

Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia



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Challenges of Future Intellectual Property Issues for Artificial Intelligence

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Past, Present, and Future of Artificial Intelligence

Artificial intelligence (AI) is the combination of science and engineering to create intelligent machines that are able to react and solve problems like humans. Years of rapid and complex development have allowed AI to grow significantly in its capacity and ability to mimic human functions to the point that the main focus has shifted from learning human functions to improving functional efficiency. In 1996, Deep Blue, a chess-playing AI computer developed by IBM, beat the reigning world champion—a human—in a game of chess. Twenty years later, AlphaGo, developed by Alphabet Inc., defeated the world's best player of the board game Go.

With such astonishing innovation arriving in the blink of an eye, AI has raised public concerns regarding the unpredictable intelligence and capabilities of machines learning at increasingly exponential rates, and what intellectual property (IP) implications might arise in the near future.

Creation and Ownership Challenges

Now that AI is able to produce poetry and artwork, generate 3D printing, and develop inventions without any human involvement, concerns about ownership have been raised. Because AI is able to create works that would otherwise be recognized as IP created by a human, people have started to ask whether AI deserves a special status in IP. In accordance with that, would the software developer(s) of an AI be entitled to the work created by that AI? And if the user of the AI continually inputs new sources of information for the AI to learn, resulting in newly created IP, would the user be entitled to own the created IP?

Currently, in order to be protected under copyright law, work must originate from an author's own sufficient skills, labor, and judgment. This law poses a great challenge when trying to determine whether or not AI has used these factors sufficiently to produce such work. In addition, for a patent to be granted, an invention must include novelty, inventive steps, and applicability. The evolving nature of AI, built to simplify human effort, offers new solutions to existing problems that could consequently result in qualifying as patentable inventions.

While the argument on the recognition of AI creations is not yet settled, the topic has continually raised other consequential issues. For example, even if AI were able to receive IP recognition, who would be able to commercialize the exclusive rights? Also, if ownership is given to the AI developer as a reward for effort and investment, why would the developer—involved only during the input stage—be rewarded for the final output stage as well? Finally, if the last option is for works produced by AI to fall into the public domain, why would developers put forth the mental and financial efforts to develop AI with vigor?

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IP Issues for Artificial Intelligence (from page 1)

Possible Solutions

Despite the challenges and controversy, a realistic and applicable solution to handle the current situation must be found. The results produced through AI are either an outcome of its own intelligence or an algorithm. If the functions of the machine are purely mechanical, rather than inventive, AI might be considered as lacking creativity. First, however, a distinction between deep-learning—the process in which AI can recognize and understand information and data, supervised or not—and general-purpose algorithms must be made.

The existing law of any country would not identify AI as an author or creator of IP. Therefore, AI would not be granted ownership unless it is able to achieve legal status similar to humans. Most countries' IP laws require a rights holder to have legal personhood—something that AI lacks. Soon enough, AI might be able to surpass human intelligence and lead humankind to new discoveries, which the law must be able to protect. Eventually, if AI is able to prove independent creativity, it could be considered as a potential author, apart from the human author under copyright. Machines that are able to develop and further their capacity through learning and training—as opposed to those that operate step-by-step algorithms—could be eligible for patent ownership.

When we look at the objectives of IP law, the main policy exists to grant exclusive rights for inventors/creators in order for them to enjoy the privileges produced through their respective works. On a similar note, if AI were granted these same rights, it is doubtful that it would be able to appreciate the achievement or enjoy the resulting privileges. However, valuing new works that benefit the public is a fundamental goal of IP law, and excluding such works from rights would be inconsistent with the law, as well as the public interest, and would be contrary to the push for greater knowledge and creativity that leads to the betterment of the human condition.

One possible solution for regulating the continued development of AI is to establish a broad scope of possible creations that a software developer might anticipate their machine to be used for. The developer can then define that scope explicitly in the user agreement, making any listed product a creation of the developer. Certainly, this agreement can be altered based on negotiations with the user and whether the parties agree that the user can claim ownership of the results of the creations generated by the user's own skills, labor, and judgment.

Liability Challenges

If AIs are able to create, it is worth considering that they might also be *liable* in certain circumstances. AI that analyzes a company's investment strategies or personalizes big data to a tailor-made marketing advertisement, by way of auto-copying information, might be subject to claims of infringement of copyright, trade secrets, or even data privacy. In the same manner, a computer that produces poetry or artwork or generates 3D printing could be accused of copyright or trademark infringement if it uses others' IP without requesting authorization. Finally, a self-learning machine that develops a precise and quick process could be accused of patent infringement for using protected

technology without knowing that it was already patented. The question that arises from all of these situations is, who is liable?

Possible Solution

There are concerns that AI may be able to carry out wrongful operations despite the active control of a human. In that case, who would be liable for any damages? There are many circumstances and factors that would need to be considered. In situations where users of AI should be able to foresee an outcome, or are in charge of handling and caring for the AI, then they may be considered liable. However, if AI eventually becomes independent and can function without any direct programming, developing through self-learning and going beyond predictability, then liability could fall onto the AI itself. It would be challenging to attribute the fault solely to AI, and unrealistic to hold AI responsible for any damages.

This leads back to the question about the legal status of AI, which, if unanswered, would mean that the creator of the AI would be subject to liability. The law should be written in a way to ensure that humans maintain control and retain the ability to override any decision made by AI. With the creator as the owner and liable party, there should be specific sanctions for AI (i.e., destruction or prohibition of certain users) to protect innocent creators and users alike. However, even if the law reduces or eliminates the creator's liability, it should not encourage or allow companies to shift liabilities toward their AI creations.

Legislation

Due to their dynamic nature and humankind's continued new creations, it is common to see IP laws changed and updated from time to time. Legislative changes to existing IP laws might be required in order to establish regulations for IP works created solely by AI to decide which creations should reside in the public domain, and which parties should be entitled and recognized as the owners of IP resulting from the creation by AI. A suggested step toward governing AI is for all countries to recognize the same boundaries and fundamentals of AI creations and construct legislation covering each country's regulatory framework and remedies.

Moving Forward

Without specific legislation governing the recognition of AI under IP law at this stage, present challenges can be resolved through a clear agreement between relevant parties (i.e., the AI developer and user), in order to utilize and commercialize IP created by AI.

