INTELLECTUAL PROPERTY IN ASIAN EMERGING ECONOMIES

Law and Policy in the Post-TRIPS Era

ASSAFA ENDESHAW

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Preface

The literature on intellectual property (IP) law and policy in developing countries (DCs), including the emerging economies, particularly those in East Asia, has been expanding at a furious pace. This is in keeping with the rising importance of IP in international trade, subsequent to the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in December 1994. Nonetheless, the level and scope of the discourse in IP policy has not necessarily changed at the same speed.

On the one hand, a huge proportion of the literature dwells on the compatibility of new laws adopted in DCs with TRIPS and the lack of implementation of those laws. The repetitive nature of the theme can be gleaned from a perusal of the literature across, and about, DCs. On the other hand, the coverage of policy issues has been torn between bland assertions of the importance of IP for DCs and increasingly shrill voices upholding the contrary view. The polarization of views is not particularly new, although the manner in which the supporters of the status quo present their arguments has undergone a certain transformation: They have resorted to natural rights theories and the deployment of economic, political and military power to make DCs continue to adhere to forms of IP generated by the most advanced nations.

This book departs from the catalogue of writings that elaborate on legislative changes in DCs following TRIPS and recommend more changes and adaptations *ad nauseam*. It aims to critically review the recurrent debate on IP law and policy in DCs (particularly the East Asian emerging economies) carried out in the last decade; to identify the still unresolved policy issues, and to propose alternative approaches that resonate with the needs for transformation of the economic and social reality of those economies. It seeks to draw lessons to be learned by researchers, policy makers, legislators and the business sector in general and concludes by putting forward proposals for reform.

Assafa Endeshaw

List of Abbreviations

ASEAN	Association of South-East Asian Nations
DC	Developing Countries
FDI	Foreign Direct Investment
FoD	'Group of Friends of Development'
FTA	Free Trade Agreement
IP	Intellectual Property
MFN	Most Favoured Nation
MNCs	Multi-National Corporations
NICs	Newly Industrializing Countries
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
USTR	Office of the US Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Chapter 1
Overview

Introduction

Asia is a vast continent with a huge diversity of countries, cultures and political–economic systems. However, only a small number of those countries have managed to achieve a measure of economic progress, becoming known variously as 'Tiger economies', 'emerging economies' or 'newly industrializing countries'. A veritable avalanche of research has been generated to understand the underlying causes and policy frameworks in the economic and political fields that have presumably led to those achievements. Studies into Asian laws and how they have managed, if ever, to keep up with the economic 'miracles' have not been as extensive or popular. Far more restricted in magnitude and scope have been inquiries into the more specialist area of intellectual property legal developments in Asia.

As with other nations across the world that sought to catch up with advances in Europe and North America by imitating the paths the latter had followed, appropriately dubbed 'modernization', Asian nations had either borrowed or adopted Western intellectual property (IP) laws. The state of IP laws in Asia (whether newly imported or left behind by colonialism) remained very much unchanged until the 1960s and 1970s when the view began to spread among the developing countries (DCs) that acceding to the increasingly strident demands of Western countries and corporations to reform their IP laws would serve their objective of attracting foreign capital and technology. The pervasiveness of such a belief is demonstrated by the fact, for instance, that China managed to introduce Western-style IP laws, lock, stock and barrel in a space of a decade in the hope of avoiding any barriers to the inflow of foreign technology and capital. Both East and South East Asian 'Tiger' economies took similar actions to thwart any possible disadvantages of criticisms levelled against them on account of the gaps left between their IP laws and that of Western countries.

Soon, however, the pace of reform in IP law-making picked up. What had begun as an attempt to transform the domestic IP laws in view of a perceived internal need to promote their self-interest gradually became a compulsion to do so for other more pressing reasons. Having come to the decision, in the 1960s and 1970s, that it needed to protect its lead in the world economy by tightening the laws regulating technology flows, the US took the uncompromising stance of raising standards of IP and their enforcement as codified in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the World Trade Organization (WTO). Increasingly, the US became more vocal in its critiques of the level of IP and enforcement across the world and, more specifically, in the

