14 video camcords), a 48 percent increase from the 23 identified camcords in 2009. Following several years of advocacy by the U.S. and Thai film industries to curb camcording, the Cabinet endorsed a draft law in September that would criminalize the act of camcording in theaters. While the Cabinet's initial approval of the legislation was a major step forward to combating this problem, the bill continues to undergo a legal review by the Council of State, the government's legal advisory body.

7. (SBU) Anti-Camcording Cont'd: The Cabinet sought the Council of State's legal opinion on several aspects of the draft legislation: whether the anti-camcording bill was necessary in light of existing copyright law; whether the law should be a stand-alone bill or incorporated into other proposed copyright amendments; whether the bill is compliant with Thailand's TRIPS commitments; and whether the criminal act of camcording should be a compoundable or non-compoundable offense (i.e., whether the complainant (right holder) can withdraw the case by settling out of court with the defendant (a compoundable offense) or whether the government can continue to investigate and prosecute the case even if the

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compliant withdraws its complaint (a non-compoundable offense). Once the Council answers these questions, the Cabinet may need to revise the provisions according to the Council's recommendations before resubmitting the legislation for a full substantive review by the Council.

8. (SBU) Anti-Camcording Cont'd: As of March 1, the Council of State has not returned its opinion to the Cabinet. Several government contacts have told us that the Council may likely determine that the anti-camcording bill should be lumped together with other copyright act amendments also currently before the Council. If the legislation cannot continue as a stand-alone bill, it would likely be delayed much longer than originally expected. If the Council approves the legislation as is, however, the Cabinet could then submit the bill to parliament, where it would undergo three readings in the lower house and three readings in the upper house before moving to a final vote.

9. (SBU) WIPO Copyright Amendments: Multiple sets of amendments to Thailand's copyright law have been under review at the Council of State for many years. One set of amendments is intended to implement provisions of the World Intellectual Property Organization Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT). Another would create a new structure for copyright collective management. The Council's review (which, on average, takes from three months to one year) appears to have stalled because of debates over the collective management amendments and the technical nature of the digital copyright provisions. Government IPR officials continue to meet with the Council of State to explain the various provisions and to improve their understanding of those aspects that deal with new technologies. Post, through the U.S. Patent and Trademark Office, has been and will continue working with the Council of State to provide technical assistance to improve their understanding of digital copyright matters. Like the anti-camcording legislation, the Council of State, after completing its review, will send the copyright amendments and opinions back to the Cabinet for final revision and approval before the bill is introduced in Parliament.

10. (SBU) Landlord Liability Provisions: In 2009, the Ministry of Commerce proposed amendments to Thailand's copyright and trademark laws to expand secondary liability to include those persons who own physical or digital spaces where infringing goods are sold, exchanged, or stored. However, similar to what happened to the anti-camcording legislation, the Office of the Attorney General and the Office of the Thai Trade Representative raised concerns with these proposed amendments when the Ministry of Commerce presented them to the Cabinet in 2010. The Attorney General argued that the amendments were unnecessary in light of existing copyright and trademark laws. While theoretically criminal charges could be brought against the landlords of notorious counterfeit markets or the internet service providers that enable the sale of pirated

music and movies, Thai prosecutors have told us that such cases would be extremely difficult to prosecute under existing laws because of the need to prove the criminal intent of the landlord.

11. (SBU) Landlord Liability Cont'd: The Thai Trade Representative separately argued that proposed landlord liability provisions could enable the "wrongful prosecution" of business or real estate owners who were unaware of the infringing activities taking place at their properties. Despite the Attorney General's and the Trade Representative's concerns, officials at the Ministry of Commerce continue to push for the adoption of the landlord liability amendments, hopeful that these provisions will enable the government to prosecute the "big fish" in criminal IP syndicates. These amendments have not been submitted to the Cabinet for approval. Given the ongoing debates in Cabinet and the lengthy review process at the Council of State, it is unlikely that these provisions would be considered by Parliament in 2011.

12. (SBU) Customs Amendments: In February 2011, the Cabinet endorsed a draft amendment to provide the Customs Department ex officio authority to inspect transshipped goods or goods in transit. The proposed amendment was included among a larger set of customs reforms that will now move to the Council of State for a legal review. Like the other proposed legislative changes, the Council of State must approve the legislation before the ruling government can submit the amendments in parliament. Some analysts have told us that, even if this legislation passes, the expense and resources required to conduct inspections of containers on transiting conveyances would be a major deterrent to the Customs Department's use of ex officio authority.

13. (SBU) Anti-Money Laundering Amendments: In 2010, the Anti-Money Laundering Office proposed multiple amendments to Thailand's anti-money laundering law, which are at various stages of review by the Ministry of Justice and the Council of State. One amendment would expand the nine predicate offenses under the law to include any criminal offense that could result in a penalty of a jail term of at least one year (what would be considered a felony under U.S. law). If this particular amendment moves forward, some practitioners believe the anti-money laundering law could then be effectively used to target criminal syndicates that sell and distribute counterfeit and pirated goods. IPR violations are currently not a predicate offense under the law.

