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Intellectual Property and Satellite Transmissions in ASEAN

by
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ABSTRACT

This paper examines how intellectual property law in ASEAN treats satellite broadcasting. After summarising, in Section 1, the general state of intellectual property law internationally (with references to the experiences in the EU and the US), it dwells on the law in ASEAN, on a country by country basis (in Section 2). Section 3 assesses the developments in ASEAN and suggests possible ways forward. The paper concludes by underlining the need for ASEAN nations to catch up with international developments in general as well as further clarify the existing laws as regards broadcasting.

Key Words: copyright, Internet, originating organisation, satellite broadcasting, works
Intellectual Property and Satellite Transmissions in ASEAN

Introduction

The communication technologies took off, early this century, with the transmission of sound through wireless means, that is, employing electromagnetic signals which travelled in a similar way to light waves. Since the signals travelled in a straight line and could not follow the curvature of the earth there was a need for receiving stations to be placed close to each other in order to convert the signals and distribute them to the recipients. Later, the original transmitter began to send messages to telecommunication satellites orbiting the earth thereby serving as a point of relay for messages (radio or television). The positioning of the satellites at a distance from the earth and travelling around the earth at a certain speed would keep the satellite in a relatively stationary state as against the earth. This allowed the dissemination of information to be possible to virtually any point on the earth and, if need be, to many countries simultaneously.

There are three forms of telecommunication satellites: point-to-point, distribution and direct broadcast satellites. The first two are “geostationary”, meaning that they are placed at a certain fixed point above the earth and move around together with it. Point-to-point satellites facilitate transmission of signals, as their name implies, from one emitting point to another receiving point or points. So long as the appropriate earth stations are available to receive the signals, the extent of geographic coverage on the ground is limitless. By contrast, distribution satellites carry signals destined for specified receivers such as broadcasters or cable service operators while direct broadcast satellites transmit messages
intended to be received directly by the public. The distinction between “fixed-satellite service” or “FSS” (the first two) and “broadcasting-satellite service” or “DBS” (the last one) is one of mere transport of signals or of distribution to the public, respectively.

Satellite transmission of programs and signals has been accompanied by the evolution in the use of cable and digital distribution systems. Satellite, cable and digital distribution are complementary and, increasingly, one presupposes the other. Cable operators set up ground stations that receive broadcasts from within and without national boundaries and distribute them to their subscribers. The digitization of transmissions, on the other hand, improves on the quality and capability to manipulate the contents of broadcasts whether through satellites or cables.

These advances in communication technologies are increasingly making laws and regulations emanating from national authorities less and less relevant; indeed, the telecommunications technologies enable broadcasters and other transmitters of information to bypass national systems of control. Overall, only issues concerning market entry or dominance and the removal of barriers appear to be gaining more currency. Nevertheless, national authorities must still grapple with such other legal issues as copyright, defamation, the political and economic impact of trans-border data flows, privacy and freedom of information.

This paper seeks to examine the extent to which intellectual property law in ASEAN has come to terms with the emergence and prevalence of satellite broadcasting or
transmissions. Section 1 summarises the state of intellectual property law in the area of satellite transmissions in general. By way of comparison, the responses to the new communication technologies in the US and EU will be referred to. Section 2 then reviews the situation in ASEAN, on a country by country basis. Section 3 attempts to take stock of the developments in ASEAN so far and to suggest the way forward. The paper concludes by pointing to the need of some members of ASEAN to bring their laws in line with international developments as well as the further clarification, in others, of existing provisions relative to broadcasting.

1. Intellectual Property and Broadcasting by Satellite: General

The direct reception of signals by the public in DBS as opposed to that in stages under the FSS (where the signals must be received and then decoded for further transmission to the public via microwave or cable) translates into one “originating organisation”\(^1\) being responsible in DBS and the intervention of others (especially cable distributors) in the FSS. The determination of copyright liability for content (cable, TV and radio programs etc.) will therefore depend on the type of satellite transmission (as well as which leg of the transmission) and the existence or absence of intervention by cable distributors or broadcast organisations (post and telecommunication authorities, radio and TV broadcasters etc.).

