

IP TRENDS

FOR

2021

By **Excel V. Dyquiango**

The year 2020 was all about one thing: Covid-19. While technology and businesses have both been forced to adapt to the “new normal” characterized by remote working, AI-assisted data management and health-risk mitigation, IP filings have reduced due to cost-cutting measures undertaken by many organizations impacted by uncertain economic climate brought about by the pandemic.

For instance, in Malaysia, patent and trademark filings decreased by almost 15 percent and 18 percent, respectively, in 2020 compared to 2019 while in Taiwan, 2020 was a year of contrast as patent applications went down while trademark applications increased. Meanwhile, in the Philippines, although patent, trademark, and industrial design filings inevitably declined compared to previous years, this was expected to pick up its pace with the introduction of improved online services by the Intellectual Property Office of the Philippines (IPOPHL).

Thailand has a different story, however. Patent application filings did not drop as sharply as originally anticipated for 2020. In fact, the data revealed only a 6 percent decrease (from January to October 2020) compared with the same period in 2019.

Given these scenarios, we chatted – virtually, of course – with lawyers around the region, and asked them what they believe is in store for 2021.

Technology and damage control

According to Mark Robert Dy, an IP consultant at QCV Law in Cebu City, Philippines, 2020 focused on damage control and adaptation, which has helped Filipinos develop an appetite for remote learning, work, commerce and socialization.

“If businesses were hesitant before, 2020 was the tipping point that forced them to go online for survival,” he says. “While industries have been focusing on the 4th industrial revolution technologies like artificial intelligence, 3D printing, and the internet-of-things, the global trauma of 2020 will inevitably lead to massive spending in medical research in the next decade. Diagnostics, treatment and disease prevention technologies will be accelerated at a pace we’ve never seen before.”

He continues: “This will be an opportunity for industries to think harder about building more sustainable future-proof and disaster-proof business models to prepare for the difficulties that are coming. Severe climate events, disease, food and water shortage, uncontrollable pollution – all these things are imminent and the world needs to be ready to respond.”

For Say Sujintaya, a partner at Baker McKenzie in Bangkok, the rise of AI assisting in patent searches is expected to grow in 2021. “The United States Patent and Trademark Office (USPTO) has started to employ AI to assist with patent classification and searches to help examiners, while the European Patent Office (EPO) has also highlighted how AI could assist with prior art searches,” she says. “Therefore, it can be reasonably expected that AI will be used to assist inventors in prior art searches and analysis of their invention in the APAC region. Furthermore, there will be an increase in the number of AI-related subject matter patent applications in APAC from 2021 and beyond.”

Further to the growing interest in AI, there is also an increased focus on synthetic data, as this is a relatively new data type that provides improved efficiency and effectiveness to machine learning systems. The other technological area of interest is that AI may simply become another tool used by professionals in adapted and evolved roles. In an IP context, AI will continue to make inroads into searching and filing. This will allow those working in those areas to increase volumes and to focus their time on less-commoditized, higher-value aspects of their practices.

“As this area is not yet fully supervised by IP laws, we should see the introduction of a new IP rights data policy that promotes transparency of AI data handling that would be beneficial to citizens,” she says. “Prior to a new policy, we are likely to see a variety of studies and system checks taking place to better support its inception.”

In addition, as more people are shopping online as a result of the pandemic, technology in the retail sector will be most prevalent. For shoppers who are missing the in-store feeling, many retailers, such as Ralph Lauren, Gap and Groupe Clarins, are creating virtual stores to provide new experiences. With this newly created digital content, trademark owners will have to make sure protection of their trademarks will be extended beyond core products and ensure that they are covered under trademark license agreements. Therefore, there may be an increase in trademark registrations covering non-core products to cope with increased digital content – which will surely impact the APAC region.

Cybersecurity and privacy issues

Because of these various technological advancements, cybersecurity and privacy also take a huge role for 2021 – perhaps more so than in the past years, because almost everyone is online now. This view is relayed by Deanna Wong of DeLab Consulting in Hong Kong, who says that cybersecurity, privacy, big data collection and transfer issues will be in the forefront more than ever and their related IP will develop further.

“With the adoption of significant new legislation covering personal data and big data in major jurisdictions including China, the United States and Brazil, data gathering, transfer, processing and ownership will be one of the biggest areas to watch,” she says. “This growth is compounded by consumer demands for new and better communication/ systems innovation during Covid. This would drive new activity on relevant IP filing, commercialization, collaboration and enforcement. We envisage interesting developments in the related protection of AI patents and a faster uptake on IoT related developments including patent pools, cross-licensing, IP sale and purchase, mergers, among others. The competing interests between demand on innovation vs data protection issues will lead to interesting developments/controversies/conflicts. Some of this is already clear with recent issues on Zoom, and TikTok, including data privacy/data transfer issues, with cross border implications.”