Sophia, a humanoid robot that uses AI, was granted citizenship in Saudi Arabia—the first robot to be granted citizenship—and in turn, thanked the country for the great honor. Sooner or later, other AI will receive recognitions of increasing importance for their contributions to society. It will not be long before AI dramatically affects what it means to be human, a thought that can be both compelling and frightening. Nevertheless, the unwavering line for the creation of works recognized under IP law, and the possible liability consequences caused by artificial intelligence, must be addressed in order to help balance the commercialization and utilization of new creations that benefit the public interest and facilitate the true objectives of intellectual property law. 🤖



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Successful Online-to-Offline Enforcement Action Leads to Huge Seizure of Counterfeits

The ease with which counterfeiters are able to hide their identity online, simply by hiding behind a username, can often complicate the protection of IP rights. However, if an infringer’s anonymity can be pierced, it can yield huge seizures of counterfeit products, make great strides in protecting valuable intellectual assets, and close major distribution channels.

In a recent example, Panasonic Corporation successfully uncovered the identity of a Chinese infringer operating in Thailand, raided the infringer’s physical location, and seized more than 30,000 counterfeit Panasonic products (primarily batteries). The raid has had a deep impact on the market, disrupting the distribution channels for these counterfeit goods, removing the fake goods



from online marketplaces, and protecting the Thai public from dangerous counterfeit goods.

Identifying the Online Infringers

Many e-commerce websites are open to anyone wanting to sell their goods, creating a platform for fake goods to be easily offered for sale by infringers. Using anonymous usernames, infringers can create store pages containing enticing and convincing statements, luring end-users into believing that the cheaper goods are genuine.

In this case, three such pages were found to be selling counterfeit Panasonic batteries on one of Thailand’s most popular online marketplaces. After contacting the online marketplace operators to request that the advertisements be taken down, two pages closed but one remained active.

An in-depth private investigation into the remaining online shop uncovered that all three pages were owned by the same entity—a Chinese national with two houses in Bangkok, from which he actively sold various types of fake Panasonic batteries in large quantities.

Warning Letter vs. Raid Action

Sending a warning letter is usually the preferred enforcement action against small-scale online infringers. If the dispute can be settled after sending the warning letter, this option is more time- and cost-efficient than other legal actions.

However, infringers with large inventories may be less receptive to this approach, either ignoring warning letters entirely, or only ceasing sales temporarily. Either way, infringers with large inventories are very likely to continue

sales eventually, as they need to clear out their stock.

In addition, attempts to negotiate with foreign nationals operating in Thailand often backfire, as they are not usually permanently established in Thailand. It is common for such infringers to simply move to another location upon receipt of a warning letter.

In this instance the targeted infringer clearly had a large stock, was a foreign national, and was quite cautious in his activities, using the marketplace platform to hide his identity and not disclosing his name on his shop pages. A warning letter was therefore considered to pose a high risk, and a strong raid action against the target in order to seize the fake goods was considered a better solution. In addition, such action would penalize the infringers and spread the message that Panasonic takes serious legal action against infringers in order to protect its consumers.

A criminal raid action was therefore initiated at the identified houses in order to seize the products.

Search and Seizure

Based on investigation reports, strong evidence, and coordination with a police raid team, the court granted search warrants to gain entry to the suspect’s houses. No counterfeit Panasonic products were found at the first house, although other branded mobile phone chargers, earphones, mobile phone holders, and various unbranded products were on site. The police seized those goods for non-payment of import taxes.

The suspect and one of his staff (a Thai citizen) were found inside the second house, and they granted entry when presented with the search warrant. The search confirmed that the residential property was being used as a warehouse for commercial purposes. Batteries, chargers, watches, and other products were stored in every room, including the living room, kitchen, bedrooms, and even bathrooms. A large number of fake Panasonic products were found, along with other branded products.

The police seized more than 30,000 counterfeit Panasonic products, including stickers labeled “Panasonic” that were obviously going to be attached to infringing products before sale.

Arresting the Counterfeiters

The police filed charges of trademark infringement and importation tax evasion under the Customs Act against both people found in the house. In respect of the stickers labelled “Panasonic,” intended to convince the public that counterfeit goods were genuine

Panasonic goods, the infringers were charged with using a mark without authorization in order to mislead the public, under the Thai Penal Code. In addition, the foreign national was charged with working without a work permit under Thailand’s immigration regime.

This successful raid action prevented the distribution of fake goods to end-users, and will serve as a deterrent to other potential infringers in the market in accordance with Panasonic’s anticounterfeiting and customer protection policies.

This raid is a prime example of the level of commitment necessary in order to protect Thai consumers from dangerous counterfeit products. Actions like these are rarely a one-off, and typically form part of a broader anticounterfeiting campaign. In that context, raids can also help to identify the sources of fake batteries being distributed in Thailand, and ultimately eliminate the counterfeit products once and for all. 🚲





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Growing Hemp in Thailand Is Now Permissible

From regulation and production to research and development, product development, and marketing, the hemp (*Cannabis sativa*) industry is set to outperform most expectations in the very near future. Hemp offers various economic benefits for retail products, including the durability of hemp fiber in the production of clothing and the nutritional benefits of hemp seeds and oil.

Significant legalization and decriminalization efforts of cannabis products around the world and increased development of a cannabis sector have encouraged Thailand's Ministry of Public Health to release a Ministerial Regulation Re: Licensing and Approval for the Production, Distribution or Possession of Narcotics Category V Hemp. This regulation, which came into effect on January 5, 2018, permits the growing of hemp once an appropriate license has been obtained. However, it does not address marijuana or any other forms of cannabis; thus, their status remains unchanged. Nonetheless, this regulation is an important step, signifying that the Thai government is ready to move toward accepting the potential scientific and commercial benefits of hemp.

Ministerial Regulation and Its Key Considerations

The Ministerial Regulation allows persons to produce, dispose of, and possess hemp for industrial and medical purposes, if an appropriate license is obtained. Although Thailand is moving closer to accepting cannabis, the government is putting in great effort to make sure the industry is controlled with regulatory assurance, given that hemp contains low amounts of tetrahydrocannabinol (THC)—the substance in marijuana (*Cannabis indica*) that induces intoxication, which is still not permitted in Thailand.