\(^1\) Defined under Article 1 of the Brussels Convention as “the person or legal entity that decides what programme the emitted signals will carry”.
As regards cable distribution systems, cable-originated programmes (or "cable casting") must be distinguished from the use of cable for broadcasting, i.e. distribution of broadcasting by cable (otherwise known as "passive distribution"). Although cable-originated programmes are a form of communication to the public (and hence, in a sense, "broadcasting"), we concentrate on broadcasting by satellite and touch upon cable-originated services when they become necessary to that discussion. It might be noted that, strictly speaking, FSS transmissions which are re-broadcast by cable might be considered as cable-originated programmes in the sense discussed already; consequently, the liability for copyright might shift from the originator of the signal to the cable operator subject as the transmission is to the exclusive right of the author at the stage where "reception to the public" could be realised in much the same way as in DBS.

There are two legal instruments on the international level which address the issue of copyright liability in satellite broadcasting: The Brussels Convention of 1974 and the Berne Convention.² We take up the Brussels Satellite Convention (officially known as the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite). The Brussels Convention relates to the container in the transmission of signals, more precisely transmission via FSS (DBS being excluded under Article 3), as opposed to the contents in the signals. The Convention seeks to protect broadcast organisations from unauthorised transmissions by distributors in the member state "for

² The 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcast Organisations recognised, besides the obvious ones, the right of broadcasters over fixation, reproduction, re-broadcasting and public communication of performances and recordings. But that is just about all its significance for our purposes here and will leave it at that.
whom the signal emitted to or passing through the satellite is not intended. The limitations of the Convention are not only the small number of signatories but also the absence of any substantive requirements as to the level of protection. Protection under the Convention therefore depends entirely on the available substantive laws in each member state. Moreover, author’s rights do not figure at all in the Convention presumably leaving them in their hands and expecting them to arrange for their protection through the originating organisation with which they would have dealings.

On the international level, Article 11 bis (1) of the Berne Convention provides for rights in broadcasting. It states

Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by the organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work

The problem of what constitutes “broadcasting” seems unresolved in Article 11 bis. Firstly, any satellite transmission consists of two legs, an “upward leg” (while the signal is sent up to the satellite) and a “downward leg” (when the signal is sent down). Moreover, besides the fact that the place (country) where the signals are sent from via satellites may not necessarily be the same as that sent to, transmission to the public may

\[3\] Article 2, Brussels Convention.
not ensue. In that sense, the question of what constitutes broadcasting will appear to be
difficult to determine (notwithstanding that direct satellite broadcasting can be very easily
equated to the original 1928 definition in the Berne Convention, revised later in 1948).

One possible view is that FSS transmission is mere transport of signals and the content
will not be revealed until it reaches its destination, that is after decoding. Consequently,
since FSS signals are not “intended for direct reception by the general public”, there can
be neither copyright liability by the originating organisation nor broadcasting in the strict
sense. According to this view, if at all there is broadcasting it starts after receipt of the
FSS transmission where cable distribution, for example, takes place. But such a
determination will make transmissions from once country subject to the law of another
country with divergent results flowing where the two sets of laws are different.

Another view holds that any transmission of the author’s works to a satellite must be
authorised as the intended ultimate consequence of sending a programme-carrying signal
would be reception by the public, no matter the intervening stages by earth stations. If
this view finds itself in the law of any nation, the impact on copyright liability of
originating organisations and distributors at the end of the chain may be much higher than
according to the previous view (which regards transmissions as being “mere transport”).

An alternative view of joint liability has also been proposed.

