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From: svcSMARTMFI
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To: SMART Core
Subject: SPECIAL 301 FOR THAILAND: PRIORITY WATCH LIST WITH OUT-OF-CYCLE REVIEW LATER IN YEAR

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Reference: A. BANGKOK 379 (RIGHT MOVES ON IPR)
Pass Line: STATE FOR EAP/MLS, EEB/TPP/IPE
STATE PASS TO USTR FOR GROVES, BAE, WEISEL AND BISBEE
TREASURY FOR SCHUN AND MNUGENT
COMMERCE FOR EAP/MAC/OKSA
COMMERCE PASS TO USPTO
SINGAPORE FOR FINATT BAKER
Subject: SPECIAL 301 FOR THAILAND: PRIORITY WATCH LIST WITH OUT-OF-CYCLE REVIEW LATER IN YEAR

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RUEHBJ/AMEMBASSY BEIJING IMMEDIATE 6818
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UNITED STATES DEPARTMENT OF STATE
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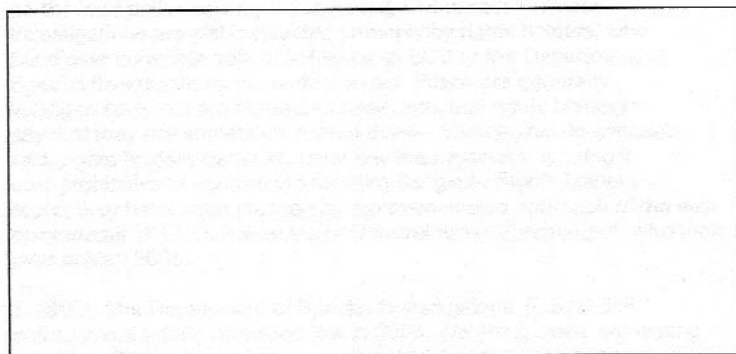
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OUT-OF-CYCLE REVIEW LATER IN YEAR

- REF: A. BANGKOK 379 (RIGHT MOVES ON IPR)
- B. STATE 8410 (SPECIAL 301 PROCESS)
- C. BANGKOK 173 (NEW PM TACKLES ECONOMIC CHALLENGES)
- D. 08 BANGKOK 3774 (NEW COMMERCE MINISTER)
- E. 08 BANGKOK 3757 (NEW FOREIGN MINISTER)
- F. 08 BANGKOK 3746 (NEW ECONOMIC TEAM)
- G. 08 CHIANG MAI 86 (PIRATED GOODS IN NORTHERN MARKETS)
- H. 08 BANGKOK 1475 (TOP IPR COP TRANSFERRED)
- I. 08 BANGKOK 1282 (REACTION TO PWL DECISION)

1. (SBU) Summary: Political turmoil throughout 2008 effectively prevented any significant policy shifts in respect for intellectual property rights (IPR). On the enforcement level, government efforts continued as they have in recent years with thousands of low-level raids and arrests, lackluster actions by the IPR courts, and limited anti-piracy campaigns that proved largely ineffectual in creating meaningful protections for rights-holders. Thailand remained a major source of and destination for pirated movies, music, software, and books, counterfeit drugs, apparel, and other counterfeit merchandise. Piracy and theft of IPR was not limited to foreign rights holders. Local rights holders were seriously affected as well. The local motion picture and music industries, for example, have faced cutbacks and company closures which if not fully attributable to IPR piracy, certainly have not been helped by it.

2. (SBU) The new government that came into power at the end of 2008, however, has significantly raised the profile of IPR protection and followed up with credible enforcement action. Prime Minister Abhisit Vejjajiva has organized a national IPR committee which he chairs himself, and has directed his Cabinet to do whatever it takes to improve Thailand's IPR record. Prime Minister Abhisit and other top government leaders have gone to great lengths to promote an improved investment climate to boost the economy and have publicly pledged to make IPR enforcement a key part of that effort. The top-down mandates have resulted in increased police raids, including several that resulted in the arrest of some "big fish" IPR offenders, and actions against police suspected of corruption. End Summary.



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Enforcement efforts remain inadequate

4. (SBU) Overall, inadequate enforcement remains the Achilles heel of IPR protection in Thailand. Rights holders have decried a general lack of interest among enforcement authorities in

undertaking extensive investigations into pirate networks, or sustained enforcement pressure against retail and wholesale establishments and manufacturers of pirate merchandise. Although police often cooperate effectively with rights holders to carry out raids and seize infringing product, little effort is made to follow up on information obtained during raids to arrest the "big fish" who run the piracy trade. Too often raids end with the seizure of a small amount of product and the arrest of a low-level employee. For most pirate operators, absorbing the occasional raid is simply a cost of doing business and has little impact on the bottom line. Rights holders also complain that a substantial amount of pirate and counterfeit product disappears from the scene of raids and that police permit low-level employees to be prosecuted in place of their bosses. These patterns seemed to be broken, however, in a widely-publicized raid after the new government came to power. In

that operation, a large-scale illegal DVD production facility was taken down. A special police team confiscated lists of customers and accounting records and arrested company officials and others who attempted to bribe the police to dispense with the raid. The local police chief was also suspended pending an investigation of his relationship to the pirating operation. The Deputy Police Commissioner later told 50 senior police officers that, unlike in the past, this IPR piracy suppression campaign would be continuous, without an end date. Later, the co-chair of the national IPR committee announced a list of 41 police officers, whom Commerce Ministry IPR staff believe are corrupt, and forwarded the list to the police internal investigation division. He promised that this will not be the last.

