



# The Legal System for Intellectual Property of the European Union

South-East Asia IP Judges' Virtual Roundtable  
| Erling Vestergaard | VICO | 6 October 2020

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# European Union – The Internal Market and Fundamental Rights



## European Union – The Internal Market and Fundamental Rights



Sorted chronologically from latest to oldest, the main treaties are:

Treaty of Lisbon

Treaty of Nice

Treaty of Amsterdam

Treaty on European Union - Maastricht Treaty

Single European Act

Merger Treaty - Brussels Treaty

Treaties of Rome : EEC and EURATOM treaties

Treaty establishing the European Coal and Steel Community

[https://europa.eu/european-union/law/treaties\\_en](https://europa.eu/european-union/law/treaties_en)



## European Union – The Internal Market and Fundamental Rights



### The Four Freedoms of the Internal Market

- Free movement of goods
- Free movement of capital
- Freedom to establish and provide services
- Free movement of persons



## European Union – The Internal Market and Fundamental Rights



- The Convention: European Convention on Human Rights (ECHR), Council of Europe, 1950, 47 countries, all EUMS but not the EU itself yet (but foreseen in Article 6(2) TEU), and subsequent protocols
- The Charter: Charter of Fundamental Rights of the European Union, EU, 2000, all EUMS and EU institutions but limited to matters falling within the scope of EU law but not limited to implementation of EU law (C-617/10, Åkerberg, CJEU Judgment of 7 May 2013)



SELECTED FUNDAMENTAL RIGHTS AND FREEDOMS	CHARTER	CONVENTION
Right to property - intellectual property	Article 17(2)	Prot. 1 Art. 1
Freedom of expression and information	Article 11	Article 10
Protection of personal data	Article 8	(Article 8*)
Right to an effective remedy and to a fair trial	Article 47	Article 6
Freedom of the arts and sciences	Article 13	(Article 10**)
Right to good administration	Article 41	(Article 6***)
Right to conduct a business	Article 16	(Prot. 1 Art. 1****)
Presumption of innocence and right of defence	Article 48	Article 6

\* Right to respect for private and family life  
 \*\* Right to freedom of expression  
 \*\*\* Right to a fair trial  
 \*\*\*\* .... *peaceful enjoyment of his possessions.*

# European Union Intellectual Property System



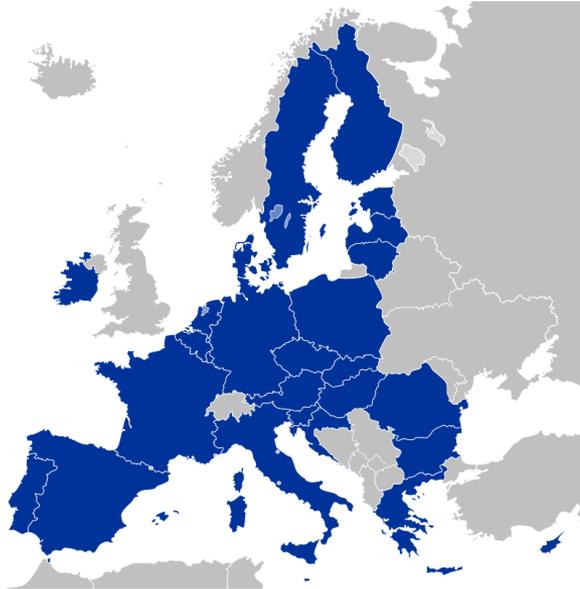
## European Union Intellectual Property Law



Treaty of the Functioning of the European Union Article 97a  
*In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.*