With cybersecurity, of course, comes cyber attacks. According to Gladys Vilchez, a partner at Hechanova Bugay & Vilchez in Manila, “in 2021, more and more organizations and individuals will conduct business online, especially with the implementation of the 5G networks in various jurisdictions. Governments and stakeholders will be faced with the issue of cybersecurity and increasing cybercrimes. But with this, they must become more knowledgeable in IoT to be able to provide competent service to clients. For 2021, there will be an increase in the adoption of IoT technology on the part of IPR firms and the training of human resources to increase their skills in this area. Focus will also be given on measures to ensure cybersecurity and data privacy.”

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Nothing, however, is closer to cyber attacks than social media and content creation. For this, the trends in 2020 will continue to be prevalent in 2021 as well – and maybe even moreso when it comes to IP infringement in the arena of social media and content creation, in which sale of goods through intermediaries is on the rise and also expected in 2021, since internet penetration countries has increased in Covid times.

“The pandemic has seen a sharp rise in a lot of illegal acts, like piracy, copyright infringement and trademark infringement, among others,” says Govind Chaturvedi, a trademark attorney at LS Davar & Co in Delhi. “Recently, a Single Judge of the Delhi High Court, while passing an interim injunction in a suit for copyright and trademark infringement, directed the messaging app, Telegram, to disclose the identity of users who were running channels on its platform to illegally share an e-newspaper produced by Jagaran Prakashan Limited on a daily basis. The High Court also directed Telegram to take down the channels which were indulging in similar infringement activities against JPL’s newspaper within 48 hours of the passing of the order.”

He adds that, due to Covid-19, more illegal activities are taking place online. “This is getting the attention of the government entities, and this is why we always advise clients as a firm that the companies should protect themselves and their products,” he says.

Trade and laws

Laws around the region may be revised too. For 2021, there will be pressure for laws to be developed to protect and respect indigenous cultures.

“There is a growing desire to ensure that expressions of such cultures are commercialized in a way that respects authenticity, avoids misappropriation and is to the benefit of indigenous peoples,” says Paul Johns, principal at AJ Park in Auckland. “Initially, we are unlikely to see a uniform approach between jurisdictions as the issues faced vary between jurisdictions and between indigenous cultures. As best practices develop, there may be a move in the longer term towards harmonization as with traditional IP laws.”

In Taiwan, some amendments to IP laws are planned, partly to assist Taiwan in joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). These include changes to the Patent Act made last year which has increased the protection of design patents from 12 to 15 years, as well as changes to the application process making it more robust and efficient.

In November 2020, the Executive Yuan began reviewing proposed changes to the Trademark Act, including specifying what qualifications a trademark agent must have, whereas previously the rules were unclear. If adopted, only those with a legal or accounting license, at least five years of trademark experience or

those who have attended a course can be identified as trademark agents.

In January 2020, the Taiwan Intellectual Property Office (TIPO) announced proposed amendments to the Copyright Act, including changes needed in light of technological developments, changes to how works are broadcast or publicly released and changes to criminal liability rules for infringement that were seen to be outdated and resulted in unnecessarily heavy sentences.

“In addition to the above, in order to strengthen the protection of intellectual property rights holders and lower the number of administrative remedial levels, so that rights holders can directly initiate administrative proceedings without the need for litigation, TIPO has proposed setting up a patent and trademark dispute relief agency within the office to ensure a more streamlined but rigorous remedial procedure,” says Peter Dernbach, a partner at Winkler Partners in Taipei. “The agency will be responsible for hearing reexamination and dispute cases.”

As for trade, many APAC nations are heavily exposed to international trading conditions, so global developments in this area will be of importance.

“The full effects of Brexit are yet to be felt,” says Johns. “It will be interesting to see how the UK progresses in making independent trade agreements, and whether deals with the EU continue to provide the expected benefits. The Biden administration in the United States seems likely to swing that country away from isolationist rhetoric and back towards a more globalist position. What we do not yet know is whether Trump’s ‘America First’ policies were a mere blip or part of a longer-term trend. China’s ongoing growth will also be a key factor in the region. Trading partners will need to continue to diplomatically balance economic reality with any concerns about internal Chinese affairs. For example, China is the largest trading partner for both Australia and New Zealand. Recent comments by these two nations (jointly with their Five Eyes partners the US, the UK and Canada) about the political situation in Hong Kong drew a sharp rebuke from China.”

