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## 1. Overview: Creative Industries in South-East Asia

Creative industries are those having their origin in individual creativity, skill and talent, and which have a potential for wealth and job creation through the generation and exploitation of intellectual property. Examples include industries relating to art, design, music and media. The creative industries refer to a range of economic activities which are concerned with the generation or exploitation of knowledge and information.

The development of creative industries in various South-East Asian countries is incredibly varied. This is evident from the 2014 WIPO Studies on the Economic Contribution of the Copyright Industries<sup>1</sup>, which compared the significance of copyright industries among several countries worldwide<sup>2</sup>. The comparison study is highly relevant as copyright-intensive industries, being industries dependent on the protection of copyright and related rights, are the main and substantive constituents of the creative industries. This study revealed that the contribution of copyright-intensive industries to Gross Domestic Product ("GDP") was the lowest in Brunei among the South-East Asian countries, at 1.58%<sup>3</sup>, while in Singapore the copyright-intensive industries had an above average<sup>4</sup> contribution of 6.19%<sup>5</sup>. As for the contribution of copyright-intensive industries to national employment, the Philippines ranked the highest worldwide (not just in South-East Asia) with

<sup>1</sup>WIPO Studies on the Economic Contribution of the Copyright Industries. (2014). Retrieved May 26, 2017, from [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2014.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf) ("2014 WIPO Comparison Studies")

<sup>2</sup>It must be noted that while this study was undertaken in 2014, it is based on each country's respective national studies which have been finalised as of December 2013. In other words, some data may not be updated as of 2017. In the interests of transparency, we will set out the year for which a datum is relevant as a footnote as and when such datum is being referred to.

<sup>3</sup>The corresponding national study was published in 2011. See Annex 1 of 2014 WIPO Comparison Studies.

<sup>4</sup>The average contribution percentage across all countries surveyed, for the avoidance of doubt beyond Southeast Asia, was 5.18%. See Pg 3 of 2014 WIPO Comparison Studies.

<sup>5</sup>The corresponding national study was published in 2017. See Annex 1 of 2014 WIPO Comparison Studies.

a percentage contribution of 11.10%<sup>6</sup>, while in Thailand the contribution was as low as 2.85%<sup>7</sup>. It is therefore arguably clear that the development level of the creative industries, or at least the copyright-intensive industries, is presently not homogenous across South-East Asia.



This is understandable for South-East Asia, where constituent countries are at various stages of economic development. Most South-East Asian countries like Brunei, Cambodia, Laos and Indonesia have economies that are still primarily dependent on natural resources or rather low-skilled labour force for manufacturing. In more economically developed or diversified countries like Singapore, Malaysia or Thailand, there is a tendency to have more substantial creative industries.

Be that as it may, there is a concerted push by the ASEAN Economic Community, through the ASEAN Working Group on Intellectual Property Cooperation (“AWGIPC”), to develop and expand the creative industries across the region. In the previous 5-year action plan formulated by AWGIPC, the ASEAN IPR Action Plan 2011-2015, it was resolved that:

- 1) national studies on the contribution of copyright-intensive/creative industries to economic development were to be completed by 2012 and subsequently a forum was to be organised to share the results; and
- 2) possible areas of cooperation among member countries were to be identified in relation to an ASEAN creative economy and thereafter, activities under the Creative ASEAN program were to be identified and implemented, all to be determined by 2012.

In addition, a new ASEAN IP Rights Action Plan 2016-2025<sup>8</sup> is due

to be published within year 2017. No further details of this plan are available as of the time of publication of this guide.

The ASEAN Economic Community Blueprint 2025 aims to strengthen intellectual property rights cooperation in ASEAN by enhancing regional mechanisms to promote asset creation and commercialisation, including the development of schemes for creative sectors. Another regional effort to develop creative industries is evident from the formation of the South-East Asian Creative Cities Network (SEACCN), which is a network for creative cities and clusters in South-East Asia<sup>9</sup>. These are all positive indicators that signal the potential growth of South-East Asian creative industries and therefore opportunities for EU companies to operate in this industry field in the region.