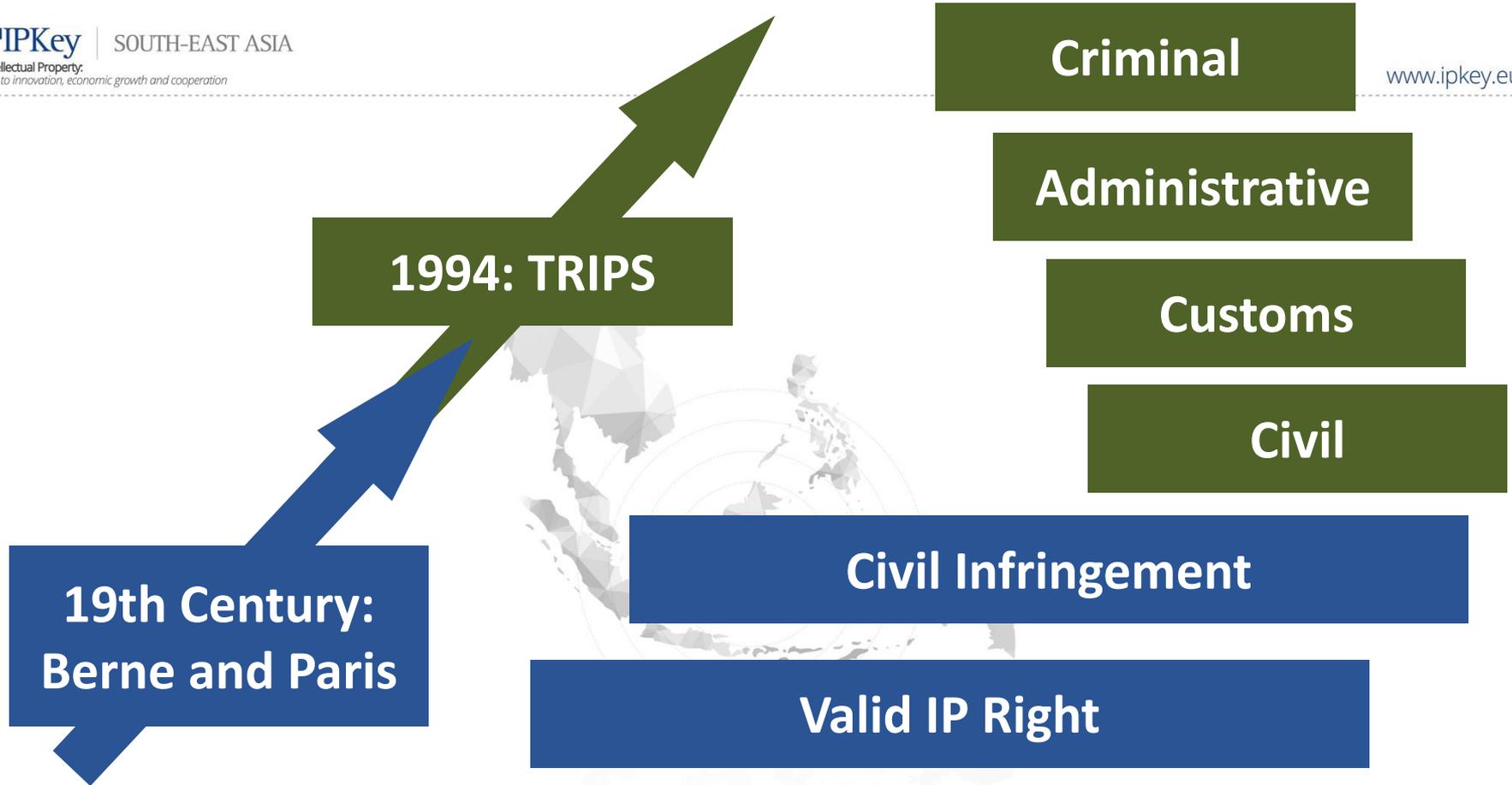
## European Union Intellectual Property Law



### EU Intellectual Property System

- Build on top of the international intellectual property system (e.g. Paris and Berne conventions and TRIPS)
- Main aim is creating a fully functioning internal market and respect of fundamental rights
- Specific EU-wide rights (e.g. EU trade mark, community design, geographical indication rights for agricultural products, wines and spirits)
- Full (e.g. registered national trade marks and some aspects of copyright and related rights ) and minimum harmonisations (e.g. some aspects of copyright and related rights)





## Directive 48/2004

- Injunctions (also targeting third parties)
- Preservation of evidence and right of information
- Damages, legal costs, corrective measures and publication of judicial decisions