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4 The number of states as at January 1998 was 22. Of the major industrial nations, only the USA, Germany,
Italy, Russia and Switzerland had joined the Convention. See, WIPO, *Industrial Property and Copyright*,
4th Year, No.1, January 1998, at 57.
5 Marie Helen Pichler, *Copyright Problems of Satellite and Cable Television in Europe*, Graham &
The general consequence of adopting any of these views is that liability will fall on the party originating or receiving (and further transmitting) of the signals (or programmes). Where the law of the emitting nation is the applicable law, it may be convenient for the originating party to conclude all the necessary contracts and obtain licences before emission. The advantage of establishing legal certainty in adopting this view is clear; yet the interests and demands of nations where receivers or distributors reside must be taken into account.

Even in direct broadcasting, where the need for intermediaries to make programmes available to the public is done away with, the law that governs the copyright in the broadcast material may have to be decided as against the possible different laws of the country of transmission and that of receipt of the broadcast. WIPO’s Committee of Experts’ proposals for the choice of the country of transmission as the basis for the law of copyright already finds support in the EU’s 1993 Directive on satellite broadcasting and cable retransmission. The same expert’s proposal further states that where the right-holders are different persons, the authorization of the author in the country of reception will have to be obtained.

The Berne Convention allows (under Article 11 bis (2)) the imposition of “conditions under which the rights...may be exercised” such as non-voluntary licensing for broadcasts (including, by implication, cable distribution as long as they are rebroadcasts).

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This was premised on the view that broadcasters might otherwise be subjected to monopolistic conditions by authors or their collective societies and be deprived of broadcast material. The fact that cable retransmission may be given non-voluntary licence while cable-originated programs are not (since they are treated as any form of making programmes available to the public)\textsuperscript{10} may create imbalance; thus WIPO has proposed a move to abolish this distinction.\textsuperscript{11} In addition, the parallel use of the communication technologies leaves some authors (in rebroadcast of their material through cable) unprotected while those whose works are included in satellite broadcasts remain so. The natural reaction is that copyright must reside in the original broadcast and the author must enjoy the right to initiate or deny permission for transmission at that stage and claim as against the original broadcaster and not from those downstream.

The rebroadcasting by cable of material which has already been authorized for distribution by satellite may not face any problems as Article 11 \textit{bis} (1) (ii) (the Paris 1971 version—which happens also to be the latest revision) provides for such. This is assuming that ‘wire’ can be read as ‘cable’. However, the wording of that provision creates difficulties of interpretation. On the one hand, if authorisation is required for transmission or distribution by those other than the originating organisation, cable operators might be liable alongside broadcasters who emitted the signals containing the programmes. In effect, while the broadcaster may have obtained a licence from the respective authors, third parties (which includes cable operators) would need to acquire the same from the right holders before they distribute the programmes. Because of this,

\textsuperscript{10} Under Articles 11 (for public performances of dramatic, dramatico-musical and musical works), 14 and 14 \textit{bis} (for cinematographic and associated audio-visual works)
cable operators have sought to interpret the same provision in terms of their passive status and the fact that they facilitate the reception of the original broadcast without adding anything of their own. Consequently, they argue that they would not need to acquire an author’s permission for distribution of the authors’ works particularly as the concerned “service area” or “direct reception zone” (also known as the satellite’s “footprint”) would have been that already intended or targeted by the originating broadcasters and that, through their rebroadcasts, they would not have introduced any “new public” into the picture. They have alleged further that allowing authors to claim from both originating organisations and cable operators would amount to introducing “double remuneration”.

Any position on the respective arguments of authors’ and cable operators must base itself on the nature of cable transmissions as compared to general broadcasting. Although, it is admitted that their origins are in a satellite broadcast, the ease of use, better reception and plurality of programmes available to the public distinguishes cable transmissions from general broadcasting. Besides, the differences in technologies of receiving broadcast material and cable programmes indicates that cables are not mere reception facilities for broadcasts. On top of this, the simultaneous availability of the same work in different media does not obviate the requirement of obtaining licence from the appropriate authors. In any case, national legislatures are allowed to decide on these issues by virtue of Article 11 bis.

