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Intellectual Property Rights: the convergence of laws in ASEAN

Overview



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- III. Objectives and actions of the ASEAN towards the convergence of IP laws**
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I. Introduction



- *“Putting in place a seamless, integrated Single Market for Intellectual Property Rights (IPR) is one of the most concrete ways to release the potential of European inventors and creators and empower them to turn ideas into high quality jobs and economic growth”.*

(Communication of the European Commission to the European institutions dated 24 May 2011)

I. Introduction (2)



- *“Intellectual Property (IP) has an important role in contributing to the achievement of national and regional socio-economic development goals. Protecting intellectual property rights (IPR) is critical (...) to move higher up in the technology ladder, in encouraging transfer of technology, and in stimulating innovation and creativity”.*

(ASEAN AEC Blueprint 2015)

I. Introduction (3)



- ASEAN countries have identified intellectual property (IP) as a fundamental element of the ASEAN Economic Community integration.
- Both ASEAN and EU wish to implement a form of convergence for the purpose of facilitating the accomplishment of an integrated single market.

II. The IP landscape across South-East Asia



- South-East Asia countries are at very different stages of economic, commercial and legal development in terms of IP protection

II. The IP landscape across South-East Asia (2)



Country	Legislation	Enforcement	Other
Singapore	Advanced	Advanced including border enforcement	<ul style="list-style-type: none"> - Expensive and enforce IP but judicial litigation is viable option - Tax incentives (royalties)
Malaysia, Thailand, Vietnam, Philippines, Indonesia, Brunei	Generally compliant with international standards as required by TRIPS	<ul style="list-style-type: none"> - Enforcement options are available in case of infringement, but related processes tend to be slow - Customs are usually experienced in IP matters such as the seizure of suspected infringed goods 	
Laos, Cambodia	Relatively new IP regime compliant with TRIPS	Basic infrastructure in terms of protection and enforcement capacity	<ul style="list-style-type: none"> - Litigation in court may be expensive and outcome uncertain as judicial system develops - Use of administrative where available/out of court settlement recommended

II. The IP landscape in Myanmar (3)



IP Rights	Subst. law	Registration	Protection	Enforcement	Prospective law
Trademark	<ul style="list-style-type: none"> - No - Not member of Madrid protocol 	<ul style="list-style-type: none"> - Declaration of ownership by manufacturer (Registration Act 1908) - Recordal possible with the Customs Department 	Weak: <ul style="list-style-type: none"> - No IP office (no prior mark research tools) - simple solemn statement of facts 	<ul style="list-style-type: none"> - Criminal (Penal Code 1861: seizure and destruction) or civil remedies (Injunction and damages) - Customs controls (Sea Customs Act 1878) 	Draft trademark law: <ul style="list-style-type: none"> - 10 + 10 years - First to file - IP office - Specialized jurisdiction - Criminal offense - No transitional measures
Copyright	<ul style="list-style-type: none"> - Copyright Act 1914 - Not member of Berne convention 	If published in Myanmar or made by Myanmar resident	No registration/ protection of foreign copyrights	<ul style="list-style-type: none"> - Criminal proceeding (limited sanction) - Civil remedies 	Draft copyright Law: <ul style="list-style-type: none"> - Life time + 50 years - Criminal offense - Protection of foreign copyrights
Patent and Design	Patent and Design Act 1946 referring to Indian Act 1911	N/A	N/A	Not enforced	Draft patent Law and Draft industrial design Law: <ul style="list-style-type: none"> - 5 years + 5 + 5 (design) and 20 years (patent) - Possible registration of foreign design and patent - IP office and specialized jurisdiction
Trade Secret	No	N/A	Competition Law 2015 (no definition of trade secret)	<ul style="list-style-type: none"> - Criminal offence (2years/USD 7k) - Civil remedies 	Implementing rules awaited
Geograph. Indication	No	Declaration of ownership	Weak		Draft trademark law: <ul style="list-style-type: none"> - Local and foreign - Agricultural and handicraft