**TRIPS Part III-  
2/3**

**Criminal**

**Administrative**

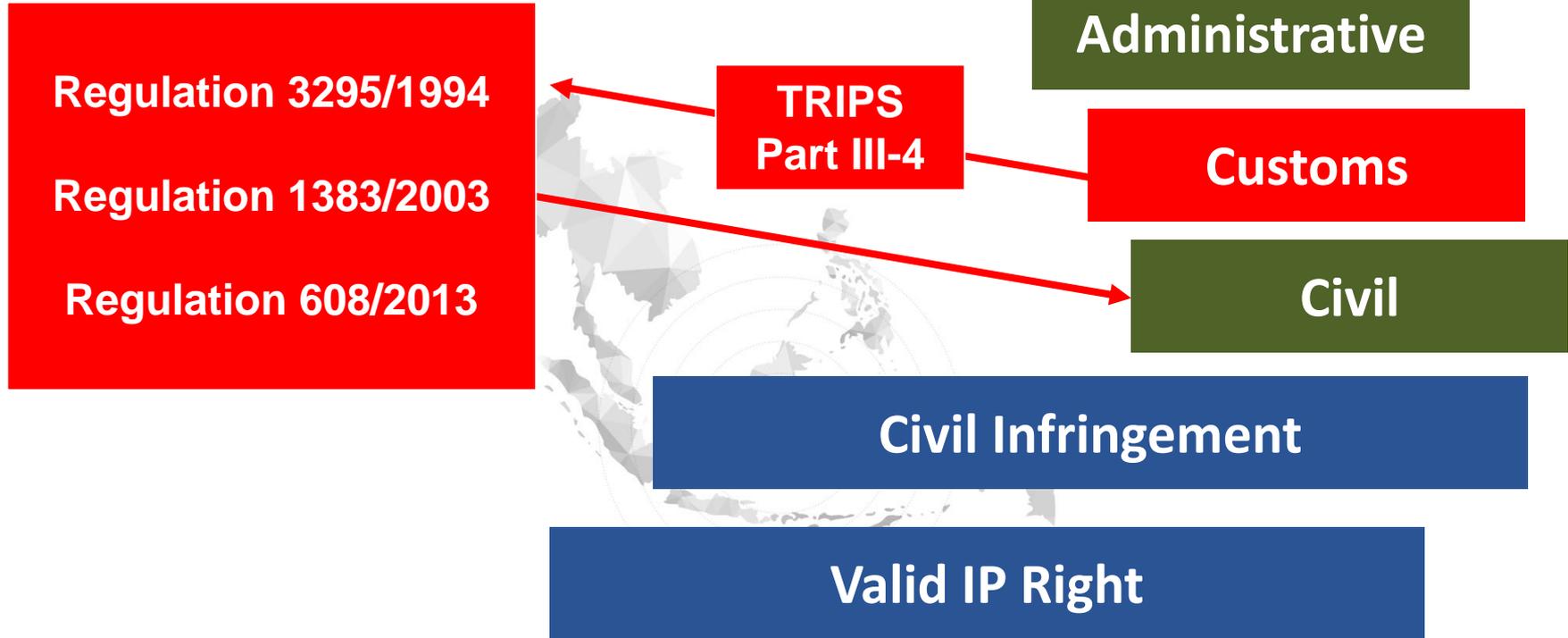
**Customs**

**Civil**

**Civil Infringement**

**Valid IP Right**





**Criminal**

**Administrative**

**Customs**

**Civil**

**TRIPS art. 49 og art 50.8 :**

*“To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.”*

**Civil Infringement**

**Valid IP Right**



## Commission Proposal for a Criminal IPR Enforcement Directive, 2005

- Updated 2006
- Withdrawn 2009

**ACTA, 2010**, negotiated but  
rejected by European  
Parliament

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**Valid IP Right**



## TRIPS Article 61

- shall provide for criminal procedures and penalties
- at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale
- shall include imprisonment and/or monetary fines
- shall include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements

