

INTERNATIONAL INTELLECTUAL PROPERTY AND THE ASEAN WAY

The Association of Southeast Asian Nations (ASEAN) is actively seeking ways for member countries to enhance their individual economic development within the context of overall regional advancement. Central to this is the creation of a regional intellectual property framework. This book examines the efforts to move beyond sovereign protections of intellectual property rights and establish meaningful interstate cooperation on intellectual property issues. Rather than aim for intellectual property harmonization, ASEAN recognizes its internal diversity and pursues an agenda of “IP Interoperability.” The chapters in this collection examine the unique dynamics of “interoperability,” analyzing the administration of intellectual property in a part of the world that is of increasing importance. The book enables the reader to compare and contrast the ASEAN model to other approaches in regional cooperation, such as Europe and Latin America, and also explores private international law as a potential vehicle for interoperability.

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International Intellectual Property and the ASEAN Way

PATHWAYS TO INTEROPERABILITY

Edited by

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For my dad and mum: From Elizabeth

For my mother: From Graeme

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Foreword

This collection of essays on intellectual property “interoperability” in ASEAN could not be more timely. With unprecedented levels of connectivity and increasing international trade, coordination between the intellectual property systems of the different nations is required as never before. At the same time, there are parallel developments that suggest we can no longer assume that intellectual property will evolve toward a harmonized form of multilateralism. The impending exit of the United Kingdom from the European Union, and setbacks for plurilateral initiatives such as the Trans-Pacific Partnership, come to mind in this connection. Indeed, relatively little progress has been made toward harmonization since the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) came into effect in 1995.

In this context, the “ASEAN Way” could offer some useful lessons. The ASEAN Way envisages greater cooperation and collaboration among member states, and this is likely to be boosted by the establishment of the ASEAN Economic Community and the adoption of the ASEAN Economic Community Blueprint of 2025. At the same time, initiatives such as these are undergirded by an acknowledgment of, and deep respect for, national sovereignty and diversity. ASEAN is a vibrant group of ten nations that together constitute the world’s sixth largest economy (as of 2015) and is projected to become the world’s fourth-largest regional economy by 2050. The ASEAN member states reflect different legal traditions – common law, civil law, and amalgams of the two. They have different political systems and are at different stages of development. The ASEAN Way reflects a desire to live well together in a spirit of cooperation and harmony, while recognizing the reality that “one size” seldom fits all and might sometimes fit none. In this context, intellectual property has emerged as one of the key policy platforms for ASEAN, but its intellectual property agenda is one of working together (or “interoperability”), not harmonization. If it transpires that the age of multilateralism is indeed

over, “ASEAN interoperability” might well offer a useful lens through which to view the new realities of the international intellectual property order.

The editors of this book, Professors Elizabeth Siew Kuan Ng and Graeme Austin, have brought together an impressive group of scholars, officials and administrators, and practitioners to explore different aspects of intellectual property interoperability. The chapters discuss important substantive law questions; cooperative initiatives between the different intellectual property offices of the various ASEAN nations; and other initiatives, such as customs regulation. There is also a comparative aspect: chapters explore models of intellectual property coordination in Latin America and in Europe. The book also explores the potential for developments in private international law to facilitate greater interoperability among diverse intellectual property systems.

The editors and contributors are to be congratulated for a collection that will be of enduring significance for intellectual property in ASEAN and beyond.

Sundaresh Menon
Chief Justice
Supreme Court of Singapore

Preface

Perspectives on Intellectual Property Interoperability

The current policy platforms for the Association of Southeast Asian Nations (ASEAN) include enhancing cooperation in the administration of intellectual property. The ASEAN members are Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Vietnam, Laos, Myanmar, and Cambodia. It will be apparent that between and among these nations considerable diversity exists across many dimensions: languages, culture, history, political systems, legal systems, and stages of economic development. With intellectual property, as with all areas of economic and social regulation, this diversity presents unique challenges for the ASEAN cooperation agenda. ASEAN has responded by adopting an “interoperability” approach. This approach pursues an agenda of increased cross-border trade, cooperation, and investment, while respecting the sovereignty of individual ASEAN nation-states and each nation’s unique perspective. Interoperability thus aligns with what has become known as the “ASEAN Way.” For intellectual property, the ASEAN Way involves working together while respecting and accommodating differences.

