



Thailand: IP Developments

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2004 IN REVIEW

by Isabella Ho and Edward J. Kelly



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INTRODUCTION

The year 2004 was a busy and challenging year in intellectual property practice in Thailand. We outline below the breadth of activities in this field.

LEGISLATIVE

Two laws relating to intellectual property were introduced in 2004. The first was the Geographical Indications Act, and the second, the Act to Control the Manufacture of Optical Discs.

The Geographical Indications Act came into force in April 2004. The regime for foreign rights owners is a re-registration process, namely that the foreign applicant must show a registered (and current) foreign geographical indication before being entitled to apply for the same in Thailand. Our firm submitted the first-ever geographical indication application last year, on behalf of a foreign client. Due to strong national interest, we understand that the Thai Department of Intellectual Property (DIP) has been encouraging Thai IP owners to protect Thai geographical indications by registering under this new regime.

The Act to Control the Manufacture of Optical Discs was passed by Thai Parliament in October 2004. Introduction of this law was supported by copyright owners facing extensive problems of domestic and cross-border copyright piracy. The Act regulates manufacturers of optical discs (compact discs, VCDs, DVDs) and is intended to allow the copyright

owners an additional measure to attack copyright piracy at manufacturing level. At the time of writing, however, this Act is not yet in force as implementing regulations under the Act are still being finalized.

Other IP-related Bills in the pipeline include:

- the amendments to the Copyright Bill, of which various drafts have been circulated for public consultations in 2004; and
- A Bill to control collecting societies of music copyright owners. It is possible that this Bill may be merged with the Copyright Bill.

POLICY AND IP-RELATED ACTIVITIES

▲ Bilateral Free Trade Agreements (FTAs)

In 2004, the Thai Department of Intellectual Property devoted a substantial part of its time and attention to the IP components involved in the FTA negotiations. Thailand concluded its FTA negotiations with Australia in July 2004. The Thai-Australian FTA made brief reference to observance of TRIPS, enforcement and border controls of intellectual property, as well as mutual cooperation in achieving effective intellectual property protection at various levels. Thailand's FTA negotiations with Japan and the US contain more comprehensive substantive IP protection issues when compared with the Australian FTA. In 2004, numerous rounds of bilateral meetings were held between the Thai negotiating team and the US and

Japanese delegations respectively. It is understood that the governments are now reviewing the draft texts of the IP content of the FTAs. With respect to the US Trade Representative (USTR) Special 301 listing, Thailand remained in 2004 on the Watch List. At the time of writing, the Special 301 list for 2005 has not yet been announced by the USTR. It is anticipated, however, that the issues raised in the Special 301 would be more closely addressed in the Thai-US FTA.

▲ Technical Training

Numerous foreign governments rendered technical assistance on IP matters in 2004. The USPTO held two workshops in Bangkok in 2004 for ASEAN government officials on issues of enforcement and optical disc regulations. The World Customs Organization, as well as the EU-IPR Network, held training for Thai Customs on border control enforcement of IPR in the latter part of 2004. These training programs were well supported by the

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private sector, particularly by Casio, Adidas, Philips, Daimler Chrysler, Levi Strauss, Epson and many others.

▲ DIP Activities

Domestically, the DIP also has continued in its efforts to highlight to the Thai population the benefits of Thailand's IP system for individuals and businesses alike. The Thai Government embarked upon numerous educational programs and promotional activities, both jointly with other government agencies and the courts, as well as individually. Programs and activities for the public included e-commerce contracts and SME sector training.

TRADEMARK AND PATENT REGISTRATION

▲ Trademark

A somewhat alarming development that emerged in 2004 was the Board of Trademarks' tendency to reject well-known trademarks where coupled with descriptive terms. Several trademark owners, who had already registered well-known "house" marks, filed supplementary trademark applications containing the well-known mark joined with descriptive words. The Registrar would then require the owner of the well-known mark to enter disclaimers of the descriptive term, leading to the applicant appealing to the Board of Trademarks. Despite submission of evidence of use of the trademarks to prove secondary meaning and distinctiveness as a whole, the appeal petitions were rejected, leading to overall rejection of the trademark application. The grounds for the Board's decision in many instances made no reference to the presence of the well-known mark, nor to any weight given to those well-known marks already registered. These cases have now been appealed to the IP&IT Court.