11 Note 8, above, at 606.
12 Note 5, above, at 66-70.
The EU has already sought to resolve these problems through the 1993 Satellite Broadcasting and Cable Retransmission Directive (93/83). The Directive identifies satellite transmissions as being "the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into the uninterrupted chain of communication leading to the satellite and down towards the earth."\(^{13}\) Consequently, it makes the place of transmission (or, in the words of the Directive, "the act of communication to the public by satellite") as being that from which (Member State) a broadcast is sent or "introduced into the uninterrupted chain of communication leading to the satellite and down towards the earth" \(^{14}\) (in other words, the "up-leg" country). This means that broadcasters would obtain licence from authors in the country of emission and that the licence would cover "down-leg" countries. The Directive requires right holders to exercise their rights collectively where cable retransmissions occur from member states.

In an effort to keep abreast of technological development and towards its objective of the single market, the EC issued a Green Paper in March 1996 on harmonization of copyright and protection for encryption services. At the same time, the EC and Parliament have issued a Directive (Directive 96/9/EC) to harmonize copyright and introduce legal protection for databases. It is also to be expected that the EU will take up, sooner or later, the challenge of the Internet both as a medium of creativity and as a means of broadcasting.

\(^{14}\) Article 1(2)(b), ibid.
In the US, during the pre-1976 Copyright Act period, the Supreme Court had decided in 1968 and 1974\(^\text{15}\) that rebroadcasts through cable of live performances did not require copyright clearance by the operators (unless there was videotaping by them). It had viewed the cable TV system to be a mere receiving device (a sophisticated antenna). This position was changed under the 1976 Act. The Act recognised that retransmission of a broadcast signal was a performance. The Act also provided for compulsory licence in favour of cable operators in view of the practical difficulty for them of obtaining such licence every time they sought to rebroadcast. Cable services are hence allowed to retransmit programmes without permission provided they pay royalties (licence fees) to the Copyright Office for later distribution (by the Copyright Royalty Tribunal) to the right holders. The fees are also set by statute by reference to the size of the cable systems.

US attempts at regulation of the Internet have been confined to the aborted exercise to impose, in the interest of children, some sort of censorship on pornography.\(^\text{16}\) Otherwise, the prevalent perception in the US seems to be that of less regulation and interference with the emergent use of the Internet for commerce and broadcasting. It might be noted that the U.S. "Report of the Working Group on Intellectual Property Rights" recommended very little intervention of substance as regards the impact of the Internet on intellectual property\(^\text{17}\)

\(^\text{15}\) Respectively, *Fortnightly v United Artists* (392 U.S. 390) and *Teleprompter v CBS* (415 U.S.394).

\(^\text{16}\) For a general review of the attempt across nations to regulate the Internet see, Assafa Endeshaw, "Regulating the Internet: Clutching at a Straw?" *Computer Communications* 20 (1998), at 1519-1526.

**The Requirements under TRIPs**

Article 14 (read with Article 9(1)) of the 1993 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) requires member states to provide protection for phonogram producers and broadcasting organisations. Sub-article 3 explicitly recognises the right of broadcasting organisations to prohibit the following acts if undertaken without their authorisation: fixation, reproduction of fixation, and rebroadcasting by wireless means, as well as the communication to the public of television broadcasts of the same. Member states are required to allow authors who are owners of the subject matter of broadcasts to prevent the same acts in cases where those states have not recognised the rights of broadcasting organisations. Sub-article 5 of Article 14 also states the term of protection for broadcasting rights to be at least 20 years from the year that the broadcast took place.

