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ACTION EAP-00

INFO	LOG-00	EEB-00	AF-00	VCI-00	AID-00	GHFS-00	CA-00
	CEA-01	CIAE-00	CPR-00	CTME-00	INL-00	DNI-00	DINT-00
	DODE-00	ITCE-00	DOTE-00	ANHR-00	DS-00	DHSE-00	EXME-00
	AVC-00	OIGO-00	E-00	FAAE-00	UTED-00	SIPD-00	DIAS-00
	FRB-00	H-00	TEDE-00	INR-00	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	IIP-00	DSCC-00	DRL-00
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DEPT OF COMMERCE WASHINGTON DC IMMEDIATE

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DEPT OF AGRICULTURE WASHINGTON DC IMMEDIATE

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STATE FOR EAP/MLS, EEB/TPP/IPE FOR JURBAN

STATE PASS TO USTR FOR BWEISEL, KEHLERS, JRAGLAND

COMMERCE FOR EAP/MAC/OKSA FOR JKELLY

E.O. 13526: N/A

TAGS: ECON, ETRD, KIPR, KCRM, TH

SUBJECT: Thailand: Special 301 Out-of-Cycle Review

1. (SBU) SUMMARY: Since Prime Minister Abhisit Vejjajiva took office in 2008, the Thai government has demonstrated a notably increased level of political commitment to intellectual property rights (IPR) protection and enforcement. Foreign and domestic rights holders alike have applauded the government's Creative Economy initiative, the placement of dedicated IPR professionals in key leadership positions, and the government's legislative agenda to bring Thailand in line with international IPR accords. However, translating the government's political will into concrete, measurable results has continued to pose a significant challenge for Abhisit and his economic team in 2010.

(SBU) SUMMARY CONT'D: Despite its best efforts, the government was simply unable to push its IPR legislative agenda forward to Parliament; proposed amendments to the copyright, trademark, and patent laws were hindered by bureaucratic hurdles and political disagreements. Thailand's political troubles this year did not help the legislative prospects. Enforcement efforts have been lackluster, too, with numerous rights holders reporting that the pirating and counterfeiting situation worsened in 2010. The government's enforcement efforts were also 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.

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IPR Still on the National Agenda

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, the Creative Economy initiative has undoubtedly 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

new government agency housed within the Prime Minister's Office to oversee the government's efforts. (COMMENT: While formally established, the Creative Economy Agency is not fully operational; the Department of Intellectual Property at the Ministry of Commerce has continued to oversee most of the creative economy programs thus far. END COMMENT.)

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) In 2009, the Thai government pledged to revise its major IPR 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 expected. U.S. and Thai industry representatives, however, remain encouraged by the government's commitment to make these legal changes. Below are specific updates on the government's legislative priorities.

6. (SBU) Anti-Camcording Law: Following several years of advocacy by the U.S. and Thai film industries, in September the Cabinet approved in principle a draft law to criminalize the act of camcording of films in theaters. According to Motion Picture Association investigations, Thailand was the source of 36 illegal camcords in 2010 so far (22 audio camcords and 14 video camcords), up from 25 illegal camcords in 2009. While the Cabinet's initial approval of the anti-camcording legislation was a major step forward to combating this problem, the bill must now undergo a legal review by the Council of State, the government's legal advisory body, before moving to Parliament. (NOTE: Post sent an English translation of the proposed draft to USTR and the Department in September. END NOTE.)

7. (SBU) Anti-Camcording Law Cont'd: Because of concerns raised by the Office of the Attorney General and the Office of the Thai Trade Representative during the Cabinet's deliberative process, the Cabinet sought the Council of State's legal opinion on whether the anti-camcording legislation was necessary in light of existing copyright law. The Cabinet also requested an opinion on the bill's

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compliance 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 (compoundable) or if the government can continue to investigate and prosecute the case even if the complainant withdraws the complaint (non-compoundable). The Council of State must first provide its opinion on the questions posed by the Cabinet, a move that is expected within the next few months. The Cabinet must then resubmit the legislation to the Council of State for a full legal review (the current review is only dealing with the questions posed by the Cabinet) before the legislation can move to Parliament. Ministry of Commerce officials have predicted that the government may be able to introduce the legislation in Parliament in September 2011; the legislation would then undergo three readings in the lower house and three readings in the upper house before moving to a vote.

8. (SBU) WIPO Copyright Amendments: Multiple sets of amendments to Thailand's copyright law have been under review at the Council of State for several years. These amendments are intended to implement provisions of the World Intellectual Property Organization Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT). The deeply technical aspects of these amendments

have significantly delayed the Council's review (which, on average, takes from three months to one year). 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, will work 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 approval before the bill is introduced in Parliament.

9. (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 it is true that 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 working-level 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.

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10. (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 strongly 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. Like other proposed legislative changes, these amendments will first need the support of the Cabinet before they can move to the Council of State for review. Given the lengthy process, it is unlikely that these provisions will be considered by Parliament in 2011.

