

Copyright Protection in South-East Asia

Copyright entitles the owners of literary and artistic works to a set of exclusive rights over their works. These rights include copying, translating, adapting and altering, communicating and performing to the public, distributing, renting and lending copies of the copyrighted works.

However, copyright is relevant to almost every business across all sectors, not just those in the creative industry. Businesses in all industries should take appropriate steps to identify existing copyrights and consider registering the most important to them. Adequate copyright protection should form an integral part of a solid overall business strategy.

What can be protected by copyright?

Copyright protects the tangible expression of an idea, but not the idea itself. SMEs can protect books, journals, instruction manuals, musical works, drawings and illustrations, computer programs, software and websites, architectural drawings and databases, etc. by copyright.

What rights does copyright provide for?

In South-East Asia, as in the European Union, copyright grants its owner two kinds of prerogatives: moral rights and economic rights.

Moral rights are aimed at protecting a creator's reputation. Their scope varies from one country to another. Moral rights include the right of attribution of authorship, right of publication of the work into the public domain, right to alter the work, and the right to preserve the integrity of the work. Moral rights are personal in nature and may not be waived, licensed, or transferred by authors. Moral rights last forever and don't have expiry date.

Economic rights give authors the exclusive right to exploit the work for economic gain. Economic rights include the right to reproduce, distribute, rent, exhibit, perform, project by visual projection, broadcast, disseminate on information networks, cinematographically produce, adapt, translate to other languages, compile the work with other works to form a new work, and use other means to exploit the work. An author has the exclusive right to exploit the work personally or license it or transfer to others in exchange for remuneration. Economic rights last for the lifetime of the author plus a certain number of years - typically fifty years - in each South-East Asia country after the end of year in which the author died.

How to obtain Copyright in South-East Asia?

Copyright protection arises automatically as soon as a work is created. Furthermore, as soon as any copyrightable works are created in any country which is a signatory to the Berne Convention, copyright protection automatically arises in every other country which is also party to the Convention. There are

currently 171 member countries of the Berne Convention for the Protection of Literary and Artistic Works, which includes all EU Member States and all ASEAN countries except for Cambodia and Myanmar.

However, it is also possible to voluntarily record copyright in most South-East Asia countries except in Brunei, Myanmar and Singapore. Although registration is not required in terms of territorial protection, copyright registration is very helpful in proving ownership in case there could be need for enforcement actions. Authorities prefer to rely on copyright registrations as evidence of ownership before accepting a case from the complainant who claims to be the copyright owner. Therefore, it is recommended that SMEs register their copyright in all South-East Asian countries that allow voluntary registrations and where they have potential or actual business dealings.

Copyright registration is normally not expensive, with official fees varying from EUR 4 to EUR 35, depending on the type of work and on the country. In most South-East Asian countries copyright owners can register their rights without engaging a local agents, however in Thailand and Malaysia, copyright owners need to appoint local agents, unless they are residents or do have actual business operations in Thailand (or are citizens in case of Malaysia).

Copyright ownership in South-East Asia and the importance of contracts

A copyright of a work generally belongs to its creator or the employer of the creator. Where it is expected that a copyright will be licensed, transferred, or used as an in-kind contribution to registered capital for the establishment of a legal entity in any ASEAN Member Country, SMEs should clearly determine the ownership of the copyright. Without evidence to the contrary, the person or entity whose name appears on the work shall be deemed the copyright owner of the work.

Without an agreement stating otherwise, the copyright of a commissioned work belongs to the commissioned party. Thus, if SMEs commission a third party to create a work, they do not own the copyright unless a relevant contract provides that the copyright belongs to them. If SMEs seek the copyright to a commissioned work, they must include in the commission contract a provision on copyright ownership. Similarly, if, for example, software development is performed by employees of a foreign company's subsidiary in South-East Asia, the subsidiary will own the copyright to the developed software unless there is an agreement between the foreign company and the subsidiary that stipulates otherwise.

Where drawings of engineering designs, product designs, computer software and other works are created by employees in the course of employment, using the company's business resources and for which the business remains responsible, the employee usually owns the right of attribution of authorship and the company owns economic rights to the service work. However, there are also exceptions to this rule, e.g. in accordance with Indonesian law and contrary to most European legislations, the copyright for works created by an employee, even during the course of employment, does not automatically belong to the employer. The ownership regime of the works created in the course of employment in Indonesia should therefore be expressly regulated within the employment contract SMEs conclude with their employees.

Copyright Enforcement in South-East Asia

Although the legal framework in most countries in South-East Asia is relatively developed, there are still many issues with enforcing copyrights. Many South-East Asian countries lack experienced judges, experts and law-enforcement authorities. Corruption is also one of the contributors to the flaws in some enforcement systems. Enforcing IP rights in the South-East Asia region can be challenging, but not impossible. Depending on the country, rights holders may enforce their copyrights through administrative, civil, customs, or criminal routes. In different South-East Asian countries different enforcement routes tend to be most efficient and most cost-effective. In many South-East Asian countries in general, and in Indonesia in particular, mediation and out of court negotiations can be the fastest and most cost-effective enforcement routes and should be considered before other types of enforcement.