emerging economies. The Office of the US Trade Representative (USTR) took it upon itself to conduct annual reviews from 1995 onwards[1] of, among other things, the state of IP law-making and enforcement in virtually all countries, with emphasis on those with an industrial and commercial significance in the export sector. The annual reviews became a signal of US intentions towards other trading nations; in particular the grouping of countries under the labels of 'priority watch list', 'watch list' and the like served as a warning of what measures the US might take in retaliation for perceived shortfalls by the respective countries. The fear of loss of access to the US market that such open pronouncements exposed the various nations to could not but lead to frenetic activity in the repeated revisions or new additions of IP laws everywhere, particularly in Asia where the dependence on the US market has always been massive. Asian governments had to hasten to acquiescence to any form of change demanded by the US (more often), the European nations (intermittently) and Japan (to a lesser extent). The consequence has been an unceasing flurry of law-making and revision in all countries to bring their laws and practices in line not only with TRIPS but also with other standards that have found favour in the major industrial powers since then.

An illustration of how the inclusion by the USTR of any country in its annual 'black list' might, if nothing else, speed up the law-making and enforcement process is that of China. The USTR issued on 30 April 1996 the names of countries likely to attract US retaliatory (so called the 'Special 301') action and designated China the sole 'priority foreign country', allegedly because it had failed to implement the 1995 agreement it had reached with the US. The US followed this in May 1996 by drawing up a list of Chinese exports to the US which would be hit by tariffs of US$3 billion unless China put an end to suspected production of pirate CDs and barriers to import of US audio, video and software products. China sought to counteract this by announcing its list of US products that it would slap with tariffs. The tit-for-tat threats of trade war were finally averted with the Chinese side agreeing on 17 June 1996 to do what the US demanded.

Much of the criticism of IP in emerging countries of Asia and elsewhere in the decade after TRIPS were based on the view that they were 'not TRIPS consistent'. Most Asian countries had to comply with TRIPS by 1 January 2000 as they were considered DCs. A number of emerging economies among them (China – though not a member of WTO yet – along with Hong Kong, the Philippines, South Korea and Taiwan) had done so by the stated deadline, although a few still had bits and pieces left in the area of protection for circuit layouts, trade secrets, simplification of procedures for acquisition of IP rights and tightening of enforcement mechanisms (customs control, for instance). Not surprisingly, Japan led the way, although it too had some remaining gaps that exposed it to some criticism. The most extensive

1 The annual reports of the Office of the US Trade Representative (USTR), known as 'National Trade Estimate Report on Foreign Trade Barriers', are available at http://www.ustr.gov/reports/index.html.

changes were made in Hong Kong, in view of its impending reunification with China and the apparent British desire to present a *fait accompli* to China.

More recently, however, criticisms have started to be levelled at the IP laws of emerging economies for their alleged failure to reflect bilateral obligations assumed by those nations when they signed 'free trade' agreements with the US. The latter type of agreement has become instrumental in injecting 'TRIPS-plus' standards across a range of countries, including a few in Asia, considered of economic or trade importance to the US.

General Features of IP Changes in Asia

A large proportion of treatises on IP in Asia is confined to explanation and manipulation of technical rules in the black-letter law tradition. Yet, IP is notoriously linked to, and mirrors, economic and technological developments or aspirations towards such. Any serious study of how IP changes in Asia came about or failed needs thus to grasp the parameters of economic and technological developments in the respective nation as well as the general framework for IP law-making and enforcement. Just as it is never easy to jumble all Asian nations together and establish their economic and technological needs and how they might resolve any attendant problems, any assumption that those nations should embrace and implement a set of identical IP laws and to prescribe such to them will doubtless be meaningless. Add to this the fact that the majority of Asian nations remain bogged down in rudimentary economic and technological problems and, left to themselves, would not believe the adoption of IP laws that have found favour in the more advanced among them (Japan) might usher in a quick fix to those problems.

As a matter of fact, the diversity in Asia expressed in terms of a handful of newly industrializing nations together with a large number of non-industrial ones has produced a divergent response to the question of accession to TRIPS, and further extension of IP subsequent to that agreement (whether through 'free-trade agreements' or in other ways). The huge dependence of Asian emerging economies on the US for market, capital and technology made sure that accession of nearly all of Asia to TRIPS would take place without much fuss. If any disgruntlement and disappointment with the lack of any 'policy space' within TRIPS to incorporate domestic Asian concerns appeared, it was after the accession and in light of developments in a new round of trade negotiations under the WTO.