11. (SBU) Customs Amendments: The Customs Department does not have ex officio authority to inspect transshipped goods or goods in transit, but legislation has been proposed to grant that authority to enable them to seize shipments of pirated and counterfeit merchandise. Following several years of discussion with the USG on this topic, the Customs Department proposed the amendment among a larger set of customs reforms which is awaiting approval by the Minister of Finance. The Minister will submit the amendments to Cabinet for approval, followed by the Council of State and Parliament. (COMMENT: If Customs obtains this authority, the expense and resources required to conduct inspections of containers and merchandise on transiting conveyances might make it difficult for this legislation to have any significant impact. END COMMENT.)

12. (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.

13. (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,

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while still in the drafting phase, would reportedly address issues such as partial design, business method invention, 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 for innovative pharmaceutical patents; the Department of Intellectual Property and the Ministry of Public Health have reportedly commissioned a study on the issue. DIP has promised a full consultative drafting process that would include patent industry representatives however. DIP hopes to present the amendments to the Cabinet in 2011.

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Enforcement: Numbers Are Down

14. (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 are down by more than 50 percent from 7,613 in 2009 to 3,551 from January to September 2009. The number of confiscated items seized is down by approximately 75 percent from 2009. While the full calendar year data is not yet available, the statistics are still expected to be much lower than previous years. 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.

15. (SBU) Cooperation with Rights Holders: While some U.S. rights holders cited positive cooperation with Thai law enforcement authorities (software and music industry representatives in particular), other rights holders lamented that the counterfeiting and pirating situation worsened in 2010 because of lackluster enforcement efforts. (COMMENT: When we ask rights holders and their law firms about enforcement, we consistently hear widely varying opinions of the effectiveness of Thai law enforcement authorities to enforce IP rights. During a recent USTR official visit to Thailand, one law firm representative, who represents major American and Japanese clients, explained that it is much easier for a client to enforce its IP rights in Thailand than in many neighboring jurisdictions. For this reason, the firm's clients tend to be relatively happy with the levels of enforcement and have selectively focused their enforcement budgets on larger scale raids in Thailand. Regardless of the rights holders' level of content with Thai law enforcement, pirated and counterfeit goods continue to be widely available through Thailand. END COMMENT.)

16. (SBU) Cooperation Cont'd: 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

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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. (COMMENT: In a year of corporate budget cuts, the decline in raids and arrests can be partially attributed to rights holders' initiating few cases due to financial restraints. END COMMENT.)

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 a search warrant, the chief judge of the court has listened to the rights holders' concerns and subsequently drafted search warrant guidelines for use on the bench. The guidelines are under review and expected to be finalized in 2011. According to official court data, the court issued 888 search warrants through October 31 with an approval rate of more than 80 percent. In 2008 and 2009, the issuance rate was approximately 60 percent. (COMMENT: Some attorneys have explained that if they believe that their warrant request will likely be denied by a particular judge, 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. END COMMENT.)

18. (SBU) Non-Deterrent Sentences: According to official court data, only two people were sentenced to jail for IPR violations in 2010; seven people were sentenced to imprisonment and a fine. This is a decline from previous years: nine to jail only and 34 to jail and prison in 2007; two to jail only and 37 to jail and fine in 2008; five to jail only and 38 to jail and fine in 2009. Rather than issue jail sentences, judges typically issue 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. Because many are first time offenders, their fines are often reduced and the jail time 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, 119 offenders were sentenced to imprisonment for not paying their court-issued fine.

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19. (SBU) Use of Tax Laws: Frustrated over law enforcement's inability to target "big fish," Deputy Minister Commerce Alongkorn has approached the Revenue Department to explore prosecuting the landlords at several major notorious markets for tax violations. While not an immediate solution to Thailand's enforcement problems, we should closely follow the government's response to this new approach over the next year. (NOTE: In a meeting with a USTR official on December 14, Alongkorn stated that the Commerce Ministry was providing details of potential tax violations by the landlords of both MBK Shopping Center and the Klong Thom Market to the Revenue Department. END NOTE).

Internet Piracy

20. (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 significantly increase in the coming years, presenting increased potential for internet-based piracy. The Thai Entertainment Content Trade Association, which represents the Recording Industry Association of America in Thailand, continued to report positive voluntary 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.

Cable Piracy

21. (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. 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. (NOTE: The process to appoint

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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. END NOTE.)

Continuing Challenges for Pharmaceutical Industry

22. (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. 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. Unfortunately, however, the Ministry of Public Health, which oversees the government's health policies, has not been an active participant in the Commerce Ministry's discussions. Industry representatives continue to complain about their lack of participation and engagement in the ongoing health policy discussions at the Ministry of Public Health.

23. (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 these extensions were granted by the Ministry of Public Health without prior consultation with the affected companies. These two compulsory licenses 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."

24. (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. Unfortunately, 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 began to take efforts to address the spread of counterfeit medicines in the Thai marketplace, including several

major raids on manufacturing and warehousing sites in metropolitan Bangkok.

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25. (SBU) Counterfeit Medicines Cont'd: In September, 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. Unlike a previous counterfeit medicines MOU that was signed in 2008, this new MOU includes the participation of Food and Drug Administration. (NOTE: U.S. pharmaceutical representatives in Bangkok complained to us that the new MOU is more limited in scope in that it only covers trademark infringing pharmaceuticals and does not include substandard drugs or patent infringing drugs. END NOTE.)

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