Administratively, the Trademark Office has now introduced a website containing updated information enabling applicants to determine the

status of their applications filed with the Registry. It is anticipated that the Trademark Office would, in the long term, allow online searches for trademarks, as well as online trademark filings. Note, however, that the website and documentation are in the Thai language and, therefore, would be accessible only to those with fluency in Thai.

▲ Patent

In 2004, the main emphasis of the Patent Office has been to expedite examinations, including efforts to bolster resources available to the Office for carrying out examinations. Patent filing fees were reduced in 2004, aimed at giving Thai applicants greater incentive to file patent applications locally.

ENFORCEMENT & LITIGATION

▲ Enforcement

A great volume of criminal enforcement cases in 2004 continued to be brought by trademark and copyright owners. We saw an increasing number of IP owners expand their enforcement focus to upcountry provinces and cities rather than merely focusing on Bangkok and its surrounds. Many brand owners from the automotive and motorcycle industry have been active, in part as an effort to foster the thriving domestic automotive industry. It seems that as the automotive industry continues to grow, there is a corresponding surge in growth of knockoffs and counterfeits. Infringements have been found not only in retail channels and factories, but also at trade shows and exhibitions, requiring rather unpleasant confrontations in public areas and delicate negotiations.

▲ Litigation

In 2004 we saw an overall increase in IP-related litigation, as litigants have become more confident in the predictability of proceedings. The largest component of cases in the IP&IT Court comprised trademark appeals from the Board of Trademarks. The next largest component was in civil litigation cases, including

an increase in patent infringement claims. There were relatively few interlocutory applications for injunction, although our firm successfully obtained and executed the first Anton Pillar Order for 2004. There were increased appeals to the Supreme Court from the IP&IT Court.

▲ On-line Infringements

We saw a steady trend of IP infringement cases involving web-based distribution of pirate and counterfeit goods, with many sites set up and managed by foreign expatriates, catering to overseas customers. The business models could be described as follows:

(i) Counterfeits sold by mail order over the Internet. In these cases, the infringers would set up websites offering the goods for sale. Counterfeit goods would either be supplied to them by a local factory, or purchased from local retail sources and offered them for sale at a markup to overseas customers. In a few other cases, the counterfeits were offered on auction sites such as eBay.

(ii) Internet downloading. Infringing copyright material such as music files and graphics were offered for downloading on the Internet. In some cases, downloads were offered for free, while in others, the downloads were offered by commercial operators for a fee.

Brand owners have taken an aggressive tack against these high-tech pirates. A host of sanctions are brought to bear on offenders in addition to trademark and copyright penalties, including filing of charges based on violations of immigration, tax, labor, and commercial regulations.

▲ Enforcement Agencies

The long-awaited Department of Special Investigation (DSI) was established. Currently, there exists a small cybercrime unit within the Royal Thai Police that primarily is responsible for policing pornographic materials and prostitution. However, the cybercrime unit has indicated that

OPTICAL DISC PIRACY IN THAILAND FACING TOUGH CHALLENGE

by Edward A. Madden



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In many countries confronted with the problems of piracy and counterfeiting, one often finds the widespread availability of pirated optical disc media such as CDs, VCDs, DVDs and CD-ROMs. Unfortunately, this has also been the case in Thailand historically. In 2003, the International Federation of the Phonographic Industry (IFPI) put the level of optical disc piracy in respect of musical products in Thailand at 35%. In 2004, the Business Software Alliance (BSA), in its annual global software piracy study, found the level of pirate software to be 80% - a significant figure considering most software products are made available on optical disc media. In 2004, Thai law enforcement made inroads against manufacturers of optical discs and institutional end-users of unlicensed software. Nevertheless, the continuing high level of piracy was one of the key factors for why Thailand remained on the US Trade Representative's Watch List in 2004. The continued appearance on the Watch List could, unfortunately, tend to weaken Thailand's bargaining strength in free trade negotiations with major IP-producing nations (such as the US and Japan). In light of this, the Royal Thai Government, under the leadership of current Prime Minister Thaksin Shinawatra, has implemented several policies to help curb the potential damage which piracy and counterfeiting could inflict on the Thai economy.