III. Objectives and actions of the ASEAN



The convergence of laws in ASEAN is driven by cooperation

- ASEAN Framework agreement on IP cooperation (1995)
 - Fields: copyrights, patents, trademarks, industrial design, geographical indications, confidential information, lay-out design of integrated circuits;
 - Scope of cooperation:
 - ✓ Enhancing IP enforcement and protection (network, effective protection and enforcement of IPR);
 - ✓ Strengthening IP administration (ASEAN wide database);
 - ✓ Strengthening IP legislations (implementation of the TRIPS);
 - ✓ HR development and capacity building;
 - ✓ Establishment of an ASEAN IP Association (1996)
 - ✓ Establishing an arbitration and dispute resolution body

III. Objectives and actions of the ASEAN (2)



- ASEAN Working group on IP cooperation - AWGIP (1996)
 - Sectorial consultative group responsible for IP issues in the region.
 - Composed of the IP offices of the 10 ASEAN Member States
 - Achievements of the AWGIP
 - ✓ ASEAN IP portal (2013): one-stop portal facilitating information flow (research of existing IPR, legislations, case law for Singapore and Thailand)
- ASEAN Patent Examination Co-operation – ASPEC (2009):
 - 9 members (excl. Myanmar)
 - Patent work-sharing program providing search tools speeding and enhancing search and examination of patent applications by IP offices and stakeholders
 - Not binding, no substantial harmonization

III. Objectives and actions of the ASEAN (3)



The approximation of laws in ASEAN is still limited to technical and procedural convergence:

- *“National IP regimes should achieve full technical and procedural convergence”*

(ASEAN AEC Blueprint 2015)

III. Objectives and actions of the ASEAN (4)



ASEAN countries have defined 4 strategic measures to achieve this convergence (Action plan 2016-2025):

- Strengthening IP offices and building IP Infrastructure, in order to ensure the development of a more robust ASEAN IP system (national infrastructure)
- Developing regional IP platforms and infrastructures (ASEAN network)
- Expanding the ASEAN IP Ecosystem (enforcement)
- Enhancing regional mechanisms to promote asset creation and commercialisation, including the development of supporting schemes for SMEs and creative sectors (valuation of IPR as a financial asset)

III. Objectives and actions of the ASEAN (5)



- ASEAN AEC focuses on:
 - National infrastructure development;
 - ASEAN network, information sharing and database;
 - Capacity building;
 - Raising awareness.

- ASEAN AEC plan is ambitious (e.g. situation of Myanmar) but incomplete:
 - Substantive harmonisation of legislations between ASEAN countries which shall only be achieved through individual accession to international treaties and organisations on IP rights
 - Institution of ASEAN wide protections rights
 - Creation of an ASEAN IP office

IV. Beyond the approximation of IP laws



- Still no sign for a regional IP protection system:

When it comes to IP protection, ASEAN will be seen as ‘an area’ in which IP rights are being (will be) protected but not as ‘one area’

- Is the technical and procedural convergence sufficient to make ASEAN countries and ASEAN region ‘safer’ and attractive places for investment?

IV. Beyond the approximation of IP laws (2)



- In a free movement of goods and services area, necessity for investors to
 - protect IP rights against theft, piracy and counterfeiting
 - secure authorized distribution networks
- In a free movement of goods and services area, internal customs controls are to be reduced, threats may be bigger for IPR holders
- The absence of ‘community’ protections is a major obstacle for local SMEs development (opportunities and challenges):
 - A unified protection system: Applying separately for IP protections in all ASEAN countries is a cost
 - A unified litigation system: Disputes have to be resolved in different national courts. As well as being extremely expensive and time-consuming for IPR holders, this fragmentation risks producing different decisions in different Member States, creating legal uncertainty

IV. Beyond the approximation of IP laws (3)



- EU and ASEAN organizations are at different levels of integration and thus of reflection concerning IPR:
 - The institutional organization of EU enables it to participate to the internationalization of IP and develop and advocate for a EU vision of IP (regional integration)
 - ASEAN is not in a position to develop a ‘community’ vision on IPR and will not act as an unique economic, political or geo-political actor at an international level (international integration)

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