This view was echoed by Wong, who says that a new approach in the USA-China trade war under the Biden presidency is possible: President-elect Biden has stated that he is willing to “cooperate with China” and will offer a “more stable approach.” “It is therefore possible that a final Phase 2 Agreement is reached between the US and China, containing further changes to China’s IPR system, even though China has recently passed a flurry of new legislation (trade secret regulations, copyright law and patent law) already containing a considerable amount of improvements to the legal system,” she says.

A push towards supporting businesses

With 2020 a challenging year for businesses globally, a key trend of IP offices around the world will be a push

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towards supporting businesses to lead the economic recovery.

Margaret Tregurtha, Deputy Director for General Policy and Corporate Division at IP Australia in Canberra, says that as part of the Australian Government's commitment to supporting businesses, particularly smaller businesses, the government has launched several Covid-19 relief measures and a suite of initiatives aimed at helping SMEs navigate the patent process.

"The trend to supporting smaller businesses will no doubt continue into 2021," she says. "Plus, at IP Australia, customer centricity has been a trend since well before the pandemic, but I see this as moving further into the spotlight. In this global context, we need to do everything we can to make life easier for businesses which means doubling our efforts to improve the experience for customers. One of the ways we are doing this is by upgrading our digital services to provide a more modern, efficient experience. We have replaced our Business to Business (B2B) solution so our high-volume IP customers are already seeing benefits, and we are in the process of replacing our online services platform to provide a better experience for all customers. We've also restructured the agency to align our customer-facing functions, positioning us to deliver on our aim of ensuring all Australians benefit from great ideas."

She adds that in the current context, governments around the world are dedicated to leading their nations out of the Covid-19 economic crisis and this is certainly the case for the Australian government.

"For businesses to successfully enter new overseas markets, we know that it is critical that they consider their IP first," she says. "Unfortunately, our research tells us that many Australian exporters are not doing this. We are making this a priority and will be working with export assistance services to encourage potential exporters to make choices about their IP early, as part of their business development and commercial strategy."

Taiwan, in particular, sees new IP developments geared towards the promotion of medical care and biotech industries due to heavy investments on the manufacturing businesses, and continuing improvements in the domestic health and welfare regulatory environment (such as the January 2020 new Medical Devices Act, and amendments discussions in the Pharmaceutical Affairs Act).

"These put Taiwan in place for opportunities in the health sector," says Kuo-Hua Fan, managing partner at Zoomlaw IP in Taipei. "In trademarks, a breakdown by Nice class shows that the lion's share of Taiwanese applications were under Class 35 (advertising, corporate management, business operation), with a 33 percent increase from last year, followed by Class 43 (restaurants, lodgings), a 27 percent increase; a close third place with Class 30 (coffee, tea, pastries); and,

in fourth, we have Class 5 (pharmaceuticals) with the biggest growth of 40 percent."

He adds that invention, utility model, and design patents will continue in great demand given Taiwan's large OBM/OEM/ODM manufacturing industries, even more so with the upcoming RTD, 4.0, A.I., medical and biotech industries trends.

"Traditionally, trademarks are a relatively less-discussed topic in the Asia-Pacific region, most times overlooked, as brands are not given due importance," he says, either by SMEs or startups that do not foresee the need for trademark protection, or even big brands that regard themselves as well-known, hence, in no need of a global trademark protection. "With the grim international economic situation, by necessity, we can observe a partial shift to domestic markets, translating into TIPO's record growth on resident trademark applications."

The boost in IP filings

For Rahim Sirajudin, a project consultant who was previously manager of intellectual property services at PlaTCOM Ventures in Cyberjaya, for ease of conducting, IP filing transactions will definitely boost IP filings in coming years.

"As 2021 will be considered as the first post-Covid-19 recovery year, we can anticipate a slight increase in IP filings in 2021 which eventually shall peak or go back to steady IP filing growth on a year-to-year basis from 2022 onwards," he says. "As anticipated in many studies related to IP trends, 2021 will see an increase of IP filings for invention or innovation related to AI and disruptive technologies. General outlook anticipates an increase in IP filings to be led by the usual top filers from China, Japan, the US and South Korea."

He adds: "Businesses, especially from small and medium-scale entrepreneurs (SMEs) or start-ups, should be able to offer high-value innovative products into the market and are typically strengthened by their IPs. Ease of conducting IP filings remotely and acceptance of more AI-related innovations into the patent fold will drive SMEs and start-ups to capture or at least, be on par with traditional big players in their respective industries."