Administrative actions

Administrative actions are considered to be the fastest and most cost-effective course of enforcement in Vietnam and in the Philippines. Administrative authorities have the power to impose preliminary injunctions, preliminary attachments (a provisional remedy wherein the court/administrative body is asked to take custody of the property of the adverse party as security for satisfaction of any judgment) as well as damages and administrative fines. It is a good way to deal with small-scale infringers and to gather evidence for larger-scale infringers, and it is the best option if the IP right holder's main priority is to immediately stop on-going copyright infringement. However, in some South-East Asian countries like Thailand, administrative actions can be relatively inefficient and not the most recommended way to enforce copyright, because of the lack of sufficient resources, lack of proper training of the enforcement authorities and because of corruption.

Criminal prosecution

Criminal enforcement is considered to be the fastest and most cost-efficient route of enforcement in Malaysia and to some extent in Thailand. Criminal actions normally result in police raids, with the aim to confiscate the counterfeiting goods, however no damages will be awarded during criminal actions. Criminal proceedings usually also allow parallel civil proceedings, where the victims of copyright infringement can ask for the damages to be paid. In most South-East Asian countries, copyright owners are expected to assist the authorities during the enforcement procedures, meaning that SMEs need to provide the authorities with evidential support and attend as a witness in court. On the other hand, criminal prosecutions are rarely used in Vietnam and in the Philippines, as criminal litigation in these countries can take years to finish and it is usually meant to stop large scale infringements.

Civil litigation

Civil litigations are largely seen as quite inefficient way to enforce copyrights in many South-East Asian countries, since these cases can take many years to resolve and in countries like Thailand and Indonesia,

it could be very difficult to calculate exact damages. Civil litigation can also be unpredictable in countries like Vietnam and Thailand because of the lack of resources and lack of trained IP professionals within the judicial system. Civil litigation could nevertheless be a viable option in South-East Asia when dealing with large scale infringements. Furthermore, in Malaysia, the Chief Justice has directed that civil cases should as far as possible proceed to trial within nine months from the date of filing, making civil litigation thus more efficient in Malaysia.

Whichever route of enforcement the SMEs should choose, they need to be prepared to provide evidence of the infringement. In practice, as a first step to enforcing copyright, SMEs need to confirm any suspected infringement and gather and preserve evidence which may be needed at a later stage. For example, in case of suspected infringing goods at a trade show, SMEs should attempt to gather business cards, take photographs, and ask questions about the source of the goods. If SMEs discover suspected infringement on the Internet, they need to determine the identity of the seller or user of the copyrighted work and the network on which the infringing content is stored. For serious cases, a rights holder may want to engage a lawyer or a private investigator to conduct an investigation to confirm the infringement, assess the scope of infringement, and identify the infringers. Where judicial action is contemplated, it is important that SMEs gather sufficient admissible evidence at this stage before infringers are alerted of their actions, e.g. notarizations of purchases of suspected infringing goods, and of downloads of web pages and online content. In minor cases, or as a first-step to enforcing copyright in serious cases, SMEs may want to send a 'cease and desist' letter to the suspected infringer. A typical letter will identify the copyrighted work, ownership of the copyright, the alleged infringing activity, and a demand that the recipient immediately cease all infringing acts under threat of litigation or further legal action.

The Customs

SMEs should also consider cooperating with customs in order to fight copyright infringement. In many South-East Asian countries, the customs have the authority to impose fines on infringers and confiscate infringing goods both for imports and exports. Note that in the Philippines the customs are only authorized to confiscate infringing goods and impose fines on imported goods. Many South-East Asian countries like Thailand, Vietnam and the Philippines have a voluntary copyright customs recording system, which is recommended for the SMEs, as it helps to maximize IP protection, as the customs will be aware of SMEs' IP. Irrespective of whether a country has any procedures for recording the copyright with the customs, the SMEs should actively monitor the market for infringements and be proactive in notifying the customs about suspected infringements, as customs authorities in most South-East Asian countries are authorized to act upon request. However, the SMEs should keep in mind that in some countries like Indonesia customs seizures are not very common because of the lack of procedure or avenue to contact the rights owners even if the customs do come across suspected counterfeits. This however, should not discourage the SMEs from using customs to protect their copyrights, as the customs are a viable enforcement route for proactive SMEs.

South-East Asia IPR SME Helpdesk Team

SOUTH-EAST ASIA 
IPR SME HELPDESK

*The **South-East Asia IPR SME Helpdesk** supports small and medium sized enterprises (SMEs) from European Union (EU) member states to protect and enforce their Intellectual Property Rights (IPR) in or relating to South-East Asian countries, through the provision of **free information and services**. The Helpdesk provides jargon-free, first-line, confidential advice on intellectual property and related issues, along with training events, materials and online resources. Individual SMEs and SME intermediaries can submit their IPR queries via email (question@southeastasia-iprhelpdesk.eu) and gain access to a panel of experts, in order to receive **free and confidential first-line advice** within **3 working days**.*

The South-East Asia IPR SME Helpdesk is co-funded by the European Union.

To learn more about the South-East Asia IPR SME Helpdesk and any aspect of intellectual property rights in South-East Asia, please visit our online portal at <http://www.ipr-hub.eu/>.