A significant reason for the widespread availability of pirated optical disc media in Thailand has been attributed to the lack of an optical disc regulation which would enable the government and law enforcement (as well as interested private sector

representatives) to supervise and monitor disc production facilities. As a consequence of this legal void, it is generally accepted that operators with ties to criminal syndicates, who had faced tightening regulation in other locations such as Hong Kong and Taiwan, relocated production to Thailand. IFPI estimated that in 2003, in excess of 50 optical disc production plants were in existence in Thailand with an annual capacity that far exceeded legitimate local demand and the legitimate export market. While it is true that some number of these plants may also engage in legitimate and licensed production, the fear is that many of the plants are engaged in illegitimate activities.

Fortunately, recent developments in Thailand would indicate that optical disc pirates are beginning to face viable obstacles to the continuance of their activities. The Thai Government has specifically earmarked optical disc piracy as an area to be addressed, with the result that a new clampdown policy has been enunciated to regulate this area. The new drive follows upon the largely successful three-month crackdown which had commenced in May 2003. In order to lend credence to this new move, there was an announcement in December 2004 (and reported in the Bangkok Post) that the Thai Cabinet had provided outline approval to an initial Baht 13 million budget to fund a further crackdown on optical disc piracy in six areas. Among the target areas are the main tourist attraction spots of Bangkok, Chiang Mai, Pattaya and Phuket.

The benefits of the new drive are already coming to fruition. Within the first few days of the new campaign, over one million pirated CDs, VCDs

and DVDs were seized in a simultaneous coordinated raid in a number of locations around Bangkok (in the Klong Thom and Bang Mo areas). The raids, which involved more than 200 police officers acting with a number of IP owners and their representatives, targeted major distribution locations in addition to production facilities. Over and above the large number of seized discs (which included movies, music, software and multimedia/game content), the attachment of four optical disc pressing machines was seen as most encouraging. These machines are capable of literally producing millions of pirate discs and are regarded as the most expensive and difficult to replace asset for infringers.

December also saw the launch of a clampdown program by the Motion Picture Association (MPA) when "Operation Eradicate" was put into operation - a coordinated effort to suppress optical disc media piracy in 12 countries in the Asia-Pacific region. It was reported by IDG News Service in mid-January that the Thai version of this operation had already seen over 54 separate raid actions leading to the arrest of 38 individuals.

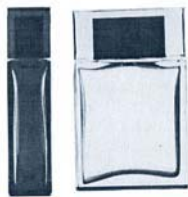
The foregoing police action has led to a visible reduction in the amount of pirated material available on the streets of Bangkok. These positive actions also bode well for the continued development of IP protection and IP enforcement in Thailand. Further encouragement has also recently come in the form of the final draft of the CD Production Act. This Act has been making its way through the legislative process for some time and recently obtained Parliamentary approval.

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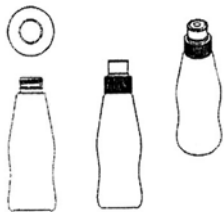
HOW TO REGISTER YOUR PRODUCT AS A 3-DIMENSIONAL TRADEMARK

by Vipa Chuenjaipanich and Suebsiri Taweepon

The Thai Trademark Act, as amended in 2000, provides protection for a 3-dimensional (3-D) object as a trademark, effective as of June 30, 2000. Since then, many applicants have filed for registration of the shape of their products as 3-D marks. As registration can be renewed every 10 years, it would provide a perpetual monopoly over the rights to the shape of that object. However, almost no application for registration of a 3-D mark has been successful. Based on local practice of the Department of Intellectual Property (DIP), the Trademark Registrar tends to reject most applications for 3-D marks that comprise the shape of the product itself on the grounds that the proposed mark is directly descriptive of the goods for which registration is sought. Some examples of rejected applications are given below.



Application No. 475755 for "Perfume Bottle Mark" by Carolina Herrera Ltd.