14. (SBU) Patent Amendments: Department of Intellectual Property (DIP) officials have said they will begin the drafting and review process for amendments to Thailand's patent law. The amendments, while still in the drafting phase, would reportedly address issues such as partial design, business method inventions, improvements to the patent examination process, and post-grant opposition. Of particular concern, however, to the pharmaceutical industry has been the government's discussions about "evergreening patents" and proposed patent examination guidelines that would deny protection to incremental innovation for previously-protected drug compounds.

The Department of Intellectual Property and the Ministry of Public Health commissioned a study on the issue, which proposed patent examiner guidelines recommended by international anti-patent activists. Currently, the patent amendment process appears to be on hold; a committee established by DIP in 2010 was disbanded, but another committee established by the Ministry of Public Health was established.

Enforcement: Numbers Are Down

15. (SBU) Enforcement Data: The government statistics this year show a decline in both the number of arrests, as well as in the number and value of confiscated goods in 2010. Arrests were down by more than 35 percent from 7,613 in 2009 to 4,851 in 2010. Thai Law enforcement officials have pointed to an increase in the average number of confiscated items seized per case (and their value) as evidence that they are targeting more large scale manufacturing and warehousing facilities rather than street-level vendors. The total number of confiscated items, however, remained lower than 2009.

16. (SBU) Cooperation with Rights Holders: While some U.S. rights holders cited positive cooperation with Thai law enforcement authorities (for end user software piracy and online music, in particular), other rights holders lamented that the counterfeiting and pirating situation worsened in 2010 because of lackluster enforcement efforts. Copyright violations are a compoundable offense under Thai law, so rights holders themselves must be willing to pursue criminal cases against infringers. Civil cases are not typically pursued because the complainant must prove actual damages accrued (i.e., the money earned by the defendant from selling the pirated or counterfeit goods), a difficult task given that criminal enterprises often lack proper accounting books. Over

the years, this scenario has meant that criminal investigations tend to be conducted by rights holders (or by law firms and investigation companies who hold the rights holders' powers of attorney), who then hand over evidence to the police to conduct a raid. These investigations and the prosecutions that follow can be very costly to rights holders. While the U.S. film and music industries have long pledged to pursue criminal charges against all infringers that they raid, U.S. software companies typically withdraw criminal charges after reaching a settlement with the infringing party.

17. (SBU) Search Warrants: Rights holders expressed fewer frustrations in obtaining search warrants from the Central Intellectual Property and International Trade Court. While some judges may still refuse to issue particular search warrants, the chief judge of the court listened to the rights holders' concerns and subsequently drafted search warrant guidelines for use on the bench. The guidelines remain under review and are expected to be finalized in 2011. According to official court data, the court issued 888 search warrants through October 31 with an issuance rate of more than 80 percent. In 2008 and 2009, the issuance rate was

approximately 60 percent. Local attorneys have told us that if they suspect that a particular judge may deny a warrant request, they will typically withdraw the request and apply for a search warrant with a different judge at a later date. This process of withdrawing requests and "judge shopping" has led some to doubt the accuracy of the court's statistics.

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18. (SBU) Non-Deterrent Sentences: According to official court data, seven people were sentenced to imprisonment and a fine in 2010; two were sentenced to jail only. This represents a significant decline from previous years. The total amount of fines imposed, however, was higher (approximately \$8.5 million in 2010 versus \$3.7 million in 2009). Rather than issue jail sentences, judges typically hand out fines to the more than 3,000 defendants that plead guilty each year. The judges reason that the vast majority of offenders before them are first time, low-level or minor-aged street vendors, for which a lesser penalty is more appropriate than a jail sentence. Because many are first time offenders, their fines are often reduced and any jail time is commuted. Interestingly, a significant number of these offenders end up in jail for not being able to pay the fine the court has sentenced. Through December 13, 2010, the court reported that it sentenced 119 offenders to imprisonment for not paying their court-issued fines.

19. (SBU) Proposed Use of Tax Laws: Frustrated over law enforcement's inability to target "big fish," Deputy Minister Commerce Alongkorn approached the Revenue Department in late 2010 to explore prosecuting landlords at several major notorious markets for tax violations. This has not yet resulted in any tax decisions against landlords. While not an immediate solution to Thailand's enforcement problems, we will closely follow the government's new approach over the next year.

20. (SBU) Trademark Law Restrictions: Trademark practitioners have raised concerns about the high number of trademark registration cases that must be appealed to the IP Court because decisions are not appropriately adjudicated at the Trademark Office. Going to court for routine trademark registration raises costs and creates delays for brand owners. Another area of concern is weak protection for trade dress: Thailand's only legal provisions on trade dress predate the trademark law, making their status unclear. Damages and penalties under these existing trade dress provisions are limited. Also, current trademark law does not protect three-dimensional marks, color marks, or other "non-traditional marks"; this lack of protection means that brand owners have limited recourse when counterfeiters copy these elements of their trademarks.