Simultaneously, South-East Asian countries have realised that developing their creative industries will help achieve sustainable economic growth as well. For example, Brunei, whose economy has long been reliant on its oil and gas industry, has made development plans to utilize its educated and skilled population and develop an economy based on knowledge and skill<sup>10</sup>. In Singapore, the government actively provides grants and tax incentives to the design sector, and in 2015, Singapore was designated a Creative City of Design by UNESCO. Its media industry, with its expertise in advertising, video games, animation, online/mobile data media and new forms of digital entertainment, is projected to bring in a revenue of US\$6.58 billion (approx. EUR5.85 billion) in 2020<sup>11</sup>. The largest growing sector is expected to be Internet advertising.

Lastly, there also appears to be a push for standardisation of intellectual property (“IP”) protection in the region. In most South-East Asian countries (with the exception of Brunei, Myanmar and Singapore) right holders may voluntarily register their copyright in national registers in order to prove ownership. Presently, Singapore is also looking to amend its copyright legislation to implement a voluntary copyright recordal system, which may lead to greater consistency across the region. Arguably, it is hoped that this is the first of many steps to greater standardisation of IP laws in the following years to come to develop creative industries in South-East Asia as a whole. EU SMEs should consult with local experts to understand how they may benefit from copyright recordal to add layered protection for their creations.

## 2. The relevance of IP in Creative Industries

From the perspective of the creative industries, IP protection serves as an incentive to both the authors and related rights' holders to continue to create. By providing authors and related

<sup>6</sup>The corresponding national study was published in 2006. See Annex 1 of 2014 WIPO Comparison Studies.

<sup>7</sup>The corresponding national study was published in 2012. See Annex 1 of 2014 WIPO Comparison Studies.

<sup>8</sup>ASEAN IP Rights Action Plan 2016-2025: <https://www.aseanip.org/Statistics-Resources/ASEAN-IPR-Action-Plan-2016>

<sup>9</sup>Southeast Asian Creative Cities Network. (n.d.). Retrieved May 26, 2017, from <http://seaccn.com/>

<sup>10</sup>O. (2013, November 14). Economic Outlook for Southeast Asia, China and India 2014. Retrieved May 26, 2017, from <https://www.oecd.org/site/seao/Brunei%20Darussalam.pdf>

<sup>11</sup>P. (n.d.). Global Entertainment and Media Outlook 2016-2020. Retrieved May 26, 2017, from <http://www.pwc.com/sg/en/publications/global-entertainment-media-outlook.html>

rights' holders with a legal recourse against infringers, they are correspondingly given the means to unlock the value of and benefit financially from their creations. This ensures that there is an incentive for the creation of new works.

As mentioned, a very relevant IP right for the creative industries is copyright, as the types of subject matter that copyright subsists in, such as paintings, films, music compositions, sound recordings, software, and books are usually the main products of creative industries. Copyright helps preventing the copying of the work or of other protected subject matter. The authors and the related rights' holders have economic rights and moral rights on their works.

However, EU SMEs can find that also other forms of IP rights, such as trade secrets and industrial designs, also feature in creative industries. Trade secrets can assist in the protection of confidential information that is crucial or critical to the creator's creative process, and industrial designs protection protects the shape of a product.

It shall also be mentioned that trade mark registrations remain relevant in relation to the creative industries as they protect the distinctive signs through which creations, works and products are uniquely identified by users and consumers. The present guide will focus on copyright, trade secrets and industrial designs, if you wish to know more about trade mark protection and enforcement in South-East Asia, visit our Guide to Trade Mark Protection in South-East Asia [here](#).



### 3. Frequent issues concerning Copyrights

#### Ownership of copyright

It is not always the case that a creator of a work in which copyright subsists is automatically the first owner of that copyright. While the general rule is that the author of the work is the first owner of any copyright in it, there are exceptions which vary across the region, EU SMEs shall be mindful that different countries adopt different systems and are recommended to seek the advice of local experts to prevent complications. Some of the more commonly recognised exceptions are when creations are made in the course of employment or pursuant to someone commissioning or paying for the work, i.e. under a commissioning agreement. For example, Singapore's Copyright Act provides that if the work is made by the author pursuant to the terms of

his employment by another person under a contract of service or apprenticeship, copyright does not vest in the author but in his/her employer. Other ASEAN countries which have a similar, but not identical, copyright policy include Brunei Darussalam, Vietnam, the Philippines, Laos, Cambodia, Myanmar and Malaysia. Exceptions are Thailand and Indonesia, whose copyright laws provide that works created in the course of employment vests in the author subject to any agreements to the contrary. The extent to which moral rights are conferred to the employer and the scope of protection afforded to moral rights also differ among the abovementioned countries. Therefore, where EU SMEs employ or enter into contracts for service with individuals to create works for them, it is recommended to state in these contracts clear ownership to avoid IP ownership disputes or unauthorised use.