5. (SBU) The Department of Intellectual Property (DIP) released statistics in February 2009 showing seizures of 4.5 million infringing goods and 5,849 arrests of IPR offenders in 2008. While the numbers may seem impressive, rights holders say they have generally struggled to get police cooperation for larger, higher value raids and to obtain timely search warrants from the courts, and are therefore relegated to carrying out smaller raids on retail areas. These thousands of small raids have done little to dismantle pirate networks and may have a perverse effect of frustrating the IP/IT Court by the high volume of small cases.

6. (SBU) The Royal Thai Police's Economic and Cyber-Crime Crime Division (dubbed ECD now, but formerly known as ECOTEC) continues to be the lead police agency investigating IPR violations. Most investigations are still conducted primarily by rights holders, who hand over complete sets of evidence to ECD or the Department of Special Investigations to conduct a raid. Police are generally willing to carry out the requested raids, although rights holders say that they are sometimes turned down. When police do conduct a raid, rights holders generally must pay the expenses, making it cost-prohibitive to venture too far from Bangkok. Rights holders report they have been pleased by the even-keeled approach of the new commander of ECD, Police Major General Kowit Vongrungrat, who took over in May 2008.

7. (SBU) The Department of Special Investigations' (DSI's) IPR enforcement efforts remained low in 2008. Weighing many competing priorities, DSI continued to focus on political corruption cases and provided few resources to IPR enforcement. In Post's most recent discussions with DSI management, DSI complained that U.S. companies rarely dedicate enforcement resources in Thailand, and that DSI prefers not to work with the lawyers and raid teams who serve as their proxies. Post pledged assistance in identifying appropriate U.S. contacts, but most rights holders manage their IP enforcement

either regionally or globally.

8. (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. From January through November 2008, DIP reported 521 Customs cases with 1,299,024 items seized. This represents an 18 percent drop in the number of cases from 2007. The bulk of seizures are from imported shipments. Customs sometimes inspects exports, but typically opens containers being exported only if the shipment is highly suspicious. Customs officials do not have authority to inspect transshipments or goods in transit, but legislation has been proposed to grant that authority. 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.

9. (SBU) Thai IP authorities have initiated anti-piracy campaigns directed at textbook copying and IPR theft in general. These efforts have included the distribution of signs, lapel buttons and stickers. In a media event at the airport, DIP officials highlighted new signs which warned tourists against taking pirated goods back to their home countries. (Unfortunately, the signs are only visible to tourists on departure, not on arrival.) Thai IPR authorities have also 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 city, Chiang Mai, the Night Market shopping area, Computer Plaza, Icon and Rinkam Market are considered red zones. In the rest of Thailand, red zones include four markets in Songkhla province, and tourist markets in the beach towns of the provinces of Phuket, Surattani, Chonburi and Krabi. These are well-known markets, but even since their listing as hot spots, there has yet to be a long-term effort to rid them of piracy and counterfeiting. Moreover, no one has been able to find suitable legal basis in Thailand to penalize landlords for tenants conducting infringement activities, so there is little incentive for landlords in the red zones to cooperate in terminating the leases of infringing tenants.

Court Actions Stagnant

10. (SBU) Thailand's Intellectual Property Court, once a model for the region, is not operating to its full potential. Rights holders frequently complain that few offenders of piracy crimes receive sentences more serious than a small fine or community service. For their part, judges have said that police bring up on charges only low-level offenders that the judges feel do not merit harsh punishment, while failing to charge large operators that the courts are ready and willing to try. DIP reported that there were a total of 4979 criminal IP cases before the court in 2008, and 15 defendants received prison sentences (Note: We have been unable to determine whether those sentences were actually served). Judges also note that some defendants end up serving time when they cannot afford to pay the fines levied by the court.

11. (SBU) Over the past three years, the court has reportedly become more reluctant 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. The software industry has particular difficulty pursuing warrants for end-user piracy cases. The court complains that many right 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 right holders rent out their powers of attorney to raid teams that enforce on their behalf. These teams conduct raids in cooperation with police, but rather than making seizures and arrests, raid teams simply demand cash on the spot. Judges have bristled at the use of their warrants for what they see as little more than extortion. (Note: U.S. music, software, and motion picture companies have long pledged not to settle retail hard goods piracy cases and push for criminal sentences in all cases.) A new chief judge is reportedly considering guidelines on the court's standards for issuing warrants.