**Criminal**

**Administrative**

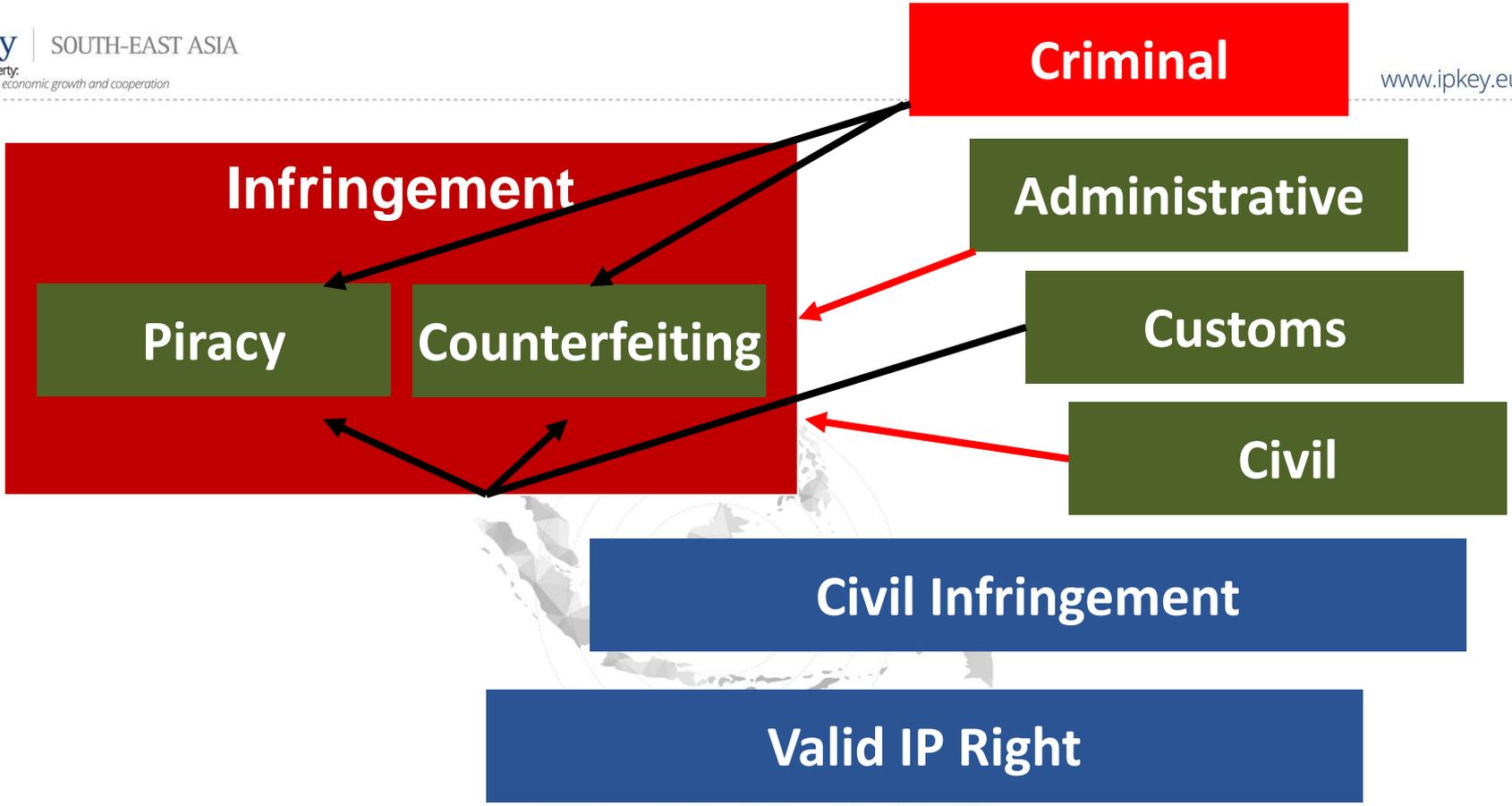
**Customs**

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**Valid IP Right**





**Customs Regulation 608/2013 Article 2 same definition**

In the EU, counterfeiting and piracy now only applies to small consignments and goods in transit

## Infringement

Piracy

Counterfeiting

**Trademark Regulation 1001/2017**

**Article 9(2)b:** *"..the sign is identical with, or similar to, the EU trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the EU trade mark is registered, if there exists a likelihood of confusion on the part of the public;*

**Danish Supreme Court Ruling 6. May 2008, U 2008.1826 H:** *"... intervention under regulation 1383/2003 presupposes identical or nearly identical marks, which would imply a narrower scope than that which would result from trade mark laws similarity and likelihood of confusion."*

**TRIPS Article 51, note 14**

For the purposes of this Agreement:  
(a) *"counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;*

# Copyright Law and Judicial System for Copyright Cases in the European Union



## Copyright Law and Judicial System for Copyright Cases in the European Union

EU *acquis communautaire* in the field of copyright consists of more than 10 directives and regulations

- piecemeal harmonization
- focus on functioning of the internal market
- not focusing on moral rights



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Infosoc Directive (2001/29/EC) that defines 3 basic rights for copyright and related rights

- *right of reproduction*
- *right of distribution*
- *right of communication to the public*



## Copyright Law and Judicial System for Copyright Cases in the European Union

### Judicial system in copyright cases

- Enforcement of copyright happens through the national court systems
- Questions of interpretation of EU law can be referred to CJEU for a preliminary ruling



## Copyright Law and Judicial System for Copyright Cases in the European Union

The EU legal instruments have been interpreted through more than 100 CJEU preliminary rulings in the area of copyright and related rights

One of the most notable decisions is the Infopaq ruling, C-5/08, of 16 July 2009

- 11 words in a newspaper article can be an original work
- *In those circumstances, copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.*
- The ruling introduced a universal criteria for what it requires to be an original work that shall enjoy copyright protection in EU MS's and has been confirmed in numerous subsequent rulings



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A significant clarification was provided in the Levola ruling, C-310/17, of 13 November 2018

- The taste of a spreadable cheese cannot be an original work
- *Copyright protection may be granted to expressions, but not to ideas, procedures, methods of operation or mathematical concepts as such*
- *The subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form*
- *The taste of a food product cannot, however, be pinned down with precision and objectivity.*



## Copyright Law and Judicial System for Copyright Cases in the European Union

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Another ground breaking ruling came last year, C-476/17, Pelham, 29 July 2019

- The exclusive rights of phonogram producers allows prevention of an even very short sound sample used in another phonogram, unless that sample is modified and become unrecognisable to the ear



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A later ruling was the Cofemel ruling, C-683/17, 12 September 2019

- The criteria for copyright protection is the same for jeans and t-shirt designs as any other work so special thresholds of originality are prohibited
- In the cases of functional products, the ambit required for it being a work is the same (*author's own intellectual creation*), that is one reflecting free and collective choices, which could give the non-functional aspect of the work, copyright protection
- an analysis of artistic merit or aesthetic impression need not be done, as it is extremely subjective and non-precise





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