This collection of essays presents different perspectives on the theme of intellectual property interoperability. In many respects, the diversity of the perspectives presented here itself reflects the ASEAN Way. Each chapter presents unique insights on ASEAN interoperability in the intellectual property context. Some champion the benefits that are seen to accompany enhanced cooperation between member states’ intellectual property systems. Others take a more critical stance, questioning the viability of greater interoperability in countries where intellectual property laws are only of marginal relevance to ordinary people, or where significant impediments are in the way of efficient administration of intellectual property. The authors are all experts in their fields, and their analyses draw on their different experiences as academics, administrators, and practitioners. Most of the chapters focus specifically on ASEAN jurisdictions and cooperation between them, and discuss important substantive law

questions and issues relating to intellectual property administration. By way of comparison, we have also included perspectives from Europe and Latin America in chapters that discuss different approaches to regional cooperation. Two chapters focus on private international law matters, reflecting our belief that private international law is itself a potential vehicle for interoperability, to the extent that it is premised on mutual recognition of, and respect for, different nations' legal systems.

We hope that the volume will provide insights as to the administration of intellectual property in a part of the world that is of increasing economic significance. To that end, the final section of the book presents a matrix on ASEAN intellectual property systems. The segment summarizes the intellectual property laws and frameworks of the ten ASEAN countries. Comprising six parts, it presents general information on their intellectual property systems, as well as specific data with respect to trademarks, patents, designs, copyright, and other related rights, such as trade secrets, privacy, and personal data protection.

At the same time, the project is animated by a broader agenda. The management of relationships between different nations' intellectual property systems distils a set of profound challenges for intellectual property law. Intellectual property is, or has the potential to be, relevant to almost every area of life. If intellectual property law is understood as one of many social policy levers available to the nation-state, it is inevitable that intellectual property laws will be deployed by different nations in ways that reflect different visions of the good life. Given this, it is inevitable that nations will, to the extent permitted by international law, approach some intellectual property issues in different ways. This might involve deliberative intellectual property policy choices: whether, for example, to adopt a "fair use" defense, or decisions about the breadth of an "experimental use" exception. But they could also reflect choices about where to direct "law reform resources," to the extent that the state of domestic intellectual property laws reflects choices as to how to manage legislative and policy priorities.

We have already noted the diversity that exists between different ASEAN member states. But, in a number of contexts, we are also witnessing a rising skepticism about the kind of economic multilateralism that has driven much of the harmonization agenda in intellectual property. In international forums, within individual nations, and in civil society groups, and among indigenous peoples there is now a diversity of views as to how best to approach the regulation of intellectual property. In some contexts, this has led to demands for greater political accountability. This new politics of intellectual property has foregrounded the need for nations' intellectual property systems to work together without necessarily relying on harmonization or top-down fiat. It is

here that the ASEAN interoperability agenda may provide useful insights for other groups of countries that see the benefits of greater cooperation in the intellectual property space, while seeking to maintain domestic differences – or, at least, reserving the *potential* to pursue different policy agendas through the fashioning of their domestic intellectual property regimes.

We are grateful to all the contributors to this volume for their willingness to share their expertise on the cluster of important issues that inform the ASEAN interoperability agenda. We both have benefitted from the enlightening discussions and exchanges of ideas that their papers have provoked. The book has benefited from the diversity of perspectives, including those derived from some authors' work in official capacities in various ASEAN member states. (Of course all chapters represent the authors' personal perspectives, and should not be taken as indications of institutional positions.) The support of the Intellectual Property Unit at the Centre for Law & Business at the National University of Singapore's Law School, which provided much of the funding for this project, is gratefully acknowledged. We have also been honored by the contribution of a Foreword by the Chief Justice of Singapore, Hon. Sundaresh Menon. Excellent research and administrative assistance was provided by Scott Fletcher, Yihang Ng, Claudia Lee, and Finna Wong. We also thank John Berger of Cambridge University Press (New York) for his continued support and encouragement of this endeavor.

Finally, we note that the perspectives presented here only scratch the surface of the complex range of issues that will engage the intellectual property community as the ASEAN interoperability agenda evolves. We have greatly enjoyed working on this current project – but our hope is that intellectual property “interoperability” will be a topic that continues to inspire the attention it deserves.

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