Application No. 539203 for "Juice Bottle Mark" by Australiana Group Holdings



One of the rejected applications belongs to the Coca-Cola Company. The company's application to register its famous "Coca-Cola Bottle" (application no. 434308) was rejected by both the Registrar and the Board

of Trademarks on the grounds of non-distinctiveness. The proposed bottle mark was considered a generic picture that was not sufficiently distinctive for registration. It was also considered a container directly descriptive of the applied goods, Beverages, in Class 32. The Coca-Cola Company then filed a lawsuit with the Intellectual Property and International Trade (IP&IT) Court against the Board of Trademarks' rejection of their proposed mark. The Coca-Cola Company claimed that their proposed mark has been widely used not only as a container but also as a trademark and as such, has acquired distinctiveness through use, hence, it should be considered to have achieved a secondary meaning. In June 2004, the IP&IT Court rendered its judgment concerning the application for protection of the Coca-Cola Company's famous bottle shape as a 3-D mark. The Court held that the proposed bottle mark was merely an invented picture presented in two dimensions -- length and width -- without the third dimension, depth. Thus, it should not be considered a container for the goods but was sufficiently distinctive for registration as a 2-D trademark.

The Court's decision on the Coca-Cola case reflects the importance of adequate preparation before



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filing an application for a 3-D mark in Thailand. As the Thai Trademark Act requires that a mark not be descriptive of the applied goods or services, the registration of a product as a 3-D mark is difficult. However, there are avenues available to increase the chances of registrability of a product as a 3-D mark.

How to Register Your Product as a 3-D Trademark

✓ When filing a new trademark application, the applied mark must be adequately represented on the trademark application form. For a clear specimen of a proposed 3-D mark, we recommend that the specimen be taken as a photo represented from every side, especially the perspective view. In other words, we believe that the specimen of the 3-D mark in the form of a photo is more clearly an application for a 3-D mark than a draft or drawing. We also recommend that the specimen of the mark be presented identical to its actual use, which is recognized by the public. This is because the non-use basis of the 3-D mark would likely be more rigid than that of the usual word or device mark.

✓ File the application to register the proposed 3-D mark claiming specific colors in order to increase the distinctive quality of the proposed mark.

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3-D TRADEMARKS (from page 4)

✓ Submit the application together with evidence of use in order to show your intention to register the mark and also to prove the wide-spread recognition of the mark among Thai consumers. Evidence of use, especially from the Thai market, will strengthen and support the chances of registrability of the proposed 3-D mark. This evidence includes the product itself; copies of the proposed 3-D mark applications and/or registrations in various countries; copies of invoices evidencing sales of the product; catalogues, leaflets, brochures, newspaper and magazine advertisements; and substantial samples or packages of the product. If the 3-D

mark has been used in Thailand for a long period of time, we strongly recommend that Thai distributors provide as much of the required evidence of use as possible.

In order to increase the chances of successful registration, we recommend submitting evidence of use with the application to prove that the 3-D mark is widely recognized and that it has achieved a secondary meaning through use. A mark, including a 3-D mark, may gain secondary meaning through distribution or extensive advertisement. Proof of use of the proposed 3-D mark in Thailand is the most influential factor in determining the registrability of the mark. Evidence of use and registration of the 3-D mark

outside of Thailand reflecting Thais' awareness of the mark is also acceptable. It would be best that all evidence demonstrates use over as extensive a period of time as possible. In other words, the longer the use, the greater the possibility that the 3-D mark will be found to have acquired distinctiveness. Therefore, we recommend collecting as much evidence of use as possible before filing your product as a 3-D mark in Thailand.

We must emphasize that the registrability of the shape of a product as a 3-D mark in Thailand is currently difficult. We are of the opinion that the most important step in registering a 3-D mark is not an early filing date but rather taking time to gather sufficient evidence of use. ✚

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it is developing the resources and the capability to detect and enforce against web-based distributors of fake and pirate goods.

▲ Customs Enforcement

Thai Customs' border control efforts have been praised by numerous IP owners. Commencing in 2003 and gaining momentum in 2004, Royal Thai Customs officers assigned at the airports and seaports detained a steady flow of containers and shipments, seizing approximately US\$1.5 million worth of various types of branded counterfeit goods. One seizure alone in December 2004 uncovered 400,000 pieces of counterfeit spark plug covers. In separate cases in 2004, over 20 metric tons of counterfeit automobile parts were seized on behalf of major multinational automobile, motorcycle and parts manufacturers. Customs has now stepped up inspections of exports, a marked improvement from the previous year when Customs had inspected only imports of suspect counterfeits. The Customs efforts can be described as nothing short of spectacular, particularly since it is the only Thai enforcement agency to regularly bring *ex officio* action for IP.