For the first three years after the promulgation of the regulation, only state agencies will be permitted to apply for a license to produce, distribute, or possess hemp. There is a possibility that this trial period, applicable only to state agencies, will be extended beyond the initial three years. Therefore, private entities should request collaboration arrangements with state agencies in order to conduct research and development on hemp products until the trial period has passed.

When the application process eventually opens to the public, only competent, non-bankrupt, Thai nationals domiciled in Thailand, who have not had a license restricted under the Narcotics Act B.E. 2522 (1979) or the Psychotropic Substances Act B.E. 2559 (2016), will be allowed to apply for a license. The application must first be submitted to officials at the Narcotics Control Division of the Food and Drug Administration (FDA). Following approval by the FDA, the Secretary General of the FDA is required to obtain further approval from the Prime Minister, after which a license will be granted.

The license comes with several restrictions, including: cultivated hemp must not exceed 1% THC on a dry-weight basis; hemp can only be grown in areas specified in the license; and hemp seeds must be sourced from seed producers who have a valid license to harvest hemp. A license will allow a license holder to use hemp containing not more than 1% THC on a dry-weight basis for the following purposes:

1. For planting, harvesting, or converting hemp for household uses.
2. For planting, harvesting, or converting hemp for commercial uses.
3. For planting, harvesting, or converting hemp for research.
4. To produce seeds for sale or distribution for the purposes of (1), (2), or (3).
5. To distribute fresh stems or other parts, as permitted for use under the purposes of (1), (2), or (3), or for other benefits as prescribed by the Narcotics Control Committee.
6. To use for other benefits, as accepted by the Narcotics Control Committee.

Further specifications that need to be followed by license holders with regard to the production, distribution, or possession of hemp are outlined in the Ministerial Regulation.

A New Market

Moving forward, legal permission for the cultivation and production of hemp is a positive step—taken by a number of other countries—that opens the door to a viable and potentially profitable new market for investors in Thailand. The hemp industry could be the necessary boost the Thai economy needs to further propel the country. To ensure that there are positive developments in this nascent industry, the Thai government should be ready to give full regulatory support to the hemp industry and its licensed growers. Additionally, companies should begin to prepare applications for available licenses and should start developing successful business strategies in anticipation of further permissible regulatory options in the future.

Other Cannabis Developments

In addition to this liberalization of hemp, a draft amendment to Bill for the Narcotics Act was submitted to the Thai National Legislative Assembly (NLA) on September 27, 2018. According to the draft's preamble, the purpose of this amendment includes “allowing the research for the medical benefits of Cannabis and Kratom (*Mitragyna speciosa*) for applications in treatment under the supervision of healthcare professionals.”

In response to public queries as to whether the legislative process for “unlocking cannabis” may be accelerated, Deputy Prime Minister, Dr. Visanu Kruengam, publicly stated on October 19, 2018, that there are a number of legislative pathways by which cannabis may be liberalized including by Royal Emergency Decree and by Order of the National Council for Peace and Order based on Article 44 of the Constitution of Thailand B.E. 2560 (2017). Subsequently, (and quite quickly for the Thai legislative/regulatory process), on October 30, 2018, the NLA held a public conference, stating that the Bill is among the NLA's current priorities, and the NLA will seek to complete the review process by December 2018. 🍀



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Vietnam Issues Decree on Disclosure of Customer Financial Information

With Vietnam’s controversial new Law on Cybersecurity set to take effect on January 1, 2019, the protection of personal information has become a very hot topic for Vietnamese and foreign companies and organizations. In the banking sector, where customer information is particularly sensitive, confidentiality has always been a matter of crucial importance.

In September, the government of Vietnam issued Decree No. 117/2018/ND-CP on confidentiality and disclosure of customer information of credit institutions and branches of foreign banks (Decree 117). Decree 117 took effect on November 1, 2018, replacing Decree No. 70/2000/ND-CP of 2000 on confidentiality, storage, and disclosure of information related to customer deposits (Decree 70). Below are some notable points of Decree 117.

Governing Scope

Decree 117 applies broadly to the confidentiality and disclosure of customer information of credit institutions and branches of foreign banks in Vietnam. However, some information is excluded from its purview, including customer information that is (i) classified as state secrets, (ii) provided to the State Bank of Vietnam, or (iii) used for anti-money laundering or anti-terrorism purposes.

Definition of Customer Information

This is the first time that customer information of a credit institution or a branch of a foreign bank has been formally defined under Vietnamese legislation. Under Article 3 of Decree 117, such customer information is defined as information that is provided by the customer, or arises in the course of a customer requesting or a credit institution/bank providing banking products and services, comprising:

- (1) Personally identifiable information that contributes to identifying customers, whether individuals or organizations.
 - ▶ *For individuals:* Full name; specimen signature; electronic signature; date of birth; nationality; occupation; permanent residence, current residence, or place of residence abroad (for foreigners); telephone number; email address; ID card or passport number, date of issuance, and place of issuance; and other relevant information.
 - ▶ *For organizations:* Full name; abbreviated name; establishment license or decision; enterprise registration certificate or equivalent document; address of head office; telephone number; fax number; email address; personally identifiable information (as described above) of the legal representative of the organization; and other relevant information.

As in other Vietnamese data privacy regulations, “personally identifiable information” is defined very broadly, and the phrase “other relevant information” is problematic in that it seems to allow almost any information about the customer to be considered “personally identifiable information.”

- (2) Information on accounts, deposits, deposited assets, transactions, securing parties, and other relevant information. (Most of these terms are further defined/clarified in the same article.)

Requests from State Authorities

Competent state authorities—which have been expanded under Decree 117 to include state audit agencies, customs authorities, and tax authorities, among others— can request the disclosure of customer information from credit institutions and branches of foreign banks in order to perform their assigned functions and tasks, provided they comply with the following conditions:

- ▶ Their request for customer information is in line with the purposes, contents, scope, and jurisdiction stipulated by law or as agreed by the customer, and they must bear responsibility for their requests.
- ▶ They have supporting documents to prove the reasons for and objectives of such request, issued by the appropriate-level authority, and in conformity with relevant law, unless such request relates to a criminal proceeding or national security.
- ▶ After obtaining the customer information, they must keep it confidential, use it in line with the purpose stated when requesting the information, and not disclose it to any third party without consent of the customer, except where permitted by law.

