RCEP – E-commerce and Intellectual Property

Tran Manh Hung | 3-4 May, 2022
Agenda

1. E-commerce

2. Intellectual Property
E-commerce
The e-commerce provisions under RCEP are **general** and **fundamental**, which cover the following issues:

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<th>Topic</th>
<th>Details</th>
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<td>Promote paperless trading, e-authentication &amp; e-signature</td>
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<td>Build domestic regulatory framework for e-commerce [1]</td>
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<td>Promote online consumer protection (including anti-spam)</td>
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<td>No customs duties for e-transmissions</td>
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<td>Promote online personal information protection</td>
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<td>Promote cross-border e-commerce by:</td>
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- **Key point 2**
  - not requiring computing facilities
  - localization
  - not restricting cross-border transfer of information by electronic means
Vietnam has complied with most of the RCEP provisions.

Vietnam’s compliance status can be summarized below:
Basically in compliance but can improve:

- Regulations to promote paperless trading, e-authentication & e-signature
- No customs duties on e-transmissions

There’re still restrictions when it comes to recognizing e-signature’s legal validity.
Already in compliance but changes are still underway:

- Mechanisms to protect online consumers
- Legal framework for e-commerce activities, considering the UNCITRAL Model Law

New obligations for e-commerce platforms, esp. the foreign ones, to protect consumers

New legal instruments have been introduced / drafted
Non-compliance:

- No comprehensive legal framework for the protection of online personal information
- Data localization requirement applying to both domestic and foreign enterprises

The Personal Data Protection Decree is being drafted.

Vietnam relies on the public policy exception under the RCEP.
Intellectual Property
Overview of the RCEP’s IP chapter

- It was built on the bones of its predecessors: TRIPS, Berne Convention, Paris Convention, CPTPP, other FTAs that the ASEAN has entered.

- However, it still has unique features:

  - It dedicates an entire section each for:
    - the protection of genetic resources, traditional knowledge and folklore
    - the protection against unfair competition

  - despite their broad & unspecific terms
Some noteworthy IP provisions that have potential effects on Vietnam's current IP framework
Copyrights and related rights

- Vietnam is obliged to accede to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty ("Internet Treaties").
  - Vietnam has joined the **former** but not the latter.

- While Vietnam’s IP legal framework has already adapted to the Internet age, further changes following the Internet Treaties will be seen in the upcoming Amendments to the IP Law.
  - Expected to be passed in **June 2022**.
Trademark

All notable changes imposed by the RCEP may be adopted by the upcoming Amendments to the IP Law, including:

- protection of sound marks
- removal of 3 criteria determining well-known marks
- bad-faith filing

(i) registered in the concerning party / another jurisdictions;
(ii) included on a list of well-known marks; and
(iii) given prior recognition as being well-known.

1 criterion in the bad-faith filing test [1] refusal of applications filed in bad faith
Parties will have to allow the use of a patented invention for experimental purposes (Bolar provisions).

However, they are generally free to determine what acts fall within the meaning of “experimental purposes.”
Design

- Vietnam is required to provide for protection for **partial designs**, i.e., outward appearance of a part of an article.
  - The IP Law Amendments will have a mechanism to protect partial design.
- While the RCEP obliges the Parties to provide special treatments for **textile design**, these treatments are not seen in the **latest draft** of the IP Law Amendments.
  - Further review of the **future guiding instruments** is needed to see if Vietnam complies with this provision.
Enforcement

The RCEP’s enforcement section

[a large portion] merely reaffirms the existing

- rights and obligations concerning civil, criminal, and administrative procedures and remedies
- provisional and border measures
  - take *ex officio* action
  - seize or destroy the materials or implements used to create infringing goods

increases the obligations concerning the seizure and destruction of allegedly infringing goods, including the grant of authority to

TRIPS Agreement

to be included in the IP Law Amendments [1]
Notably, while the RCEP provisions on criminal procedures and penalties are not as extensive as those of the CPTPP, the RCEP similarly calls for criminal procedures and penalties for unauthorized camcording in cinemas.

The agreement also confirms that the laid-out civil and criminal remedies must also be available for infringement of copyright or related rights and trademarks, in the digital environment.

- Currently, there is no plan in sight to amend the Penal Code of Vietnam.
- Further updates are needed to find out how Vietnam is going to comply with RCEP’s requirements on criminal actions.
Questions