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Editorial

Despite perceptions to the contrary, Vietnam has been actively protecting intellectual property rights (IPR) for nearly 30 years. It began with the adoption of several major ordinances protecting IPR in 1981, 1989 and 1994¹ which were followed by the implementation of the Civil Code, codifying and replacing all former legal regulations on IP protection, in 1995. More recently, and following negotiations for Vietnam's admittance to the World Trade Organization in the late 1990s, the country has adopted a fast pace of legal reform which has included intensive efforts to improve the existing IPR legislation.

As a result, Vietnam's IP regulations have been thoroughly rewritten and now conform with the Agreement on Trade-Related Aspects of Intellectual Property Rights' (TRIPS) and the main international treaties on IP protection. Vietnam has notably signed the Patent Cooperation Treaty of Washington, the Paris Convention on Protection of Industrial Property and the Madrid Convention on International Registration of Marks.

At the same time, while the international business community and foreign investors were urging Vietnam to reform its former IPR system, the perception of IP issues among local consumers has been slowly changing. The population is now considerably more aware of issues such as counterfeiting, and perceives the benefit to businesses of IPR protection.

However, IPR protection is still at an early stage of development in Vietnam and the authorities have limited experience in the application of IP regulations. Vietnam still has no specialized courts or judges and the level of litigation for IP rights infringement is very low, even in comparison to other countries in the region².

Moreover, despite the recent enactment of IP laws, legal provisions related to IP protection remain scattered in numerous texts of administrative, criminal or civil law. Some issues are sometimes governed by different overlapping laws when others remain unregulated. For example, IP crimes committed within the digital environment remain absent from the Criminal Code. The low level of penalties³ enforceable is also a problem when considering the profits generated by IP infringement.

We therefore highly recommend that investors seek professional advice in order to utilise every available measure to safeguard their IPR, including rights that people are often not aware they possess, in Vietnam. Recent actions undertaken by international firms, selling cosmetics or luxury items, both at the administrative and judiciary level have certainly indicated that the results of doing so are encouraging.

¹ Ordinance on Innovation and Invention in 1981, Ordinance on the Protection of Industrial Property Rights, passed by the State Council on 28 January 1989 and Ordinance on Copyrights of 1994.

² Between 2000 and 2007: only 320 copyright infringement cases have been registered in Vietnam, while in comparison 6,700 piracy cases were brought before Thai Courts in 2007 alone. Vietnamese courts process barely 20 copyright infringement cases per year. Also, between 2002 and 2007, the total number of internationally registered inventions was 26 for Vietnam but 53 for Thailand, 116 for the Philippines, 264 for Malaysia and 2,504 for Singapore.

³ The highest fine is VND 200 million in criminal procedures (USD 11,000), and VND 500 million (USD 27,000) in administrative procedures.



PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN VIETNAM: AN OVERVIEW

Until the first Vietnamese law entirely dedicated to intellectual property was adopted on 29 November 2005 (the “IP Law” No. 59/2005/QH 11), intellectual property rights (IPR) were only governed by scattered regulations⁴ contained in various codes, decrees, circulars and regulations issued by administrative bodies, such as the National Office of Intellectual Property.

The IP Law was principally adopted in response to the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights’ (TRIPS), at the time when Vietnam was completing its negotiations to join the WTO. The law has truly improved Vietnam’s IP legal framework, even if the effective protection and enforcement of IPR remain a crucial challenge in Vietnam.

The IP Law was amended in June 2009 and significant improvements were made to the former legal framework. In particular, some areas of non-compliance with TRIPS and Vietnam’s other international commitments have been resolved, while certain inconsistencies with the former laws have been addressed. Finally, key amendments have notably been made to improve the enforcement of IPR. It is nevertheless too early to say how effective these changes will be in improving the current protection.

IPR and related administrative bodies

Vietnamese regulations protect:

- copyright and copyright-related rights;
- industrial property rights (invention, utility solution, industrial design and design of semi-conducting closed circuits);
- trademarks, trade names and trade secrets;
- geographical indication;
- new plant varieties.

Certificates and patents are issued and administrated by three different administrative bodies depending on the nature of the right:

- The Copyright Office of Vietnam (“COV”) under the Ministry of Culture, Sports and Tourism, is in charge of copyrights (literary, artistic and scientific works) as well as copyright related rights (performances, audio and visual fixation, broadcasts and satellite signals carrying coded programs).
- The National Office of Intellectual Property of Vietnam (“NOIP”) under the Ministry of Technology and Science is in charge of the administration of industrial property rights: namely inventions, industrial designs, designs of semi-conducting integrated circuits, trademarks, trade secrets, trade names and geographical indications.