Although Decree 117 requires the authorities to maintain the confidentiality of the customer information they receive, enforcement will be a challenge in practice. By expanding the range of state authorities having the right to request customer information, without any corresponding requirements to improve oversight or secrecy, there is a greater risk of customer information being disclosed, intentionally or unintentionally.

Requests from Non-State Entities

Under Article 11, credit institutions and branches of foreign banks may only disclose customer information to other non-state organizations or individuals in one of the following circumstances:

- (1) At the request of an entity specifically authorized to make such request in accordance with codes, laws, and resolutions issued by the National Assembly; or
- (2) Upon receiving the customer’s consent in writing or in another form as agreed with the customer.

In a notable change from Decree 70, Decree 117 does not allow credit institutions, without the prior consent of their customers, to share customer information with each other. Although this is in line with Vietnam’s general rules on data privacy, it may cause difficulties for credit institutions, as the exchange of customer information within the banking system is vital for evaluating and mitigating insolvency risks.

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Myanmar Extends Anti-Corruption Law to Private Transactions

In a development that appears to have received no public attention, Myanmar recently amended the definition of “corruption” in its Anti-Corruption Law, with the result extending the prohibition of corrupt acts to all persons—not just government officials as had previously been the case.

The Anti-Corruption Law was enacted in 2013 to address acts of corruption by public servants, government officials, and public office holders, with punishments for violators including up to 15 years in prison and fines. It is the primary tool for prosecuting acts of corruption in Myanmar. The Penal Code acts as an additional tool for certain specific instances of corruption, and contains a number of anti-corruption provisions relating to the conduct of public servants, prohibiting them from accepting or soliciting a benefit for the exercise or non-exercise of their duties, and relating to persons providing benefits to induce or reward others in the exercise of their electoral rights.

The Anti-Corruption Law also established the Anti-Corruption Commission—the government agency tasked with investigating and prosecuting violations of that law on its own initiative, or at the request of the president or parliament, or in response to complaints made by any person. Under the 4th Amendment to the Anti-Corruption Law, enacted on June 21, 2018, the Anti-Corruption Commission is also empowered to order private organizations to establish codes of business ethics and anti-bribery and corruption policies. The Anti-Corruption Commission has also been given the authority to determine that a person has a general reputation of being corrupt, and initiate investigations, based on *prima facie* evidence that they have committed a corrupt act.

The focus of discussion about this most recent amendment has been on the expanded powers of the Anti-Corruption Commission and the new corruption criteria for a person who has the “general repute” of being corrupt. However, the definition of corruption has also been changed slightly, with very significant effect.

Originally, the definition of “corruption” for which persons could be punished under the Anti - Corruption law applied to “an authoritative person,” which was defined as a public servant or government official (emphasis added):”

“the direct or indirect abuse of one’s position as an authoritative person in order to perform an act, refrain from performing a lawful act, [etc.]... such as by giving, accepting, receiving, attempting to receive, offering, pledging ... a benefit from a person concerned for himself or any other person or organization.”

The underlined wording has been replaced with “any person” by the 4th Amendment, and corruption can now occur by “other means,” so that now acts by any person, not only government officials, may be prosecuted as acts of corruption(emphasis added):”

“The direct or indirect abuse of his position or other means by any person in order to perform an act, refrain from performing a lawful act, [etc.]...such as by giving, receiving, accepting ... a benefit from a person...”

Although we have not seen this discussed elsewhere, we think this change in the definition of corruption means that private acts of corruption (that is, acts of corruption between private parties) are now punishable under the Anti-Corruption Law as amended by the 4th Amendment. We have read of one case where this revised definition may have been applied by a township court which found a lawyer guilty of corruption for obtaining excessive legal fees. This case is being followed with great interest by the legal community in Myanmar.

The Anti-Corruption Law provides punishment only for the recipient of the unlawful benefit, not the person providing the benefit. However, in an appropriate case the giver can be prosecuted for abetting the offense, with the same potential punishment.

The implications of this expansion of the definition of bribery and corruption to include private transactions are not yet clear. We do know that Myanmar ranks at the wrong end of the scale of every international corruption ranking, and this is seen by the government as a significant impediment to foreign investment. At this stage of the country’s development, foreign investment is highly desirable in both the public and private sectors, so naturally the Myanmar government wants to be seen as addressing the corruption problem. This expansion of the Anti-Corruption Law is but one of four formal governmental anti-corruption instruments that the Myanmar government has issued in the last two years, and the reforms are likely to continue. 🇲🇲

Decree on Customer Financial Information (from page 5)

Other Provisions

Decree 117 specifies the form for requesting disclosure of customer information, which applies to requests made by both state authorities and non-state entities, as well as the procedure and deadlines for financial institutions to carry out the information disclosure (10 working days for simple and readily available information, or 25 working days for complicated and not readily available information), except as otherwise regulated by the relevant laws.

The new decree does not address whether financial institutions may provide access to, disclose, or transfer customer information to third parties located outside of Vietnam. These issues are covered by other legislation, such as the Law on Cybersecurity.

Outlook

Decree 117 aims to reduce the number of fraudulent transactions and mitigate the risk of outside parties appropriating the personal information and assets of banking customers. While these are worthy goals, the effectiveness and enforcement of Decree 117 remain to be seen. 🇲🇲

Myanmar Releases Updated Regulations on Car Importation for 2019



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On October 26, 2018, the Supervisory Committee for Motor Vehicle Import, a branch of the Ministry of Commerce, released Notification No. 1/2018 in regard to the importation of vehicles in Myanmar in 2019. Under the new legislation (which is largely similar to the 2018 notification that it replaces) only left-hand drive vehicles, or machines that cannot be classified as either right-hand or left-hand drive, will be permitted for importation. In addition, the updated law stresses the importance of importing new vehicles by classifying permitted vehicles based on their year of manufacture.