This was echoed by Fan, who says that IP filing requirements are also expanding beyond the national level as there have been a myriad of evolving options for a foreign IP filing route.

"For countries and regions, there is the constant competition in order to attract foreign entities (in terms of market, IP protection, cost and effectiveness, IP litigation, time pressures, border detention measures, etc.) to be part of the international IP filing strategy route, and, even be a first application choice," he says. "For the IP attorney, there will always be the challenge to understand the basis of these new IP-based business models, transactions or opportunities, not only on how

IP is applied to them, but also on the business model itself.”

He continues, noting that an attractive and cost-effective IP location varies according to the type of industry and the overarching IP strategy, to attend to all needs is an impossible task.

“As for the Asia-Pacific region, there is the recent RCEP agreement conclusion. Its Chapter 11 attempts to harmonize Asia-Pacific’s IP standards based on the general principles of fair use, cooperation, transfer of technology and socioeconomic welfare in the international community, with some common rules on unfair competition; well-known, bad-faith and geographical indication trademarks; experimental patent use allowances (Bolar provisions); etc.,” he says. “Of course, they are a welcomed first IP standardization attempt in the Asia-Pacific region; however, there is still much room for improvement, being a far cry from similar FTAs such as the CPTPP.”

Compulsory licensing and developmental challenges

Chaturvedi lists five developmental challenges that may lie ahead: compulsory licensing; provision of drug price control order; food security and IPR; IPRs, community property rights and indigenous knowledge; and AI.

“With the provision of compulsory licensing, the Government of India can compel the owner company or other companies to mass-produce some drugs in an emergency irrespective of who got the patent,” he says. “Multinationals are accusing India of being opportunistic in their stand and are asking to abrogate this provision. However, the Indian government is not willing to cancel this provision to safeguard the interests of the masses. However, an interesting point to note over here is that only one compulsory license is granted to date.”

When it comes to the provision of drug price control order, he says that companies can’t charge an unfair price for drugs that they are producing. According to him, the price has to be justified regarding investments, and if someone plays foul, then the government has the right to intervene.

“For food security and IPR, India is a land of farmers, wherein most of the people are engaged in doing farming for their livelihood,” he says. “India’s domestic support schemes are generally in the form of minimum support price for major agricultural commodities and input subsidies provided to farmers in the types of electricity, fertilizers, seeds, etc. However, for the complete implementation of TRIPS agreements, these subsidies will have to be reduced or eliminated. Thus, the Indian government is struggling to create a balance between food security and providing IP rights in India.”

He adds, “In addition, traditional knowledge gives ready-made leads for pharmaceutical companies and then simply comes up with the new formulation to show

the efficacy of the general traditional understanding. The Indian government is bound to protect the rich source of traditional knowledge by not allowing multinationals to get patents on the traditional culture. As a defensive mechanism, the government has created the TKDL (Traditional Knowledge Digital Library) to challenge patenting traditional Indian understanding. Multinationals and developed countries are also opposing this move. Lastly, AI is another challenge. As we move forward, AI-related inventions are already one of the points of contention. Laws need to be made more multi-dimensional in order to deal with this new aspect of machine learning.”

Entertainment and events

With increased players in movie streaming services, many are expanding or will be expanding into the APAC region. According to Sujintaya, services like Netflix, Amazon Prime, Disney+ and HBO that are already active in the APAC region will soon be joined by others such as Hulu and Peacock, all of which will create original content to meet the growing number of subscribers, especially as they are losing licensed shows.

“Simultaneously, major US movie studios will continue to create original content and many of these productions will take place in APAC countries due to tax rebates offered to foreign production companies,” she says. “This should lead to an increase in movie production activities for both major US studios and streaming services in the APAC region.”

She adds: “The coronavirus pandemic is reshaping listeners’ habit when it comes to music streaming and other digital channels. There will surely be some changes in consumer behavior who will think twice about packing themselves into stadiums or arenas; thus, investments in live-streamed concerts will increase. With these changes, more copyright issues, including infringement and circumvention, will surely increase all over the world, including in the APAC region.”

Johns says that events and gatherings seem likely to remain largely “virtual” for at least the near future.

“This will continue to boost advancements in technologies that facilitate remote working, virtual conferencing and distance learning,” he says. “Video conferencing and collaborative online working are already well-established within the new normal. However, I am yet to see a ‘killer app’ for the more social, personal networking aspect of conferences.”

With these changes and transformations in 2021, all of these lawyers echo the same sentiment: that 2021 is going to be a great year for intellectual property. More so because many opportunities of growth have already bloomed – and will continue to bloom – in spite of the pandemic. ^{AI*}