IPR enforcement

Administrative procedures

By far the majority of IPR disputes are settled more quickly and easily through administrative actions. However, these are only applicable in cases of obvious infringement. Administrative actions are generally fast and cost-effective, but the sanctions are limited and no compensation is available through these procedures.

To request administrative penalties against an offender, the complainant must submit an application to the competent authority which details the charges and a list of evidence documenting the infringement.

The system of enforcement through administrative action relies on a large number of disparate authorities, from city to national level, which contributes to the complexity and lack of efficiency in the protection of IPR. The following parties may be involved:

- The **Economic Police** for organized, serious and large-scale cases and specifically those cases with a health and safety dimension.
- The **Inspectorate of the Ministry of Culture** for copyright infringement.
- **Science - Technology Department Inspectors** for violation at the time of manufacture, trading, use, advertising and circulation (except import and export).
- **Market Management offices** for violation during circulation of goods and commercial business in the market.
- **Customs offices** for violation at the time of import and export.
- **Provincial People’s Committees** and **District People’s Committees** for violations committed within their locality where the levels and forms of penalties exceed the authority of other bodies.

⁴ Before the IP Law of 2005 was enacted, IP regulations were scattered in over 40 legal documents and not always consistent with each other. The two landmark texts, historically, were an Ordinance passed by the State Council on 28 January 1989, and the Civil Code of 1995, that replaced all former legal regulations on IP protection.



- The **Competition Administration Department** which investigates cases involving unfairly competitive practices and imposes fines, if applicable.

If proven necessary, the complainant may also request the competent authorities to apply preventive measures and/or measures to secure the enforcement of an administrative penalty (for example, temporary custody of infringing goods, material evidence and facilities to search, seize, seal and prohibit the transfer of ownership or other provisional urgent measures). Administrative sanctions may consist of:

- a warning (for minor first-time offences, with negligible consequences);
- a monetary fine (depending on the value of the counterfeited product, from a sum equal to the value of the counterfeited product up to a maximum amount of five times such value);
- confiscation of counterfeited goods, raw materials and materials used for production or trading;
- suspension of business activities for a fixed period;
- compulsory destruction of counterfeited goods, raw materials and non-raw materials and facilities that were used to produce the counterfeited goods;
- compulsory exportation of transit goods infringing intellectual property rights and other rights.

In the case of an abusive complaint which may include loss or damage caused by an unjustified sanction, the complainant must pay compensation.

Border measures may also be taken, including provisional suspension of customs procedures for imported or exported goods suspected of infringing IPR, and specific supervision and examination in order to detect goods suspected of infringement.

To benefit from such measures, an owner of IP rights must submit a request application, evidence of lawful IPR and evidence of infringement of IPR to the customs office. They must also pay in advance or submit a letter of guarantee issued by a credit institution for potential compensation for any damage and expense caused by an improper request for provisional suspension of customs procedures.

Civil procedures

Very few cases of IP infringement are litigated in Vietnam. Preliminary conciliation or out-of-court mediation is compulsory before initiating any action

before the courts, where injunctions, damage indemnities and/or destruction of the counterfeit products may be obtained.

In respect of civil cases, the competent jurisdiction is the People's Court at provincial level. In a case which involves at least one foreign party, the competent court will be the Hanoi or Ho Chi Minh City People's Court, at the plaintiff's choice.

The Court must decide to accept or refuse the case within five days from the date of receiving the petition. Within four months from acceptance, the court must organize the hearings. In practice, it takes from six months to one year for a case to come to trial, and decisions of the People's Courts are generally not issued until two or three years after trial.

Decisions of the People's Court may be appealed to the Supreme Court (the highest and final court). Decisions by the Supreme Court are usually issued within one year from the date of appeal.

Unfortunately, civil actions relating to IP infringement are time-consuming, their outcome rather uncertain and the number of civil lawsuits relative to IP rights remains fairly limited.

Criminal procedures

In order to initiate criminal proceedings, the injured party must lodge a complaint with the police, prosecution or any other authorized investigative agency, who may decide to initiate legal proceedings. If sufficient evidence is found, public prosecutors will start investigations and indict alleged infringers for crimes of infringement before the Court.