#### Varying extent of protection of moral rights

'Moral rights' are those rights of an author to protect the integrity and ownership of their work and are aimed at protecting a creator's reputation. Moral rights are personal in nature and may not be waived, licensed, or transferred by authors.

Generally, the protection of moral rights in some South-East Asian countries appear to be more limited as compared to that in the EU. In Singapore, for instance, moral rights are protected to the extent that authors may prevent others from falsely attributing the authorship of a work or the identity of a performer of a performance, falsely representing an altered work or a recording of a performance as unaltered, and falsely attributing the authorship of a reproduction of an artistic work. There is no express recognition of an automatic right of attribution, but merely a legal prohibition against false attribution.

In Vietnam, an author's moral right to publish his/her cinematographic, photographic, stage, applied art and anonymous works, or authorise others to publish these works, only lasts for 50 years from the date of the first publication.

In the Philippines, moral rights are subject to exceptions. When an author contributes to a collective work, which is a work created by two or more persons at the initiative and under the direction of another with the understanding that it will be disclosed by the latter under his/her own name only, the right to attribution for the contribution is deemed waived unless he/she expressly reserves it.

While the abovementioned countries appear to limit protection of moral rights, some other countries provide for a wider protection. Cambodia's copyright law, for example, provides that moral rights include the rights to decide the manner and timing of disclosure of the work.

Due to the differences in protection offered by each South-East Asian country, it is crucial that EU SMEs would be able to collect information on the country of their interest as soon as possible in order to be able to take IPR informed decisions. The differences in the South-East Asian countries would require tailored strategies for the country(ies) of interest to avoid uncertainty and inconsistency as to the extent of protection granted to moral rights across the region.



Copyright also include economic rights. Economic rights give authors the exclusive right to exploit the work for economic gain. They include the right to reproduce, distribute, rent, exhibit, perform, project by visual projection, broadcast, disseminate on information networks, cinematographically produce, adapt, translate to other languages, compile the work with other works to form a new work, and use other means to exploit the work. An author has the exclusive right to exploit the work personally or license it or transfer to others in exchange for remuneration. The economic rights of the copyright holder are infringed if another exploits the work without his/her permission and where such exploitation is not considered 'fair use' or under a statutory license.

### Piracy

Piracy of copyrighted content is still widespread in South-East Asia. Based on the 2016 BSA Global Software Survey, the Asia-Pacific region, which includes South-East Asia, has the highest average rate of unlicensed software use in the world<sup>12</sup>. This is especially high in Vietnam, where 78% of software units installed are unlicensed. Further, in countries like Thailand, Vietnam and Malaysia, DVDs and CDs containing infringing copies of software and movies are produced, distributed and sold.

Internet piracy, which includes torrent use and file sharing, is on the rise in South-East Asia. Based on the MUSO Global Piracy Report 2017, Singapore ranked ninth in the world for the most number of visits to piracy sites per internet user<sup>13</sup>. This surprisingly makes Singapore the number 1 country in South-East Asia for piracy demand, with 179.38 visits per Internet user. One likely reason for this is that Singapore has the highest number of Internet subscribers per 100 persons in South-East Asia<sup>14</sup>.

While Singapore has enacted legislation enabling copyright owners to compel Internet Service Providers ("ISPs") to block access to piracy websites, its laws do not enable owners to compel ISPs to provide the particulars of their subscribers without further evidence that the subscribers were in fact the infringing downloaders. Therefore, attempts to identify the infringing downloaders for the purpose of suing them for copyright infringement have been unsuccessful thus far (see Case Study 1 below).