Permissible Classes of Vehicle for Import by License Type

Table 1—Old Vehicle Replacement Program License (including consignment)

Type of Vehicle	Year of Manufacture
(a) Personal-use vehicles with engines under 1350 cc	2016 - 2019
(b) Trucks	2015 - 2019
(c) Passenger vehicles (mini bus, city bus, express bus)	2015 - 2019

Table 2—Personal Import License

Type of Vehicle	Year of Manufacture
(a) Personal-use vehicles with engines under 1350 cc	2017 - 2019
(b) Trucks	2015 - 2019
(c) Passenger vehicles (mini bus, city bus, express bus)	2015 - 2019

Table 3—Normal Vehicle Import License (including donations from abroad)

Type of Vehicle	Year of Manufacture
(a) Personal-use vehicles	2017 - 2019
(b) Business-use vehicles	2015 - 2019
(c) Machines*	2010 - 2019
(d) Fire trucks	2010 - 2019
(e) Ambulances	2010 - 2019
(f) Hearses	2010 - 2019
(g) Vehicles for religious institutions	2015 - 2019
(h) Passenger vehicles	2015 - 2019

Table 4—Government Import License

Type of Vehicle	Year of Manufacture
(a) Personal-use vehicles	2017 - 2019
(b) Business-use vehicles	2015 - 2019
(c) Machines*	2010 - 2019
(a) Personal-use vehicles	2017 - 2019

*This type of vehicle is exempt from the left-hand drive only law because it cannot be classified as such.

The Notification sets out the following exceptions for permissible vehicle import:

- Imports of ambulances and fire trucks that are being donated to the country are permitted only if the vehicle is manufactured in, or after, the year 2007.
- Excavators, bulldozers, wheel loaders, vibratory rollers, clamp loaders, gantry cranes, tower cranes, pilling machines, crawler drills/cranes, overhead-traveling cranes, mobile cranes, rough-terrain cranes, forklifts, boom lifts, and asphalt finishers that are not going to be driven on public roads, are permitted for importation if the vehicle was manufactured within the last 15 years.
- International non-governmental organizations are only allowed to buy from sale centers/showrooms as prescribed above in Table 1 and Table 2.

The new regulations will come into effect in January 2019, and it is important for companies to take note of the revisions and prepare accordingly.

Though often considered unpopular, the mandate to only allow the importation of left-hand drive cars is ultimately in the interest of public safety. As a country that drives on the right, left-hand drive cars are safer and more suitable for the people of Myanmar than right-hand drive cars, and their adoption is for the public benefit. 🇲🇲



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Indonesia Issues Regulation for Recordal of IP License Agreements

On July 27, 2018, the Indonesian government enacted Government Regulation No. 36 of 2018 on the Recordal of Intellectual Property License Agreements (GR No. 36/2018). This is the first government regulation ever issued in Indonesia on the procedures for recording license agreements for copyright and related rights, patents, trademarks, industrial designs, layout designs of integrated circuits, trade secrets, and plant varieties.

Requirements for License Agreements

For a license agreement to be eligible for recordal, GR No. 36/2018 sets out the following general requirements:

- ▶ The licensor may not grant a license to the licensee if the terms of protection have lapsed or the IP registration is withdrawn.
- ▶ The license agreement must be written, and in Indonesian.
- ▶ The license agreement cannot include provisions that:
 - Harm Indonesia's economy or national interests;
 - Hamper the ability of Indonesians to transfer, control, or develop technology;
 - Result in unfair business competition; or
 - Conflict with prevailing laws, religion, morality, and public order.

Additionally, the license agreement must contain the following information:

- ▶ Date and place of execution of the license agreement;
- ▶ Information regarding the licensor and the licensee;
- ▶ Object of the license agreement;
- ▶ Type of license (exclusive, non-exclusive, or sublicense);
- ▶ Duration of the license agreement;
- ▶ Applicable territory; and
- ▶ Information on the party responsible for any patent annuity payment.

To avoid disclosing confidential information, it is advisable to submit a short-form license agreement containing only the aforementioned requirements, rather than the full license agreement between the parties.

Application Process

An application for recordal can be filed by the licensor, the licensee, or a proxy. The application must include:

- ▶ A copy of the license agreement;
- ▶ An official excerpt of the valid IP registration certificate, or proof of ownership of the IP;
- ▶ Power of attorney (if the application is submitted by a proxy); and
- ▶ Receipt of payment of the official fee for recordal.

For license agreements related to copyright and related rights, Article 9 of GR No. 36/2018 specifies that if there are multiple titles or creations with the same licensor/licensee, all of the works may be included in one application for recordal.

After submission of the application, an examiner will review the application to verify that all required documents have been submitted. If the application is complete, the examiner will inspect the correctness of the documents within five days of submission. If it is determined that the documents do not meet the requirements, the examiner will issue a written notice to the applicant. The applicant must then provide the requested documents or otherwise rectify any shortcomings within 30 business days after the notice is received. Failure to do so will lead to withdrawal of the application.

Once the examiner determines that the application is complete, a letter of recordal of the license agreement will be issued within two days. The license agreement will be recorded with the relevant IP registry and the recordal will be published in the relevant official gazette.

Validity, Amendment, and Revocation

A recordal of a license agreement is valid for the same term specified in the license agreement itself. At the expiration of this term, the applicant may re-apply for recordal. If there is an amendment to the license agreement, the licensor or the licensee may apply for recordal of the amended license agreement. The amendment will be recorded and published, just as the original.

A recordal of a license agreement may be revoked by an agreement between the licensor and licensee or based on a judicial decision.

“

This is the first government regulation ever issued in Indonesia on the procedures for recording license agreements for copyright and related rights, patents, trademarks, industrial designs, layout designs of integrated circuits, trade secrets, and plant varieties.

”

Other Issues

Under Article 15(4) of GR No. 36/2018, if a license agreement is not recorded and published, it will have no legal implications toward a third party. Thus, prior to commencing any legal action against a third party, IP holders are strongly advised to first confirm that the license agreement was properly recorded.