Depending on the seriousness of the case, sanctions vary from fines of up to VND 200 million, a ban from holding certain functions or practicing certain occupations for a period of time to imprisonment or even capital punishment in the case of fatal/material adverse consequences.

Finally, it is worth noting that there is no law barring concurrent penalties for the same offence in Vietnam. Thus, a civil suit can be settled concurrently with a criminal case. Consequently, civil, criminal and administrative penalties may be applied against an offending party in relation to one offence.



Transfer of IPR

When including IPR in the valuation of a company's charter capital, they must be valued on an agreed basis, whether between the founding members/shareholders if the contribution is carried out at the time of establishment of the company, or between the company itself and the contributor in the case of increase of the charter capital of an existing company. The parties are jointly responsible for valuation, which can be carried out through three methods: the income approach; the market approach; or the cost approach (there is no best method).

A written agreement between the company and the capital contributor/transferor regarding the transfer of registered IPR must be executed. The capital contributor can elect not to transfer the IPR but only to authorize the use of the IPR. Some IPR cannot be transferred, such as moral rights or rights to geographical indications. Others can only be transferred subject to certain conditions, for example the rights to trade names may only be assigned together with the transfer of the entire business establishment and business activities under such trade name.

Licensing of IPR

Licensing an industrial property right means the granting of permission by the owner for an organization or individual to use the industrial property within the scope of owner's rights. Licensing contracts must be registered with the National Office of Intellectual Property of Vietnam (NOIP).

Nevertheless, such licensing is limited and:

- the right to use geographical indications and trade names cannot be licensed;
- the right to use collective trademarks cannot be licensed to organizations or individuals other than to members of the owners of such collective trademarks;
- a licensee must not enter into a sub-licence contract with a third party unless it is so permitted by the licensor;
- trademark licensees are obliged to indicate on goods and goods packaging that such goods have been manufactured under a trademark licence contract.

Some provisions are not allowed in a licence contract, such as provisions prohibiting the improvement of the industrial property object (except in relation to the

licensing of a trademark), the obligation to transfer free of charge to the licensor improvements made by the licensee or provisions that directly or indirectly restrict the licensee from exporting goods to territories where the licensor neither holds such IPR nor has the exclusive right to import such goods.

COPYRIGHT AND RELATED RIGHTS

Creative works such as books, music, plays, films, broadcasts as well as computer programs and data collection are protected by copyright. Such protection is, however, subject to the works being (i) personally created by the authors, or (ii) through an author's own intellectual labour and (iii) without copying the works of others.

Authors of original works in Vietnam are given economic rights by which they are entitled to exercise rights of control over copying, performance and broadcasting.

Vietnam further recognizes the moral rights of the creator of a work, such as the right to be credited for the work or prevent any amendment to, or distortion of, it.

Registration

As in most countries, copyright protection in Vietnam arises from the moment a work is created and fixed in a certain material form, irrespective of its content, quality, form, mode or language and irrespective of whether or not such work has been registered.

Vietnam has been a member of the Berne Convention since 2004 so prior official registration with a government office is not required in order to exercise copyright.

Nonetheless, such registration would, in practice, strongly evidence a valid copyright in the case of litigation. The government office in charge of copyright registration in Vietnam is the National Copyright Office of Vietnam under the Ministry of Culture, Sports and Tourism.

Royalties

Creative work may be used without permission or payment of royalties in certain circumstances, such as when used for teaching purposes or scientific research, performances that are free of charge, or for personal use.



However, use of a creative work without permission and/or payment of royalties for commercial use will constitute an infringement of copyright.

Copyright royalties are collected in Vietnam by various organisations, including the **Vietnam Center for the Protection of Music Copyright (VCPMC)**, the **Vietnam Printing Association (VPA)** and the **Vietnam Literary Copyright Center (VCC)**.

Term of protection

The copyright term for most existing works is the life of the author plus 50 years after death, which is the minimum term under the Berne Convention.

However, the amended law has increased the term of protection from 50 years to 75 years for cinematographic, theatrical, photographic, applied art and anonymous works from the year of first publication. Should such work not be published within 25 years from the date of its formulation, protection shall last 100 years as from the date of its formulation.

Finally, moral rights of the author are protected for an indefinite term.