**The Impact of Digitisation**

As regards the emergence of digital distribution systems in general and the Internet in particular, the only problem, from the broadcasting point of view, seems to be that they enable users (private individuals as well as businesses) to have at their disposal a capability to reproduce, manipulate and distribute copies. The resulting deterioration in the enforcement mechanism available to the right holders has led to the recurrence of calls for collection of royalties on blank media that audio and video recording had triggered in earlier decades.
The response to this problem in the EU has been the introduction of a levy system in many of the states, though not at the EU level. The introduction of a rental system at the EU level has helped address the problem to a certain extent. Partially too, the resort to the use of spoilers to make further copying more difficult has contributed to the decrease in the appeal of the levy system. The effectiveness of spoilers has been enhanced by inserting legal provisions that legitimise the use of such anti-copying devices as being within the rights of producers. On the other hand, in the UK, the 1988 copyright law explicitly made room for home-taping.

In the US, home taping or time shifting was pronounced as legal after the momentous decision of the Supreme Court in *Sony Corp. of America v United City Studios*. In spite of the various lobbies to change that law and the proposals before Congress to introduce a levy of some sort on VCRs and blank tapes, the attempt has so far failed. By contrast, the sound recording industry has scored a measure of success through the passage of the 1992 Audio Home Recording Act. That Act imposes on all purchasers of blank media and digital audio recording equipment a fee (as royalty) on top of the sale price.

2. Intellectual Property and Broadcasting by Satellite in ASEAN

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ASEAN has not yet devised any regional legal instrument for intellectual property. We must therefore peruse the national legislation pertaining to broadcasting in each member state. This is done in the following pages, in an alphabetical order.

**Brunei Darussalam**

Of all the member states of ASEAN, Brunei still lags behind in many aspects of intellectual property. The residual laws that have been carried over from the colonial period do not extend protection to broadcasting. The continuation in the application of the 1911 Copyright Act means that Brunei is stuck with pre-broadcasting rules in its copyright law.

**Indonesia**

The Indonesian Copyright Law of 1982 (as amended in 1987 and 1997) provides a long list of copyright subject matter. Among these, “broadcasts among others for radio, television and film, as well as video recordings” are “protected creations”.$^21$ Besides the obvious fair use exceptions, the use by the government of “a creation” for radio and television broadcast “in the national interest” may be done without prior permission provided that reasonable compensation is given to the right owner.$^22$ The respective broadcasting organisation would employ its own equipment and use such work solely for its own broadcast—subject to payment of compensation for subsequent broadcast.$^23$ The duration for broadcast copyright is fifty years from “first publication”, meaning obviously “broadcast”.$^24$

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$^21$ Article 11, the Indonesian Copyright Act of 1982 (as amended)
$^22$ Article 17(1), *ibid*.
$^23$ Article 17(2), *ibid*.
$^24$ Article 27, *ibid*. 
Malaysia

The Malaysian Copyright Act 1987 (as amended in 1990 and 1997) refers to the person by whom the arrangement for the making of the transmission from a country of a broadcast as an author.25 “Broadcast” was earlier defined as transmission, “for reception by the general public”, by wireless means of any sound and or image.26 “Communication by cable” was also defined as operation by which “signals are guided by wire, beam or other conductor device, to the public or any action thereof, for reception.”27

A broadcast is clearly designated as subject matter for copyright28 if it is transmitted from Malaysia.29 The copyright in a broadcast entitles the owner to exclusive right to control in Malaysia the recording, reproduction, rebroadcasting or showing to a paying public of the whole or part of the broadcast.30 The copyright in a television broadcast includes the right to take still photographs from such a broadcast.31 However, the general faire use exemptions from copyright will limit the broadcast right particularly for private and domestic use, recording for educational purposes and for news reporting or public information.32 The copyright subsists for 50 years from the first date of broadcast.33

The law makes the presumption in favour of the broadcaster that, where an author of an original (literary, musical or artistic) work has authorised that work to be included in a