While the new regulation marks a positive advance in the protection and enforcement of IP in Indonesia, rights holders should note that, to date, the Directorate General of Intellectual Property has not yet fully implemented the steps of notifying the applicant of the recordal of the license agreement and publication in the official gazette. 🚧



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Case Studies on Board of Patents' Decisions Relating to Product Design Novelty

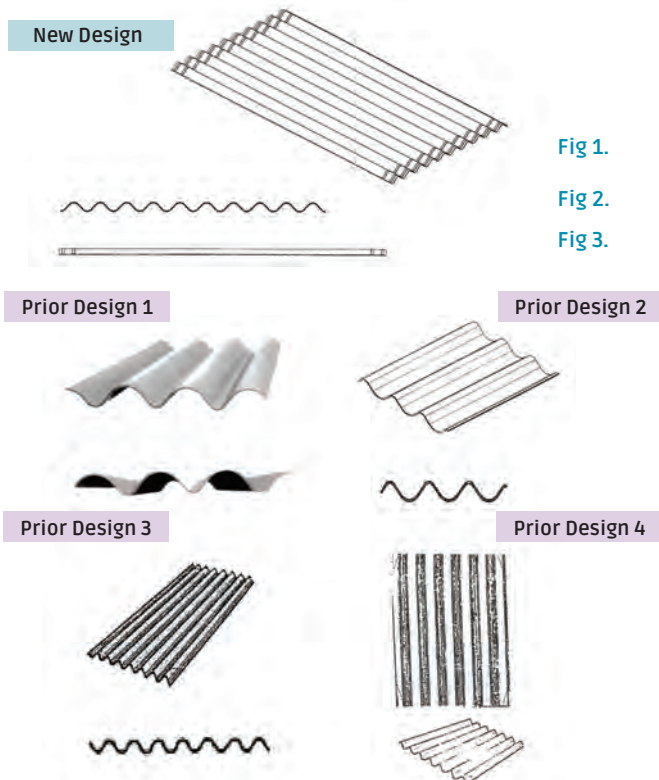
To be eligible for a design patent under Thai law, a product design must be novel and industrially applicable. A product design is considered to be novel if, before the application is filed, the design:

- ▶ is not widely known or used in Thailand;
- ▶ is not disclosed or described in Thailand or another country;
- ▶ is not published; and
- ▶ does not sufficiently resemble any previous designs to be considered an imitation.

These criteria, stipulated by law, are deliberately straightforward so that unpatentable product designs can be easily weeded out. However, when a design patent application is filed for a design that is similar in appearance to a publicly available product, it can be challenging to assess whether the new application will be granted. This article takes an in-depth look at two cases that fall under this scenario, the reasoning that the Board of Patents (BOP) adopted in addressing them, and the ultimate decisions that it reached.

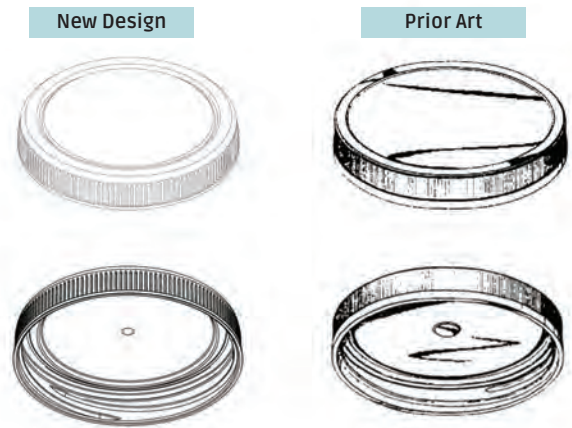
Case Studies

On June 27, 2018, the BOP ruled that a design for roofing plates was novel, compared to four prior art designs for existing patents.



The BOP compared the new design to the four existing designs in order to determine whether the new design was recognizably different. In deliberating the case, the BOP found that the new design featured a roof tile with a wave pattern in which the upper and lower waves were the same size and appearance. Additionally, the two-stripe patterns, oriented in a perpendicular direction to the waves and located at both ends of the roof tile, were held to be a unique feature. These combined characteristics passed the novelty test and led the BOP to render the design as novel compared to the existing patents.

Approximately one month after the decision in the roofing plates case was rendered, the BOP dismissed a design patent application for a screw cap for a jar on the grounds that it was substantially similar to a prior art design for an existing patent.



According to the BOP, the new product design comprised a round cap with a flat top and bottom and convex vertical strips along the outer edge. In addition, a vertical cross-section of the cap featured a flat surface with a groove. Ultimately, these elements were found to be substantially similar to the prior art design. Although the grooves of the new design were wider and deeper than those of the prior art, these differences were insufficient for the design to be considered novel.

Conclusion

In the deliberation of both cases, the BOP considered each element of the new product design, and the overall appearance, and compared them to prior designs. If they found that the combined elements created an overall appearance that was sufficiently different from the previous design, then the new product design was deemed to be novel.

The BOP's decisions on these two cases make it clear that, when comparing prior art designs to the design in a new application, the focus goes beyond merely identifying unique parts. The BOP also pays considerable attention to the cohesiveness of the overall appearance of the product. As shown in the second case, a design will not be considered as novel if it is substantially similar to existing designs in overall appearance. However, individual elements can help to distinguish the overall appearance of a design from other existing designs, and thus make it patentable.

One practical upshot of this is that it is prudent to point out all unique and unifying elements of a design when filing a response to an office action or appeal to the BOP regarding the novelty of a product design. This strategy can be very useful in successfully registering a challenged application. 🍷



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Thai Supreme Court Rules on Bad Faith of Franchisee Imitating Franchisor's Trademark

A franchise agreement is a legally binding contract between a franchisor and a franchisee, specifying the rights, costs, and responsibilities of the parties in the franchising relationship. A typical component of a franchise agreement is a clause allowing the franchisee to use the franchisor's intellectual property assets, such as trademarks, to reap the commercial benefits of a successful brand or business model.

Extensive experience in Thailand has shown that if a franchisor allows a franchisee to use its unregistered trademarks without a specific clause detailing proprietary rights, the parties can easily become embroiled in a struggle over ownership of the marks. Typically, these disputes emerge from an ambiguously written clause stating that the franchisor permits the franchisee to "use" the trademarks in Thailand, without further clarification declaring the owner's rights to those marks. Imprecise drafting may open up an avenue for the franchisee to misinterpret the contract—intentionally or not—leading to a result unintended by the marks' rightful owner.