Legal Improvements Pending

12. (SBU) Thailand implemented its obligations under the WTO TRIPs Agreement but has not moved further to modernize its laws to keep pace with technological or international developments. Thailand remains well behind other similarly situated countries in implementing treaties and international standards needed to encourage the growth of domestic IP-centered industries. Of the 12 significant IP treaties that the U.S. promotes bilaterally, Thailand is a member of only one; ASEAN neighbors Indonesia, the Philippines and Vietnam are each members of six. In January 2008, Thailand took preliminary steps to join the Paris Convention and Patent Cooperation Treaty, but the process stalled. The Thai government has not moved forward to implement the Madrid Protocol on trademarks but will need to do so as a part of its ASEAN Economic Blueprint commitments. Thailand has also not taken the necessary actions to join the WIPO Copyright and Performances and Phonograms Treaties, but the new government has yet to address the subject.

13. (SBU) In early 2008, Thailand considered various pieces of legislation that would amend its patent, trademark, copyright, broadcasting and IP border enforcement laws. None of these saw the light of day amid the ensuing political turmoil. For U.S. industry, the most important legislative drafts are copyright amendments to implement provisions of the WIPO Copyright Treaties. However, the Department of Intellectual Property has not made these amendments a priority and has instead proposed another set of copyright amendments that call for the creation of a mandatory collective management system and the elimination of minimum penalties for copyright infringements.

14. (SBU) In the patent area, Thailand's laws do not prevent a generic manufacturer from relying on innovator data as the basis for its drug or agricultural chemical regulatory approval. There is not a formal system to deny regulatory approval to generic producers while pharmaceutical originals are still under patent. Because the IP Court rarely issues preliminary injunctions, even patent owners who succeed in costly litigation often find themselves unable to reestablish their market position against the infringing generic producer. Thailand's handling of conflicting trademarks and geographical indications (GIs) is also problematic, with GIs being given greater weight.

15. (SBU) Although motion picture studios and cinemas have been vocal in fighting a potential film quota under the 2007 Film Act, the RTG has yet to make legislative changes necessary to allay

industry's fears. Similarly, although the cable industry has demonstrated to the RTG that the 2007 Broadcast Act was a missed opportunity to ensure that cable pirates lost their broadcast licenses, over the past year Thai authorities have not been open to the idea of amending the act. The motion picture industry has lobbied heavily for a law to prohibit the camcording of motion pictures, largely because of evidence of a sharp rise in camcording in Thailand. The Thai government has rebuffed industry's concerns and claimed that the current copyright law is sufficient to deal with the problem.

Compulsory licenses still in place

16. (SBU) Thailand issued compulsory licenses (CLs) in late 2006, early 2007, and early 2008, breaking the patents on seven pharmaceutical products registered in Thailand. No new licenses have been issued by the past three governments.

17. (SBU) The Thai health authorities who issued the licenses claimed authority under WTO rules, but pharmaceutical industry representatives complained of a lack of transparency in the government's decision making process and an unwillingness to engage in good-faith negotiations before issuing the licenses. Rights holders also saw the 2008 expansion of the compulsory licensing to cancer drugs as evidence that the government then was using CLs as a solution for budget problems rather than focusing on access for poor patients. Over the past year, government officials have sought to distribute products under all but one of the CLs, and Post believes that products have been distributed under five out of the seven licenses. The two remaining products have not been imported because the patent owner provides one of them free to any Thai patient upon request, and the other is not available in generic form.

18. (SBU) The new Prime Minister has made a number of statements to the foreign industry that pharmaceutical companies view as positive, including that Thailand should not sacrifice long term healthcare access for short term solutions and that his government is committed to full consultation in advance of any action. The Foreign Minister has gone further, telling a large group of visiting U.S. business executives that this government will not issue any new CLs.

19. (SBU) The politics surrounding the compulsory licensing situation have made it difficult for industry to get any traction in dealing with the significant counterfeit pharmaceutical problem in Thailand. Industry reports that counterfeit erectile dysfunction drugs are widely sold in certain tourist-oriented locations, but this is only a small part of the problem. More troubling is a range

of counterfeit medicines meant for diseases endemic in developing countries, such as infectious hepatitis and malaria. The RTG is ill-equipped to work through the chain of sellers and suppliers of fake drugs. On February 14, 2008, DIP signed an MOU with industry, the police, DSI, and Customs, to increase efforts to combat counterfeit pharmaceuticals. Noticeably absent from the signing ceremony was the Food and Drug Administration (FDA), which has enforcement authority over pharmacies. DIP had reported that FDA would later join the MOU, but there has been no progress as of this report.

Internet piracy a looming threat

20. (SBU) In 2008, movie and music representatives remarked on 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. The sharp rise in movie camcording in 2008 is a potential indicator of this increasing threat; every Thai language film screened in 2008 was camcordered and posted on the Internet within the first week of its release. Although Internet service providers say they act on rights holders complaints and take down infringing sites upon request, such cooperation is voluntary and often depends on personal relationships. Trademark rights holders believe that a number of pirate outfits selling counterfeit apparel and handbags via the Internet are based in Thailand, though the websites are typically hosted outside the country and are difficult to trace. The new government under Prime Minister Abhisit recently conducted the first major internet piracy and counterfeiting operation against an online retailer selling counterfeit goods.

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