25 Section 3, the Malaysian Copyright Act 1987 (as amended)
26 Ibid.
27 Ibid.
28 Section 7(1)(f), ibid.
29 Section 10(2)(c), ibid.
30 Section 15(1), ibid.
31 Section 15(3), ibid.
32 Section 15 read with s 13, ibid.
33 Section 20, ibid.
film, the broadcast of the film will be considered to have been authorised by the author. However, this goes hand in hand with compensation to the right holder.\textsuperscript{34}

The Copyright (Amendment) Act 1997 has refined the definition of "author" (in s 3) in relation to broadcasts \textit{in any country} by reference to "responsibility for the selection of the content" or the provision of programmes and making of arrangements for transmission. The change also inserts in the definition of broadcast lawful receipt by members of the public and the transmission of encrypted signals where the means of decoding are provided to the public by the broadcasting organisation or upon its consent. The definition of "communication by cable" has been removed obviously because the new definition of "broadcast" makes it unnecessary. (Note the overlap in the respective definition in the copyright laws of the Philippines and Singapore, respectively discussed below.)

Finally, the 1997 amendment allows the Minister concerned to exclude from "broadcast" a number of services: interactive services, internal business service, individual domestic service and services in single occupier premises. All these are low level activities that have no large impact on right holders.

\textbf{Philippines}

The 1997 Intellectual Property Code of the Philippines recognises the exclusive right (in the words of the Code, "copyright or economic rights") to "authorise or prevent", among

\textsuperscript{34} Section 16, \textit{ibid.}
others, communication of a work to the public. It confines “communication to the public” of a work to the use of wireless means. On the other hand, it defines “broadcasting” in an identical way although at the same time the same term subsumes “transmission by satellite” where the means of decryption are made available to the public. It is not however clear why two sets of definitions are provided.

A broadcasting organisation has exclusive rights to rebroadcast or record its broadcasts or film them for further broadcasts or public viewing or use the records for subsequent broadcasts. Nevertheless, the inclusion of a work in a broadcast will be exempt from copyright if such is done for illustration or educational purposes and complies with fair use. The making of ephemeral recording of broadcast material by a broadcast organisation and for use in its own broadcast is similarly exempted from copyright. Moreover, apart from the usual fair use exceptions, use of broadcasts solely for teaching or scientific research, or private use by a natural person are exempted from copyright. Broadcasts are protected for a period of 20 years from the date of broadcast. It is worthy of note that protection is available to organisations not only registered in the Philippines but also where the transmitters are in the Philippines. It is difficult to say whether relay stations would be covered under the latter.

35 Section 177, the 1997 Intellectual Property Code of the Philippines.
36 Section 171.3, ibid.
37 Section 202.7, ibid.
38 Section 211, ibid.
39 Section 184.1(e), ibid.
40 Section 184.1(g), ibid.
41 Section 212, ibid.
42 Section 215.2, ibid.
43 Section 224, ibid.
Singapore

Rights in broadcasts were introduced in Singapore law for the first time in the Copyright Act 1987 (cap 63). Section 117 clearly lays down that rights in derivative works such as broadcasts are distinct subject matter of copyright separate from, or in addition to, the original (literary, musical or artistic) works of authors. The exclusive rights granted under Part IV (sections 82-90) for sound and television broadcasts and cable programmes include transforming them into films, making sound recording of them, causing them to be available to the public for viewing or listening, rebroadcasting them or including them in a cable system. Programmes included in cable services attract copyright only if the service is provided by a qualified person in Singapore; otherwise, the reception and immediate retransmission by a cable service of television broadcast or sound broadcast does not give rise to any copyright. This suggests that diffusion services or relaying of transmission from Singapore would not bestow fresh copyright to anyone. This might change once Singapore joins the Berne Convention.

On a conceptual level, overlaps seem to abound. Thus “broadcast” is narrowly defined in reference only to wireless transmission. On the other hand, a cable programme service is defined broadly to include non-wireless transmission. Separate definitions are also given for “television broadcast” and “telecommunication system”. The piecemeal approach gives the impression that the law unnecessarily compartmentalises the area. On the other hand, section 20 seems to bring them all together under the term “broadcasting”.