PHARMACEUTICAL INDUSTRY

Within the pharmaceutical industry, the issue of access to AIDS drugs came to the fore with Thailand's hosting of the 15th International AIDS Conference in July 2004. NGOs, generic drug manufacturers, and the Thai Government Pharmaceutical Organization (GPO) have lobbied hard for access to pharmaceuticals' proprietary data on file with the FDA, and the possibility of compulsory licensing of drug patents was discussed in the media. These issues will come into sharp focus as the FTAs are concluded, and it is believed that the present administration seeks to maintain its pro-development policy, namely, to secure various compromises to ensure that access to cheap and essential medicines are retained for Thai subjects. The Thai patent law will be re-examined in at least four areas which include (a) the use of "Bolar" Provisions; (b) the ability to obtain patent term extensions; (c) parallel imports of medicines; and (d) the requirement of the drug regulatory authorities to consult the patent register when granting approval for product registrations for generic medicines.

DIRECTION FOR 2005

In January 2005, the Thai DIP announced its intention to conduct a broad review of existing IP legislation, setting up a working committee to carry out public consultations and to make recommendations. What had begun as an effort to amend the Trademark Act will now be a study to determine whether and when Thailand would accede to the Madrid Protocol, as well as the manner in which domestic implementation would be carried out. Similarly the initiative to accede to the Paris Convention will come under closer study through this committee. This is anticipated to be a project that will gain momentum throughout 2005. Coupled with the current FTA negotiations with Japan and the USA, the possible future legislative framework for Thai IP laws is a dynamic picture at the moment.

The burgeoning Thai manufacture and export industries (automotive, food, traditional handcraft and silk, animation, film and media) will ensure that Thai companies would become more serious participants in the Thai IP system in 2005. ✚

ACHIEVEMENTS IN 4TH QUARTER 2004

Litigation Successes Litigation Successes Litigation Successes

The fourth quarter of 2004 proved to be another positive term for the members of our IP litigation team. Further success in several high profile cases involved complex and technical problems. T&G clients scored victories in December before the Intellectual Property & International Trade Court (IP&IT Court) in appeals from decisions of the Board of Trademarks challenging rejections of trademark applications:

- In one case our client, a leading European aviation services company providing maintenance services and aircraft sales, faced an opposition action by a global petrochemical company arguing that our client's mark was too similar to be registered under the Thai Trademark Act. The complaint ultimately led to our client's mark being refused by the Board of Trademarks, which gave rise to the appeal to the IP&IT Court. Accepting that our client's mark had been known for an extensive period of time and the fact that the services of both companies were different, the Court accepted that our client's mark would not cause public confusion as to the ownership or origin of the goods/services. As a consequence, our client's mark was permitted to be registered.
- In an additional case our client, a multi-national food production company with many famous brands, faced opposition to its proposed mark for a new nutritional drink. The opposition was mounted by the proprietor of a trademark using a similar logo which had been registered in the same class, but for different products (blood products). The Court ruled that even though both marks contained similar features, those features could not be claimed by either party for their exclusive use. Despite this our team managed to persuade the Court that additional features on our client's mark served to distinguish our client's mark from that of the opposition. The Court agreed, with the result that our client was successful in registering the mark.
- In a third case involving an appeal from a decision of the Board of Trademarks, our client, a world famous Swiss watchmaker, challenged the decision of the Board to refuse registration for a mark used on its exclusive line of watches. The Board had reasoned that the sought-after mark was descriptive of watches; however, on appeal to the IP&IT Court, it was accepted that the mark was not descriptive (but would have been descriptive of calendars for example). As a consequence, our client was able to register its mark. ❖

Settlements & Raids Settlements & Raids

Software Settlements

During the fourth quarter of 2004, the IPE raid team initiated raids against several corporate end-users of illegal software programs resulting in successful negotiated settlements. Compensation and product purchases totaled over US\$650,000 (THB 26 million). ❖

Trademark Raids

The Justice Ministry's Department of Special Investigation (DSI) coordinated efforts with police and members of T&G's IPE raid team and conducted a raid against a warehouse in Yannawa District of Bangkok which brought about phenomenal seizures. Approximately 150,000 pairs of shoes bearing various well-known trademarks with an estimated value of more than US\$2.5 million (THB 100 million) were seized. Eight Chinese nationals were arrested and charged with possession for sale of counterfeit goods and filing false shipping declarations.