### Enforcement of copyright

Right holders may find it challenging to enforce their copyright in some South-East Asian countries due to lack of transparency in the enforcement process. Myanmar, Laos, Vietnam, Thailand, the Philippines, and Indonesia, for example, are all countries that rank poorly on the Corruption Perceptions Index 2016, with scores that fall far below the global average score<sup>15</sup>. Enforcement via the courts is rare and often inefficient in such countries. For EU SMEs seeking to enforce their copyright, reaching a settlement via negotiations and conciliations may be a better and more effective recourse at present time. That being said, it would be helpful for EU SMEs to enlist the help of reputable local experts, as well as trade associations and organizations familiar with local laws to manage and protect their IP rights.

It should be noted that South-East Asian countries have generally been making an effort to strengthen their law enforcement mechanisms on different levels. This provides an optimistic outlook for the near future as well as an opening to a fairer level playfield (see Case Study 2 below).

*For more information about Copyright in South-East Asia, please refer to our Guide on Protecting Your Copyright in South-East Asia at [http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/Copyright\\_english.pdf](http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/Copyright_english.pdf).*



<sup>12</sup>B. (2016, May). Seizing Opportunity Through License Compliance. Retrieved May 26, 2017, from [http://www.bsa.org/~media/Files/StudiesDownload/BSA\\_GSS\\_A4.pdf](http://www.bsa.org/~media/Files/StudiesDownload/BSA_GSS_A4.pdf)

<sup>13</sup>M. (2017). MUSO Global Piracy Report. Retrieved May 26, 2017, from [https://www.muso.com/wp-content/uploads/2017/04/MUSO\\_2017\\_Global\\_Sample\\_Market\\_Insights\\_report.pdf](https://www.muso.com/wp-content/uploads/2017/04/MUSO_2017_Global_Sample_Market_Insights_report.pdf)

<sup>14</sup>A. (2016). ASEAN Statistical Leaflet. Retrieved May 26, 2017, from [http://asean.org/storage/2012/05/ASEAN\\_Stats\\_Leaflet2016\\_web.pdf](http://asean.org/storage/2012/05/ASEAN_Stats_Leaflet2016_web.pdf)

<sup>15</sup> "Corruption Perceptions Index 2016." Transparency International. *Transparency International*, 25 Jan. 2017. Web. 29 May 2017. <Transparency International>.

## 4. Frequent issues concerning Trade Secrets

### Protection of trade secrets

A main issue concerning trade secrets protection in South-East Asia would be the different levels of protection offered by the various countries in terms of legislative developments as well as implementation. With the exception of Myanmar, all the other countries have some laws relating to trade secrets protection. However, different countries provide different criteria to be satisfied before protection is to be granted.

For example, in Indonesia, it must be shown that a trade secret has been unlawfully obtained by the suspected party which might be difficult to prove under some circumstances in the course of business dealings. It is for the Plaintiff to prove that the information is unlawfully obtained as opposed to requiring the Defendant to prove it is lawfully obtained. Such burden of proof in this scenario makes it difficult for companies to succeed in their claim. It may however, be helpful if a claimant can show that the suspected party had access to the trade secret.

In Malaysia, protection is granted only if the information is not available to the public, the information has a real or potential advantage to the business in question and measures have been taken to protect the confidentiality of the information. There are however ways in which the information may become public due to an inadvertent leak. For instance, a careless employee may leave a stack of confidential documents unattended, resulting in them being taken. Not having firm internal policies restricting the transfer of data/documents across electronic devices and allowing employees to have unfettered and easy access to such information may also cause unwanted leakage of it.

In Vietnam, reasonable measures have to be taken to ensure secrecy before the trade secrets are recognised as such. As there is not a specific definition of what constitutes 'reasonable measures', there remains a risk that what a company thinks to be reasonable measures may end up being insufficient or considered insufficient by the court during litigation with the inevitable frustration of losing the case. At present, not many cases concerning trade secrets have been heard by the Vietnamese courts, which further lead to a dearth of cases providing judicial interpretation of it.