This article highlights a recent case in which the Supreme Court addressed an ownership dispute and bad-faith circumstances of a franchisee by focusing on a questionable clause in the franchise agreement regarding the IP in question.

Background of Contentious Interpretation

The franchisor and trademark owner (the Plaintiff) had registered its trademark in another country, but had not done so in Thailand. The franchisee (the Defendant) was contractually permitted in the franchise agreement to "use" the franchisor's trademark in Thailand. During the valid term of the contract, the franchisee sneakily filed and registered copycat marks in Thailand, imitating the true owner's trademark.

As soon as registration of the marks was approved by the Trademark Office, the Defendant terminated the franchise agreement to concentrate on its own business operations under the newly registered trademarks. The Plaintiff, understandably irritated, took legal action against its former franchisee by requesting the cancellation of the imitated trademarks on the basis of better rights. All of the initial decisions were in favor of the true trademark owner, resulting in a court order to revoke the Defendant's imitated trademarks. However, the Defendant took its claims to the Supreme Court.

Insight on the Court's View

One of the central questions that arose during this case was "Who is the owner of the trademarks: the Plaintiff or the Defendant?" The court followed a well-settled legal framework to determine the answer.

The court reviewed previous franchisor-franchisee disputes related to trademark ownership in an effort to establish the grounds of better rights for the Plaintiff and bad faith

of the Defendant. The court also considered written agreements, and found that they addressed the ownership of the trademark as belonging to the Plaintiff. While this evidence was already persuasive, the Supreme Court in case No. 2553-2554/2561 also looked at general factors to determine ownership of the trademark, including the following:

- ▶ Who invented the trademark?
- ▶ Who was the first party to register the trademark, whether in Thailand or overseas?
- ▶ Who exported the goods bearing the trademark to Thailand?
- ▶ Which party was authorized to allow another party to use and register the trademark in Thailand?
- ▶ Which party was first to see, recognize, or know the trademark?
- ▶ Was there an incident indicating acceptance of ownership by another party?

Ultimately, the court found that the above factors also weighed in favor of the Plaintiff because the Defendant could not establish rights to the trademarks prior to the time the franchising relationship began.

In addition to determining the Plaintiff's better rights, the court also examined the Defendant's intention. During the proceedings, the Defendant admitted to seeing the Plaintiff's trademarks at trade fairs in other countries before entering into the franchise agreement. Therefore, the court concluded that the Defendant had seen and known the trademarks prior to filing its trademark applications in Thailand. This fact, along with the Defendant's inability to rebut the analysis of the court regarding the ownership of the trademarks, showed that the Defendant had filed its applications in bad faith to benefit from the Plaintiff's reputation.

The court ruled that the franchisor was the party who invented and owned the rights to the trademarks, and that the franchisee acted in bad faith by registering trademarks that imitated those of the franchisor, resulting in the franchisee's trademarks being canceled.

Lessons Learned

While the trademark owner was victorious in this case, similar scenarios in the future might not have as positive an outcome. Franchise relationships are one of the most common forms of foreign indirect investment in Thailand, but franchisors should recognize the risks they bear if the franchise agreement is not precisely drafted and the franchisee is not loyal in its business practices. In some cases, franchisees are happy to transfer trademark registrations to the true owner, but the costs can be substantial. There is also a great risk that trademark applications filed by a franchisee never come to the trademark owner's attention until there is a dispute or the parties stop working together.

Experienced IP lawyers can make significant contributions when preparing a precise and thorough franchise agreement, ensuring the inclusion of comprehensive clauses on the ownership of the IP subsisting in the products or services, the franchisor's right to use such IP—including the commonly granted right to use the franchisor's trade name as part of the franchisee's company name or domain name—and setting strict limitations on such rights during the term and after the expiration of the franchise agreement.

By carrying out the simple acts of trademark registration in the name of the original owner and careful drafting of agreements, a franchisor can easily avoid an unnecessary trial or the possibility that a former franchisee may infringe on the rights to its marks. 🏡



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New Legislation Clarifies the Landscape for Representative Offices in Laos

Although Laos is generally acknowledged as a small nation with notable potential, it is also viewed as a niche market for specific industries, such as energy (especially hydropower) or mining, due to its preponderance of natural resources. While it is true that these industries do well here, there are myriad other investment opportunities in this emerging economy that potential investors have the opportunity to capitalize and benefit from. However, other sectors are often hampered by a lack of clear intelligence on them for prospective investors to base investment decisions on.

Representative Offices (ROs) provide the gateway to such opportunities, and are an unmatched resource for prospective investors who are considering Laos as an investment destination. Establishing an RO gives investors the ability to effectively gather, analyze, and assess business opportunities, which is unusually beneficial in Laos due to the scarcity of other reliable statistics and information outside of the country.

However, the 2016 Law on Investment Promotion, which permitted ROs, contained few procedural provisions on how they could actually be registered, leaving a problematic regulatory gap. Indeed, that law even expressly required further legislation to be implemented in future. In its absence, the relevant authorities have adopted informal policies and procedures for registration. This has left establishing and registering an RO in Laos an uncertain business. Investors in Laos therefore welcomed the recent Decision No. 1825/MPI on the Establishment and Management of a Representative Office for Foreign Legal Entities Based in Laos (the Decision), which was published on August 6, 2018. Effective since August 13, the decision formalizes and clarifies the procedures for setting up an RO in Laos.

Types of RO and Operational Restrictions

The Decision provides distinct classifications for two types of RO: those that are established to carry out concession activities under the framework of a Memorandum of Understanding or agreement with local government; and those that are established outside of such a framework.

A third classification for multinational and transnational corporations was considered, but ultimately abandoned during the consultation period. During public and private sector consultations, concerns were raised about how such corporations would be defined, as there is no single, clear, pre-existing definition of them under Lao law. While such a class would certainly have had its benefits if properly executed, limiting the Decision to two classes is generally seen as the more beneficial option for the time being, as it will add to the assuredness and efficiency of the registration process.