Enforcement and Protection

Piracy remains a major problem in Vietnam, particularly in the fields of entertainment, software and books.

Administrative penalties for infringement of copyright and related rights were re-evaluated in May 2009 with the maximum fine being raised to VND 500 million (around USD 27,000). However, the revenue earned from piracy often exceeds this amount which therefore does not constitute a deterrent strong enough to prevent copyright infringement.

Overall, it remains difficult for foreign businesses to fight copyright violation, mainly due to the inadequate substantive and procedural rules concerning the issuance of injunctions and the lack of experience on the part of Vietnamese judges.

However, it should be noted that awareness to copyright issues is slowly growing and 50 important hotels in Vietnam have recently agreed to pay the Copyright Protection Center, representing Vietnamese musical composers, an annual royalty amounting to about VND 3 billion (USD 160,000) in total, for the use of the musicians' songs in their hotels.

TRADEMARKS

A trademark is defined by the IP Law as *"a sign used to distinguish goods or services of different organizations or individuals"*.

As mentioned in our editorial, Vietnam has signed major international trademark treaties including the Paris Convention and the Madrid System for the International Registration of Marks (the "**Madrid Agreement**" and the "**Madrid Protocol**"). Thus, foreign applicants can file a separate national application or include Vietnam in their international application. Vietnam has also adopted the Nice classification system, established by the Nice Agreement, setting out 45 classes of goods and services (multi-class applications are accepted in Vietnam).

Registration

To be protected, a trademark must be registered with the NOIP. However, well-known trademarks can be protected without registration.

Requirements

A mark shall be protected if it is a visible sign in the form of letters, words, drawings or images including holograms, or a combination thereof, represented in one or more colours, and it is capable of being distinguished from other goods or services.

Signs will be ineligible from registration if they are, among others:

- identical to or confusingly similar to a national flag or national emblem;
- identical to or confusingly similar to real names, aliases, pseudonyms or images of leaders, national heroes or famous personalities of Vietnam or foreign countries;
- signs which cause misunderstanding or confusion or which deceive consumers as to the origin, properties, use, quality, value or other characteristics of goods or services.

Moreover, a mark shall be distinctive if it consists of one or more easily noticeable and memorable elements, or of many elements forming an easily noticeable and memorable combination.



A mark is indistinctive if the sign is:

- a simple shape or geometric figure, a numeral, letter or script of an uncommon language, unless widely used and recognized as a trade mark;
- a conventional sign or symbol, picture or common name in any language, that has been widely and regularly used to designate the goods or services in question;
- an indication of the geographical origin of the goods or services identical or confusingly similar to a registered mark, a well-known mark, or a mark that was the subject of a prior application;
- identical to or not substantially different from an industrial design that has been registered or has an earlier priority.

Procedure

The registration procedure involves three main steps: (i) a formal examination; (ii) the publication in the Official Industrial Property Gazette; and (iii) a substantive examination. The formal examination is aimed at evaluating the validity of the application. If it is valid, the NOIP issues a notice of acceptance and publishes the application in the Official Industrial Property Gazette within one month from the date that such application is accepted. After such acceptance, the application will be subject to a substantive examination within nine months from the date the application is published.

Trademark protection is also available for geographical indications, which may now be registered as well.

Registrability is determined, as in European countries, in consideration of generic terms, geographical names and distinctive features.

After registration, a trademark must be used by either the registrant or its licensee. In the event of a cancellation request, if the trademark has not been used during the five years prior to the request its registration will be cancelled.

PATENTS AND UTILITY SOLUTIONS

Vietnam's new IP Law defines "inventions" as "technical solutions in the form of products or a process which are intended to solve a problem by applications of natural laws"; while "utility solutions" is defined as "technical solutions intended to solve a problem".

Conditions for protection

To be patentable, an invention must show: (i) novelty, (ii) an inventive step and (iii) industrial applicability. Such concepts are common to most countries' patent requirements.

- An invention is deemed "novel" if it has not yet been publicly disclosed through use or by means of written descriptions or in any other form either inside or outside Vietnam before its registration.
- The notion of an "inventive step" means that the invention constitutes inventive progress and cannot be easily created by a person with an average knowledge in the art.
- An invention must also be susceptible to industrial application; it is possible to carry out mass production of the products or repeat the application of the process which is the subject matter of the invention.

Where an invention fails to show an "inventive step", it may still be protected through a utility solution patent.