In Singapore, trade secrets are protected under common law principles, and thus are in the same category as confidential information. Therefore, there is no higher level of protection afforded to trade secrets. At a very general level, the default position regarding trade secrets in Singapore is that protection is only available if the information in question has yet to be disclosed to the public. Be that as it may, the Singapore judiciary has tended to interpret narrowly what constitutes public disclosure. In this sense, it is harder for the protection of trade secrets to be lost. A very similar legislation is also present in Malaysia.

Therefore, EU SMEs should collect information and become familiar with the laws of the relevant countries prior to conducting business there, and draft and adapt their policies and agreements accordingly as well as diversify their strategy according to local legislation.

*For more information about Trade Secrets in South-East Asia, please refer to our Guide on Protecting Your Trade Secrets in South-East Asia at <http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/Trade-Secrets-English.pdf>.*

## 5. Frequent issues concerning Industrial Designs

### Overlap between industrial designs and copyright

In the context of architecture, art, crafts, design, one problem designers might face in securing protection for their designs is the potential overlap between the registered designs scheme and copyright. For instance, in Singapore, if a uniquely designed chair was mass produced for sale but not registered under the registered designs regime, then the design of the chair would neither be covered by copyright (assuming it originally satisfied the requirements for copyright protection) nor designs.

Therefore, it would be prudent for EU SMEs to file for industrial designs protection.

It should be noted that in Malaysia, where a design is registered as an industrial design, it loses copyright protection. Therefore, EU SMEs should make a choice as to whether they wish to rely on industrial designs or copyright protection to protect their designs in Malaysia. This is similar to Singapore, where a registered design also loses copyright protection.

### Protection of industrial designs

Designs should be novel in order for them to be protected as industrial designs in South-East Asia. However, what is considered "novel" may differ among South-East Asian countries. In most South-East Asian countries, public disclosure of the design before the first filing of the application for registration will prevent the applicant from obtaining industrial designs protection as the novelty is deemed to be lost in such circumstance. However, some South-East Asian countries such as the Philippines, Indonesia and Cambodia offer a grace period, during which the applicant's own public disclosure will not invalidate an industrial design registration. This grace period is 6 months in the Philippines and Indonesia, and 12 months in Cambodia.

Therefore, EU SMEs should carefully check such requirements and local laws of the relevant countries prior to conducting business in that country in order to ensure that their applications for registered design protection will succeed. This is a practical example of the need for IPR decisions to be integrated in the overall business strategy when entering new markets or launching new products. A mistake of neglecting to check local practice and requirements, or generalising the approach in a new and unfamiliar market can reflect in a considerably huge economic loss which could have been prevented ex ante with proper preparation.

For more information about Industrial Designs in South-East Asia, please refer to our Guide on Protecting Your Industrial Designs in South-East Asia available at <http://www.southeastasia-iprhelpdesk.eu/en/content/helpdesk-guides>.

## 6. Case studies

### Case study 1: Hollywood studios attempting to sue downloaders in Singapore<sup>16</sup>

#### Background

In an attempt to proceed with copyright infringement actions against illegal downloaders, two Hollywood studios, Voltage Pictures and QOTD Film Investment, applied to the Singapore High Court to compel local internet service providers to release the particulars of Internet subscribers who allegedly downloaded the movies Father & Daughters and Queen of the Desert.

#### Action Taken & Outcome

The Singapore High Court ended up throwing out these applications on the grounds that there was insufficient evidence to show a link between the Internet Protocol addresses and the alleged illegal downloaders. This is due to the possibility that multiple individuals could be utilizing the same IP address at any given time.

#### IP Lessons

Even in a jurisdiction reputable about enforcing IPR, valid and sufficient evidence play a very important role to successfully complete a legal action. Though the Singapore jurisdiction provides for any applicant to compel local internet service providers to divulge details of potential illegal downloaders, copyright owners may face evidential barriers in doing so.

### Case study 2: Vietnamese company ordered by the courts to compensate photographer for infringing his copyright<sup>17</sup>

#### Background

A Vietnamese photographer took a photograph of the Da Nang City Bridge for his work titled "Da Nang – toward future". He later discovered that this photograph was modified and used without his consent by a Vietnamese company for advertising purposes.