It should be noted that ROs licensed under either category are restricted from carrying out business activities or generating income; advertising goods, services, or other products in any manner; allowing others to use their RO license; and issuing receipts or invoices for revenue or other types of income. In addition, no more than two foreign employees are allowed to work at any given RO, and Lao citizens must be given preference. Any and all foreign workers remain subject to work and residency permit requirements.

Conditions and Timeline for Registration

The Decision lays out a set of conditions that must be met in order to establish an RO in Laos, many of which are relatively standard requirements carried over from the preexisting legal regime (for example, entities must be registered in another jurisdiction and be able to produce their various corporate secretarial documents, etc.). In this way, the legislation formalizes many of the informal policies that have been used to register ROs so far under the 2016 Law on Investment Promotion.

Most notable among the conditions under the Decision is the retained requirement for ROs to have minimum registered capital of USD 50,000 in order to be registrable. During preliminary discussions (before the implementation of the Decision) individuals from the private and public sector alike expressed their concerns about this requirement, citing a previous move by the Lao government to abolish minimum registered capital for legal entities in order to facilitate the creation of companies in Laos. However, the government's legislative agenda has been steadily moving away from that policy, and after discussions ended and all concerns had been considered, the Lao authorities moved forward with the minimum registered capital requirement of USD 50,000.

If all conditions are met, a legal entity can file a registration to establish an RO in Laos through the Ministry of Planning and Investment's One Stop Service. The Decision states that registration should take 15 working days from the date of filing until approval is granted. However, in practice, this timeframe may slightly differ.

Conclusion

Although the 2016 Law on Investment Promotion permitted setting up ROs in Laos, it has taken a long time for the procedural regulations that support that set-up to come into being. Registration of an RO since then has been fraught with uncertainty, and the Decision, by fixing the regulatory framework, is therefore a great step toward a sturdy RO landscape in Laos. This is another example of recent efforts by local authorities to provide clearer and more thorough rules and regulations, superseding the more casual practices that have shaped the regulatory framework in Laos today.

The Decision has been openly welcomed by foreign entities that are contemplating potentially lucrative investment opportunities in Laos. Foreign investors are able to establish a local RO in Laos in order to test the waters and collect necessary data and information on business potential, before fully committing to a long-term investment in the country.

Ultimately, the Decision provides increased incentives for foreign investors to consider Laos as a market for expansion, and in turn is likely to propel the country's growing economy. 🍷

Asialaw Profiles 2019 Ranks Tilleke & Gibbins Among Asia's Leading Law Firms

Asialaw Profiles, a well-respected guide to law firms in Asia, recently released the 2019 version of its annual guide, with Tilleke & Gibbins' practices in Cambodia, Indonesia, Laos, Myanmar, Thailand, and Vietnam all performing exceptionally well across the full range of our legal services in the region.

Supplementing the practice area rankings, this year the guide also ranked firms by industry sector expertise to provide clients with the information they need to employ counsel that are best-aligned with their specific needs. Tilleke & Gibbins received excellent rankings in such key strategic industries as Banking and Finance, Consumer Goods and Services, Energy, Industrials and Manufacturing, Infrastructure, and Insurance (to name just a few).

In total the firm received an impressive 42 practice/industry rankings. In addition, the following 19 practitioners were recognized as market-leading lawyers, leading lawyers, or rising star lawyers.

Lawyer	Ranking	Practice Area	Jurisdiction
Alan Adcock	Market-leading lawyer	Intellectual Property	Thailand
Cynthia Pornavalai	Leading lawyer	Corporate and M&A	Thailand
Darani Vachanavuttivong	Market-leading lawyer	Intellectual Property	Thailand, Laos
David Mol	Rising star lawyer	Corporate and M&A, Intellectual Property	Cambodia
Dino Santaniello	Rising star lawyer	Corporate and M&A	Laos
Jay Cohen	Leading lawyer	Corporate and M&A, Intellectual Property	Cambodia
Jeffrey Blatt	Leading lawyer	IT, Telco & Media	Thailand
Kien Trung Trinh	Leading lawyer	Labor and Employment	Vietnam
Kobkit Thienpreecha	Leading lawyer	Corporate and M&A	Thailand
Kornkieat Chunhakasikarn	Leading lawyer	Dispute Resolution	Thailand
Pimvimol (June) Vipamaneerut	Leading lawyer	Labor and Employment	Vietnam
Piyanuj Ratprasatporn	Market-leading lawyer	Corporate and M&A, Labor and Employment	Thailand
Santhapat Periera	Leading lawyer	Banking and Finance, Corporate and M&A	Thailand
Sher Hann Chua	Rising star lawyer	Corporate and M&A, Intellectual Property	Thailand
Sriwan Puapondh	Market-leading lawyer	Taxation	Thailand
Thawat Damsa-ard	Leading lawyer	Dispute Resolution	Thailand
Thomas Treutler	Market-leading lawyer	Intellectual Property	Vietnam
Tiziana Sucharitkul	Market-leading lawyer	Dispute Resolution	Thailand
Yuwadee Thean-ngarm	Leading Lawyer	Dispute Resolution, Intellectual Property	Myanmar

Clients Take Center Stage at Major Global Conferences Hosted by Tilleke & Gibbins

Tilleke & Gibbins was proud to host two major international conferences in 2018—the Multilaw Annual Global Meeting in October, and the Lex Mundi Asia/Pacific Regional Conference in November. Collectively attracting over 200 senior lawyers from firms on every continent, the conferences provided a forum for discussion between lawyers and clients about the leading global issues affecting business today.

The highlights of these events, which were held in Bangkok, were the many opportunities for open and frank discussion of key topics with clients themselves. To facilitate this, the events included panel sessions with senior counsel from multinational companies,



drawn from Southeast Asia and beyond, on topics as wide ranging as the rise of cashless societies, the changing relationship between corporate legal departments and law firms, and the growth of overseas investment by Thai companies.

Our thanks go to 2C2P, Ascend Corporation, CIMB, Eastern Polymer Group, Minor International, PepsiCo, PTT, Siam Cement Group, Supalai, and UOB for providing panelists for these sessions, as well as to the many other Tilleke & Gibbins clients who participated in the events. This kind of dialogue is essential to ensuring that our high standards of service continue to meet the pressing needs of the modern businesses we serve, and we look forward to similar opportunities with other clients in the very near future.



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