Numerous raids were conducted on behalf of many of our clients that brought about substantial quantities of goods seized. As many as over 7,600 pairs of jeans imitating the designs of a popular US manufacturer of denim and other apparel were seized. Other types of goods seized included brush cutters bearing the marks of a well-known Japanese automobile manufacturer, counterfeit handbags bearing the trademark of a famous US manufacturer of trendy fashion apparel, and counterfeit mobile phones that imitate the reputed Finnish mobile phone manufacturer. In one particular raid, leads to the target raided were developed from the marked US manufacturer of printer cartridges' hotline that led to fantastic results. The total estimated value of the goods seized exceeded US\$410,000 (THB 16.4 million). ❖



Customs Seizures

The Royal Thai Customs moves forward in its aggressive enforcement efforts against importation of counterfeit goods by continuously detaining shipments that contain goods suspected of being counterfeit. A recent seizure was made when a shipment from China arrived containing approximately 400,000 pieces of counterfeit spark plug covers bearing a notable Japanese spark plug manufacturer's trademark. The importer was charged with importation of prohibited goods under the Customs Act, which carries a maximum penalty of a fine up to 4 times the value of the seized goods and 10 years of imprisonment. Customs also seized over 10,000 mobile phone covers bearing many different renowned trademarks and intercepted an outbound shipment to a European destination containing 22 boxes of different branded counterfeit handbags. All of the seized goods will be destroyed at the next Destruction Ceremony. The estimate total value of goods seized is US\$85,000 (THB 3.4 million). ❖



T&G Wins Prestigious Award



At the recent Asialaw IP Awards 2004 in Hong Kong, Tilleke & Gibbins was announced the winner of the “**Thailand IP Firm of 2004**” award. The ceremony was held on November 3, 2004 at the Ritz-Carlton and was attended by over 100 business leaders and senior lawyers in the Asia-Pacific Region. Members of the IP Awards judging panel remarked upon T&G’s excellent service and its “invaluable ability to provide accurate, fast and practical advice”. According to Isabella Ho, Deputy Director of Enforcement, pictured left accepting the award for T&G, all voters in the in-house survey emphasized high quality of legal advice, speedy response and practical business approaches.

EU IPR Network Workshop

During the EU IPR Network Workshop that was held on October 27-29, 2004, T&G acted on behalf of several European brand owner clients in providing product identification training to the Thai Royal Customs and participated in a round table discussion on strategies to protect and promote IPRs hosted by the European Commission Delegation. There were also panel discussions presented by judges and justices from the Central Intellectual Property & International Trade Court, the Thai Dika (Supreme) Court as well as officers from the Department of Intellectual Property of the Ministry of Commerce. The 3-day workshop was attended by many European brand owners and their representatives, including Nokia,



Mercedes Benz, Hermes, Louis Vuitton, L’Oreal, Unilever, and representatives of several foreign embassies, such as Germany and France.

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It is likely that some provisions of the legislation may be tested for constitutionality before Thailand’s Constitutional Court. Despite this, it is expected that this law will soon find its way into Thailand’s codes and regulations. The legislation will be supplemented by Ministerial Regulations and should create a

regime requiring optical disc producers to make certain notifications before commencing production in addition to notifications concerning the acquisition of raw materials for the manufacturing process. Producers will be required to mark discs with unique identification numbers enabling the source of optical disc media to be traced. Competent

officials will have the right to enter manufacturing premises to inspect for compliance with the law. Penalties under the Act are proposed to include fines of up to Baht 1 million and terms of imprisonment of up to five years. The new legislation, when it comes into force, will be seen as a new and welcome deterrent tool available to the copyright industry against pirates. ❖

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