The rising wave of discontent as to why Asian nations were not allowed to decide at their own pace to evolve IP policies for their socio-economic transformation only emerged with the opening up of TRIPS for revision under the auspices of the WTO. Indeed, Asian nations have, for a long time, understood that the incorporation of laws into the statute books was not identical with their implementation. Regardless of whether they were politically willing to implement those laws, a multiplicity of factors had intervened to forestall such a prospect. For one thing, the vast disparity

in economic and technological standings with advanced nations where IP was found to be relatively relevant did not inspire confidence in them that they would benefit from the usual gap filling or modifications of existing premises of their own IP laws. Secondly, many Asian nations did not feel that the peculiarity of their domestic interests was addressed by laws that matched developments in Western Europe and North America.

Nonetheless, they did not go to the extent of rejecting wholesale transplantation of foreign IP laws by embracing the lessons learnt in studies of the evolution of IP in the advanced economies (e.g. Penrose,[2] Grundmann[3] and Endeshaw[4] echoing Seidman[5] and Trubek and Galanter[6]), namely that the making or enforcement of IP laws appropriate to countries should be founded on an understanding of the role of law in development and the necessity of translating economic and technological policies into laws that facilitate development. As a matter of fact, the fundamental question of whether any form of IP in Asia should be devised and continuously updated to facilitate the development of technology as well as the economic prerequisites for such an outcome never really surfaced in any official communications by governments or at the increasingly frequent conferences by heads of states (the Asia–Pacific Economic Cooperation, APEC, for instance). It was not therefore unexpected for Asian nations not to clamour for an approach in IP law-making of formulating concrete principles and rules to help transform their economies. The fear of retaliation by the US and hope that adorning themselves with the latest IP laws might thwart such threats and even lead to transfer of technology and inflow of capital put paid to any ideas of charting any national approaches towards a more relevant IP system.

The huge influence that the main trade partners of Asia, namely the US, Japan and the EU, have on developments in Asia, in particular through their constant critique of the level of IP protection available to their corporations, led to constant pumping of the IP systems with additions and trimmings often suggested by those powers. According to one commentator:

> The history of the West's relations with East Asia over the past century and a half is replete with examples of the impact of might, even when it has not made right. And one would be disingenuous when assessing intellectual property

2 Edith T. Penrose , *The Economics of the Internatinal Patent System*, Johns Hopkins Press: Baltimore, MD, 1951.

3 Helge E. Grundmann 'Foreign Patent Monopolies in Developing Countries: An Empirical Analysis', 12 *Journal of Development Studies* 186, 1976.

4 A. Endeshaw, *Intellectual Property Policy for Non-Industrial Countries*, Dartmouth: Aldershot, 1996.

5 R.B. Seidman, *The State, Law and Development*, Frances Pinter: London, 1978.

6 D.M. Trubek and Marc Galanter, 'Scholars in Self-estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', *Wisconsin Law Review* 1062, 1974.

> developments in the ROC and Korea – and even in Japan and the P.R.C. – to ignore the impact of threats to limit access to the American market.[7]

Another commentator added in the same vein:

> Europe and the United States have an important stake in accelerating the adoption and enforcement of stronger intellectual property in Asia ... If the US and Europe combines their market power [in Asia – as major export markets for Asian goods] to push for stronger intellectual property in Asia, they would send a doubly strong message about the importance of this issue for first world investors, and probably speed up enforcement efforts.[8]

The perennial question for Asia in general and for emerging economies in Asia in particular is how and when they might start to plug the inflow of external (foreign) IP developments without any real examination, modification or pronounced reservations and move towards tailoring their own laws to address domestic requirements in tune with their cultures and aspirations.

Aims of the Book

Intellectual Property in Asian Emerging Economies scrutinizes the existing legal and institutional structure relating to IP in emerging economies of Asia and proposes the direction and forms of possible reforms in light of the failure of the system already in place. It lays down alternative plans of future action that governments and civil society within those countries would be expected to implement.