Growing Threat of Internet Piracy

21. (SBU) Copyright industry representatives are increasingly concerned about the growing threat of internet-based piracy in Thailand. Thailand's telecommunications infrastructure lags behind many of its neighbors, but bandwidth and access will likely increase in the coming years, presenting increased potential for

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internet-based piracy. The music industry reports that there are currently more than 4,000 websites in Thailand where illegal music downloads are available. The Thai Entertainment Content Trade Association, which represents the Recording Industry Association of America in Thailand, continued to report positive cooperation from internet service providers. TECA representatives told us that of the 896 requests made to ISPs from January to November to take down websites with infringing materials, 717 sites were removed by the ISPs -- an overall takedown rate of 80 percent.

Widespread Cable TV Piracy

22. (SBU) Cable television piracy and broadcast signal theft in Thailand have been a thorn in the side of rights holder for many years. CASBAA, the Cable and Satellite Broadcasting Association of Asia, estimates industry losses at \$240 million in 2010, the second highest losses in Asia, only surpassed by India. Thailand's top movie channel, Sun TV, for example, is known to broadcast pirated copies of major films, including many from the Hollywood studios.

23. (SBU) In a welcome development for the cable and broadcast industry, in 2010 the Parliament passed the long-awaited Frequency Allocation Act, which establishes the National Broadcasting and Telecommunications Commission (NBTC). While the existing National Telecommunications Commission (NTC) was technically authorized to regulate the broadcast industry in the absence of a separate broadcast regulator, the NTC did not attempt to do so until 2009, when it began issuing temporary broadcast licenses to more than 450 cable television companies throughout Thailand. With a combined regulator now in the works, regulations governing copyright infringement, signal theft, and other IPR violations may now be addressed by the government. The process to appoint commissioners to the NBTC will likely take many months, so the regulator will not be up and running for at least a year. However, when the NBTC is fully operational, it will reportedly be able to suspend and/or revoke licenses for cable television operators found guilty of copyright infringement.

Continuing Challenges for Pharmaceutical Industry

24. (SBU) Pharmaceutical Dialogue: The relationship between public health and intellectual property in Thailand is complex, particularly as the government continues to wrestle with policies regarding access to medicines and the different positions of civil society groups and IP rights holders. We have urged the government to dialogue with the pharmaceutical sector regarding these issues, and to date, the Ministry of Commerce, through the leadership of Deputy Commerce Minister Alongkorn, has made efforts to strengthen the government's dialogue with industry, including chairing two interagency meetings with pharmaceutical representatives in April and July. The Ministry of Public Health, however, which oversees the government's health policies, has not been a constructive participant in the Commerce Ministry's discussions. Industry representatives continue to raise concerns about their lack of

participation and engagement in the ongoing health policy discussions at the Ministry of Public Health.

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25. (SBU) Compulsory Licenses: In September, the Ministry of Public Health approved the extensions of two existing compulsory licenses on patented pharmaceutical products, one for Merck's HIV/AIDS drug Efavirenz (distributed locally under the trade name Socrin) and a second for Abbott Laboratories' Kaletra (a combination HIV/AIDS drug that contains lopinavir and ritonavir). U.S. pharmaceutical representatives have told us that the Ministry of Public Health granted these licenses without prior consultation with the affected companies; the companies have described these as "new" licenses rather than extensions of the previous ones. The compulsory licenses on Efavirenz and Kaletra were the first ones issued by the Thai government and the only ones with expiration dates; the other compulsory licenses issued later by the Thai government were valid "until the end of the patent protection period." The compulsory licenses on Efavirenz and Kaletra were scheduled to expire on December 31, 2011, and January 31, 2012, but with the September renewals, these licenses have also been extended through "the end of the patent protection period."

26. (SBU) Counterfeit Medicines: The availability of counterfeit and substandard medicines throughout Thailand continues to be a major concern to rights holders, health advocates, and consumers. The public discourse on public health has focused more on intellectual property flexibilities, including mechanisms such as compulsory licensing, rather than the serious health dangers posed by counterfeit medicines. In 2010, the Thai government took some efforts to address the spread of counterfeit medicines in the Thai marketplace, including several raids on manufacturing and warehousing sites in metropolitan Bangkok.

27. (SBU) Counterfeit Medicines Cont'd: In September 2010, eight Thai government agencies and the Thai pharmaceutical industry association signed a new memorandum of understanding (MOU) regarding the prevention and suppression of trademark-infringing pharmaceutical products. According to government officials, the MOU should enable increased cooperation and information sharing on counterfeit medicines between law enforcement authorities, IPR officials, public health officials, as well as representatives from the pharmaceutical industry. Industry representatives were not happy with this MOU but felt pressured to sign it. Unlike a 2008 counterfeit medicines MOU, this new MOU includes the participation

of Food and Drug Administration. However, the new MOU covers only trademark-infringing pharmaceuticals and no longer includes the substandard and patent-infringing drugs that are a major concern for industry.

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