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44 Section 90, the Singapore Copyright Act 1987 (as amended)
45 Section 7(1), ibid
Singapore passed a law in 1998 amending the 1987 Act in an attempt to bring the latter into line with TRIPs. Among the changes effected is an entirely new section on the rights of performers. Broadcasters’ rights to make ephemeral copies for the sole purpose of broadcasting have been whittled down. A time frame (of six months) for such copies has been inserted into Sections 43, 68 and 107 of the Act.

**Thailand**

The 1994 Copyright Act has generally expanded the ambits of the 1978 copyright law. The neglect of rights to performances and sound recordings in the 1978 Act was remedied, in view of the TRIPs obligation assumed by Thailand, by their inclusion (in section 44). “Communications to the public”, or “dissemination to the public”, that is broadcasts, continue to be protected as under the 1978 Act. However, the law still lacks clarity and displays the problems of overlapping definitions already indicated in relation to the copyright laws in the Philippines and Singapore.

**Vietnam**

Chapter 1, Part VI of the Civil Code of Vietnam provides for copyright protection. Article 747 enumerates the types of works protected by the state. Among these are “radio and television works” (undefined). Among the exclusive rights of an author or owner of a work, enumerated under Articles 751(2) and 753(2), respectively, are radio and television broadcasting of the work. The same rights are granted (under Article 758) to individuals and organisations producing “radio and television works”. In addition, performers have
rights, among other things, to authorise the broadcast or televising of their performances.\textsuperscript{46}

The Code also treats the obligations and rights of radio and television broadcasters in two further provisions (Articles 778 and 779), respectively. The obligation relate to obtaining permission for “unpublished works”\textsuperscript{47} and acknowledge the names of authors and performers in using published works as well as pay remuneration.\textsuperscript{48} (It strikes one as odd that broadcaster’s are not required to seek permission form the latter group of persons.)

As regards the rights of broadcasters (listed under Article 779 in an inchoate fashion), they have exclusive rights in their programs for a period of 50 years after the first broadcast. Although, both provisions only reiterate what have already been dealt with, they demonstrate the awareness of the Vietnamese authorities as to the problems raised by broadcasting in terms of protection of works included in, as well as generated through, them.

Article 749 excludes from protection such works as might be considered to constitute “propaganda” encouraging “violence, aggressive wars…or which spreads reactionary ideology and culture, obscene life styles…” It is exactly not clear what might be the targets of these exclusions. The relevant exemption from seeking authors’ permission or making payment (cited in Article 761) are using works “without alteration of the contents for teaching and testing activities in schools”, “archival and library use” and recording or reporting for “public information and educational purpose”.

\textsuperscript{46} Article 775, the Civil Code of Vietnam.

\textsuperscript{47} Article 778 (1), \textit{ibid.}
The period of protection for rights of authors (categorised as “personal rights”) as well as the rights “to receive” royalties or remuneration (called “property rights”) are the usual 50 years plus life while rights in radio and television programs run for fifty years from “first publication”.

3. Unfinished Tasks in ASEAN and the Way Forward

The general picture of intellectual property in ASEAN may be gleaned from their membership of the major conventions. A perusal of the following table will suggest that members of ASEAN have still got a lot to go before they can have similar schemes of protection for intellectual property. For one thing, not all the nations have the entire spectrum of laws. Thus Brunei has yet to introduce the principal chunks of intellectual property law and join the international conventions while Singapore and Vietnam have to join only the Berne convention. In terms of details, the rights to performances, sound recordings and broadcasts appear in the copyright laws of most of the members of ASEAN. As a result of the requirements under the TRIPs, the majority have already made a quick transition. It is to be expected that, once they have streamlined their laws with TRIPs, the remaining three member states of ASEAN will seek to join the Berne Convention while the six might possibly also join the Rome Convention.