In particular, this book will point to the differentiation that needs to be maintained in the making or implementation of laws across countries and cultures by contrast to the current dominant perception that all nations should think alike and behave alike in IP terms, if not in others as well. It will also underline that emerging economies must take stock of their own internal peculiarities, needs or problems and set out to craft a legal and institutional structure in tune with their own state of social and economic conditions. However, the threat of trade sanctions, political and military pressure has compelled nations to abandon making their own laws and, instead, copy versions of the laws of the major industrial nations. Indeed, many countries have to work hard to establish what is expected of them across a range of policies, laws and institutions rather than what they might need for themselves.

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7 W.P. Alford, 'How Theory Does – and Does Not – Matter: American Approaches to Intellectual Property Law in East Asia', 13 *UCLA Pacific Basin Law Journal* 8, Fall 1994; available online from Lexis-Nexis; accessed on 13 October 2000.

8 B. Callan, 'US and European Efforts to Enhance Intellectual Property Protection in Asia: A Logic in Cooperation', *IPAsia*, 35–8, November 1997, at 35.

Intellectual Property in Asian Emerging Economies also highlights the attempts of those economies to fake compliance with the wishes and demands of the industrial nations instead of working out *autonomously* policies and laws appropriate to their requirements and in line with their capabilities. The consequence is that, preoccupied as they are with the perennial pressure to copy IP laws and institutions of the industrial nations, these countries cannot effect any real changes in their own domestic laws and institutions. This has generally resulted in a state of paralysis in law-making and enforcement in these nations.

The book will also show that the continuous rise in expectations of IP owners in the industrial nations, particularly the big powers, that the rapid spread of their laws to emerging economies and DCs amounts to a promise to execute them instantly has generated illusions. For many a multinational company operating in DCs, including emerging economies of Asia, the state of IP enforcement has remained patchy or non-existent. Governments such as those of the US and EU thus continue to put pressure on DCs to implement the IP laws on their statute books. Yet, DCs have discovered that they can hardly afford, or willingly commit, to implement laws that do not conform to their requirements.

Moreover, the book will argue that the industrial powers' perception that treaties should be upheld, that DC governments should fulfil their obligations lest they fell prey to trade sanctions and external political pressure, serves only to heighten the state of misunderstanding between the two sides and to lead to confrontations in international fora such as the WTO (Doha Round). It adds that the confrontation is made worse by the dominant literature in IP which ignores the specific problems that afflict the enforcement of IP in the non-industrial and newly industrializing nations of the world but pushes for more of the same regardless of the brewing dissent and backlash against the status quo. Even where a section of the literature accepts the need for reforms, its prescriptions are piecemeal (focusing mainly on education or institutional capacity building) and come to an end shortly after barely scratching the surface.

Finally, the book explores the growing recognition that the transformation of the DCs in the economic and technological fields may be desirable even for the industrial nations. The crises that bedevil the world economy every so often, the latest being the one which erupted in 2007/8, could be averted or overcome through an expansion of the market in emerging economies, the DCs in general and ultimately the global market. The impasse in the IP field could also be resolved if both industrial and developing nations accept the necessity for a joint approach to achieve mutual benefits.

Organization of the Book

Intellectual Property in Asian Emerging Economies is organized in two parts. Part I (in Chapters 2–7) deals with post-TRIPS issues in IP law-making, while Part II (in Chapters 8–13) examines the backlash against post-TRIPS extensions of IP.

Chapter 14, by way of a conclusion, suggests the possible future directions of IP law- and policy-making in Asian emerging economies.

Chapters 2 and 3 inquire into the IP law-making process in a selected number of Asian emerging economies (the Association of South East Asian Nations, ASEAN, and China, respectively) in view of their expected compliance with TRIPS. The author decided against a similar treatment of IP developments in India, mainly because that country is an interesting and distinct case all by itself and would deserve an independent study. Moreover, the relative complexities of its legal history and tumultuous relationships with the major industrial powers would not lend themselves to a brief account that fits the limited space available here.

Chapter 2 focuses on policy grounds in the making and constant revision of IP laws in five countries of the ASEAN (namely Indonesia, Malaysia, the Philippines, Thailand and Singapore), often referred to as the emerging economies of that block, as well the legal rationale behind the variations in the local laws as well as among them and the adoption or rejection of specific formulae. The setting for the interplay of all the issues to be raised and considered is the likelihood of success in the formulation of an ASEAN-wide IP system, as has been framed by the member states. Chapter 3 dwells exclusively on developments in China in view of its rapid absorption of foreign IP laws by way of completing the 'modernization' of its laws and gaining entry into the WTO. It discusses how China's emergence as an economic powerhouse and its adoption of the most up-to-date IP laws have not necessarily obviated criticisms of the low level of its enforcement of those laws and continuing mismatch between the IP laws and the domestic demands on them.