#### Action Taken

The photographer attempted to resolve matters with the company amicably, but to no avail. He then started a copyright infringement action in the court of Hai Chau Ward in Da Nang for compensation of about US\$1,146 (approx. EUR1,000)

#### Outcome

The matter was decided by the court on 12 May 2015. With the help of experts, the court determined that the photograph was worth about US\$917 (approx. EUR800). The court eventually ordered the company to pay US\$700 (approx. EUR600) as compensation to the photographer for infringing his copyright in a photograph.

#### IP Lessons

While relying on some South-East Asian courts for the enforcement of copyright is generally inefficient and/or ineffective, this rare instance of success serves as a reminder that South-East Asia's enforcement mechanisms are still developing and strengthening, and provides grounds as to the future of IP enforcement in South-East Asia.

<sup>16</sup>Tham, I. (2017, April 20). High Court throws out Hollywood movie piracy case. Retrieved May 26, 2017, from <http://www.straitstimes.com/singapore/high-court-throws-out-hollywood-movie-piracy-case>

<sup>17</sup>Redfeam N. (2015, July 1). Vietnam civil copyright case. Retrieved May 29, 2017, from <http://www.lexology.com/library/detail.aspx?q=980df667-8c24-4b56-acb5-0e337e822ad7>



## 7. Take Away Messages

- EU SMEs should consider using a combination of IP to protect their goods and services, rather than relying on just one type.
- EU SMEs should clearly address the rights of all IP as much as possible in their contracts where IP ownership and authorised use are clearly stated.
- EU SMEs should register their IP in South-East Asian countries where the option of registration is available.
- EU SMEs should be aware of the different levels of IP protection offered by the different South-East Asian countries and tailor their strategy for the markets of their interest with the support of local experts.

- **Industrial designs** – Features of shapes, configuration, pattern or ornament applied to or embodied in an article by any industrial process, and they are protected on the basis that these features can substantially influence a consumer's choice.
- **Moral Rights** – Rights of an author to protect the integrity and ownership of their work.
- **MUSO** – a London-based technology company providing content protection, market tracking and audience connection solutions that disrupt the global digital piracy market.
- **SEACCN** – The South-East Asian Creative Cities Network (SEACCN) is a network for creative cities and clusters in South-East Asia.
- **Plaintiff** – is the party who initiates a lawsuit (also known as an action) before a court.
- **Trade secret** – Any confidential business information which provides an enterprise a competitive edge may be considered a trade secret.

## 9. Related links and additional information

- Visit our Guide on Protecting Your Copyright in South-East Asia - [http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/Copyright\\_english.pdf](http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/Copyright_english.pdf)
- Visit our Guide on Protecting Your Industrial Designs in South-East Asia - <http://www.southeastasia-iprhelpdesk.eu/en/content/helpdesk-guides> (available shortly)
- Visit our Guide on Protecting Your Trade Secrets in South-East Asia - <http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/Trade-Secrets-English.pdf>
- Visit the country factsheets of South-East Asia countries – <http://www.southeastasia-iprhelpdesk.eu/en/country-factsheets>
- Visit other publications at South-East Asia IPR SME Helpdesk website – [www.ipr-hub.eu](http://www.ipr-hub.eu)
- Visit the Helpdesk blog <http://www.yourIPinsider.eu> for related articles on IP in South-East Asia and China

## 8. Glossary of Terms

- **ASEAN** – The Association of South-East Asian Nations is a regional organisation comprising ten South-East Asian states which promotes intergovernmental cooperation and facilitates economic integration amongst its members. Since its formation on 8 August 1967 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand, the organisation's membership has expanded to include Brunei, Cambodia, Laos, Myanmar, and Vietnam. Its principal aims include accelerating economic growth, social progress, and sociocultural evolution among its members, alongside the protection of regional stability and the provision of a mechanism for member countries to resolve differences peacefully.
- **AWGIPC** – The ASEAN Working Group on Intellectual Property Cooperation is a regional forum dedicated to the creation of an IP ecosystem for businesses and the IP community.
- **Copyright** – An intellectual property right which entitles the owners of literary and artistic works to a set of exclusive rights over their works.
- **Defendant** – is the party accused of a crime in criminal prosecution or a party against whom some type of civil relief is being sought in a civil case.

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