48 Article 778(2), ibid.
49 Article 766(2), ibid.
50 Article 766(4), ibid.
Membership of ASEAN in the major international conventions

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It is no wonder therefore that the United Stated Trade Representative’s (USTR’s) latest assessment has put five countries of ASEAN, namely Indonesia, Philippines, Singapore, Thailand and Vietnam on either the priority (the first) or watch list (the latter four). As always, the indications are that these countries lag behind the rest of the industrial countries in terms of the scope of their IP laws or the extent of enforcement.

Regarding our subject of inquiry, it is fairly apparent that the state of intellectual property law relating to broadcasting in ASEAN is not homogenous. Except for Brunei which has yet to adopt a modern copyright law, the rest of ASEAN possess general provisions relating to broadcasting but with varied formulations as well as levels of detail or clarity.

It is not difficult to guess that, as the majority of ASEAN, with the possible exception of

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Singapore and Malaysia, do not engage in cross-border transmissions, the legal implications of not having detailed rules protecting broadcasters in the specific nation will take time to surface.

Above all, the determination of at what stage of a transmission will broadcasters have obligations towards authors and according to which law are critical for both broadcasters and authors in the ASEAN region, not to say for those who will increasingly seek to enter this market sooner or later. Not less important is the general absence of any legal formula for collection of royalties or remuneration on behalf of authors whose works are taken up by broadcasters (and cable operators). Considering the allowance made by the Berne Convention for the establishment of a compulsory licensing system, ASEAN might extend the same benefit to local (possibly also regional) creators of works.

A major factor that has impact on the state of broadcasting law in general and the specific rules of copyright protection in ASEAN is the extent of state involvement. Most of ASEAN radio and television broadcasting is undertaken or operated by governments. Thus, for instance, in Brunei, this is done through the Department of Broadcasting and Radio Television Brunei. In Malaysia, the government operates four radio networks broadcasting in the various languages and two TV channels. Only one channel is run by a commercial TV station (TV3). In the Philippines, the number of commercial and non-commercial broadcasting radio stations has reportedly reached 321 while that for television stands at five commercial channels with the provinces being served by relay

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stations. In Singapore, the Singapore Broadcasting Corporation broadcasts radio and TV programmes in four languages. Hotels TVs are linked to SBC Tem, a teletext system. Moreover Singapore CableVision (SCV), a government-linked company, operates a multi-channel cable system.

Clearly, under the current structure of the broadcasting industry in ASEAN, rights in broadcasts across member states of ASEAN will nearly always belong to state or quasi-state bodies. Although, in theory, this will diminish with more opening up of this sector to private businesses and, most of all, foreign broadcasters, the prospect of that materialising is tied with other considerations which are beyond the scope of this paper. Nevertheless, the rights that are currently all but exclusive to those bodies might gradually but eventually be extended to others as well.

Finally, ASEAN will have to brace itself for the inevitable opening up of the telecommunications sector to foreign broadcasters and the setting up of more and more "originating" broadcasters in the region. The challenge will have to be met in legal terms by working out the detailed rules we have mentioned already.

4. Conclusion

The differing levels of intellectual property protection available in ASEAN and the nature of the broadcasting industry at the moment and its future prospects combine to create loopholes and lack of clarity that need to be addressed by each member state or as a
group. As against the advances made in the EU and the US, it is submitted that ASEAB have a lot more to do.

Firstly, ASEAN nations not only need to bring their laws in line with TRIPs and the Berne Convention, but also work out detailed rules to make the rights granted under the laws relevant to their nationals (both private authors and broadcasters) and workable. Secondly, the national concerns as regards the development of culture and language must find some form of protection, by way of exception from the emerging international regime of satellite broadcasting. As things stand, the fair use exceptions normally included in the national laws may not address the new problems generated by the advance in technology, including the digital revolution.

References

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