Chapter 4 takes up the harmonization of IP in ASEAN. Most of ASEAN have put in place IP laws that were originally either inherited from the colonial past or adopted later as part of the urge to modernize. Although a desire has been expressed, through the 'ASEAN Framework Agreement on Intellectual Property Co-operation', adopted on 15 December 1995, to unify their IP systems, that agreement has not been followed by any detailed plans yet. The chapter seeks to examine the prospect for ASEAN of adopting a single regional IP system within the context of the international system and by reference to the intra-ASEAN divergent economic and social circumstances. It argues that ASEAN will not be able to trail blaze in terms of formulating IP policies and laws that conform to domestic requirements as they would be forced to embrace international developments in the IP sphere willy-nilly; nevertheless, they might succeed in introducing a single administrative machinery for ASEAN based on the stated developments.

Chapter 5 surveys the prospect for developments in IP law-making beyond TRIPs and at the behest of the major industrial powers. It looks at the instance of the new demands on the major economic powers and the pharmaceutical companies to alleviate the chronic problems of development in general and AIDS in particular, and how the debate has thereby widened. It contends that, while piracy is a global problem, rampant even within the industrial countries themselves, the incidence of piracy in DCs be better characterized as the main direct consequence of the forcible

incorporation of incongruent or inappropriate IP laws into their statute books. It argues further that the role of emerging economies and DCs in IP law-making has vanished for the most part and that piracy in those countries is partly the flip side of their inability to craft IP laws in aid of their national economic and cultural pursuits and partly as an ideologically motivated label (hence a misnomer).

Chapter 6 scrutinizes Asian perspectives on post-TRIPs issues. It starts with the premise that Asian countries have, for the most part, slavishly imitated the IP system long entrenched in, or newly introduced by, the major industrial powers. It notes that, in recent years, governments, industry groups and academic scholars in the major industrial countries have sought to restrain further expansion in IP in view of its arguably deleterious effects on innovation, investment and competition. Asian emerging economies have also started to respond to the same problem, although in the limited contexts of health, traditional knowledge and the environment. Moreover, their approach lacks coherence as well as breadth, thereby hindering the emergence of a common position in their negotiation vis-à-vis the developed countries in the new round of negotiations (Doha and afterwards). This chapter examines the efforts of the Asian economies in confronting the stated problems and the possible paths for the emergence of a common position among them.

Chapter 7 opens by examining the role of IP law in Asia in light of the euphoric references to the 'tiger economies', the 'Asian Miracle' and the 'Asian Century' by comparison to the conditions in Africa. It argues that, although the disparity between Asia and Africa, both in terms of past achievements and future prospects, might appear to make a comparison of the respective roles of IP in Asia and Africa implausible, there are a few common features that are shared by Asia and Africa.

Both Asia and Africa are vast continents with a multiplicity of nations, histories and cultures. Their laws have largely originated from, or been heavily influenced by, foreign or colonial traditions. The equation of 'modernization' to 'Westernization' has propelled their legal developments in the direction of imitations, copying and full-scale transplants of further Western legal forms and jurisprudence. In the realm of IP too, despite the specific differences in the way that the laws may have evolved in each nation, the general patterns are broadly alike.

The chapter attempts to establish an analytical framework to fill the gap between the two sets of nations in terms of the significance of IP. It points to the congruity of the IP laws to the specific economic and social conditions of those nations as well as the existence or absence of industrial transformation among them as the most critical issues in the analytical framework.

Chapter 8 inquires into whether and how Asian nations have succeeded in managing the disconnect created between the protection of IP internationally and the circumstances in which they, together with most non-industrial or developing nations, were forced to forego their domestic interests and accede to treaty obligations without being given corresponding minimal benefits deserving of sovereign contracting parties. It starts with a survey of the common misperceptions about the role of IP. It then attempts a brief appraisal of the conflicting interests and forces that condition the level, or lack, of IP law-making and enforcement