Scientific discoveries and theories, mathematical methods, computer programs, presentations of information, aesthetic creations, methods of prevention, diagnosis and methods to treat diseases etc. are not protected.

Establishment and maintenance of the intellectual property rights to inventions

Vietnam's patent law operates under the "first to file" principle. That is, if two or more applicants file for patent protection in relation to identical inventions, the one whose application was filed first prevails. The NOIP issues a certificate of registration ("protection title") to the applicant, in respect of the invention or utility solution.

The protection is valid throughout the entire territory of Vietnam, for a term of 20 years for inventions and 10 years for utility solutions.



In order to maintain the validity of an invention patent or a utility solution patent, the owner shall pay a validity maintenance fee. Failure to pay this fee will result in the invalidity of the patent.

Registration procedure

Once a national patent application has been filed with the NOIP, its form will first be examined to determine whether it complies with applicable legal requirements and whether the subject matter is actually patentable. If it is, it will be published in the Official Industrial Property Gazette in the 19th month after the filing date or earlier at the request of the applicant (or two months in cases where the Patent Cooperation Treaty is applicable).

A request for substantive examination must be filed with the NOIP within 42 months (for an invention patent) or 36 months (for a utility solution patent) from the filing date. If no request is submitted within this time frame, the patent application will be deemed to have been withdrawn.

The substantive examination period is 18 months. The Examiner conducts an examination to see whether the invention satisfies the protection criteria. If it does, the patent will be granted and a notification will be published in the Official Industrial Property Gazette.

In practice

Awareness of the need to protect inventions is still limited among the Vietnamese people and official statistics show that the number of applications filed with NOIP by foreigners forms an overwhelming portion in the total volume of applications for invention registration. To change this situation, the Ministry of Science and Technology is notably promoting patent protection to the local population.

INDUSTRIAL DESIGNS

Industrial design means the outward appearance of a product embodied in a three-dimensional configuration, lines, colours or a combination of such elements.

Conditions for protection

An industrial design shall be eligible for protection when it is: (i) novel; (ii) of a creative nature; and (iii) susceptible to industrial application.

- (i) Novel means that an industrial design significantly differs from other industrial designs publicly disclosed through use or by means of written descriptions or in any other form either inside or outside Vietnam prior to the filing date or the priority date, as applicable, of the application for registration of the industrial design.
- (ii) It is creative if, based on industrial designs already publicly disclosed, the industrial design cannot be easily created by a person with an average knowledge of the respective field.
- (iii) It is susceptible to industrial application if it can be used as a model for the mass manufacture of products with the outward appearance embodying such industrial design by industrial or handicraft methods.

However, the following will not be protected as industrial designs:

- (i) the outward appearance of a product which is necessary and due to the technical features of the product;
- (ii) the outward appearance of civil or industrial construction works;
- (iii) the shape of a product which is invisible during the use of the product.

Establishment and maintenance of the industrial property rights of industrial designs

Vietnam's industrial design law also operates under the "first to file" principle.

The protection is valid throughout the entire territory of Vietnam for a term of five years for industrial designs, and can be renewed for two consecutive five-year periods.

Registration procedure

Registration takes nine months, but currently applications are taking from 12 to 15 months to proceed to registration.

Industrial designs must be registered with NOIP, following the usual steps (formal examination, publication and substantive examination). Terms for publication and substantive examination are respectively one month from the date of filing and seven months from the date of publication.



PROTECTING TRADE SECRETS

The risk of trade secrets and other confidential information being misappropriated or misused by competitors, business partners and/or employees is a major concern for foreign investors dealing in Vietnam.

Trade secrets are defined under Vietnamese law as: *"financial or intellectual information which has not yet been disclosed to the public and by which a business can obtain an economic advantage over competitors"*.

Such valuable, confidential information may include know-how, business strategies, customer lists, quality control data, formulae, recipes but does not extend to industry practice in a specific field.

Maintaining secrecy

In order to be eligible for protection under IP Laws, the confidentiality of trade secrets must have been maintained by the owner in accordance with the appropriate means.

Trade secrets do not need to be registered and, in the case of a dispute, the holder of the trade secret will have to prove the discovery or lawful acquisition of the trade secret as well as the means by which it has been protected.

As current regulations do not impose any general confidentiality obligations upon employees who have access to trade secrets when performing their job, employers must therefore be very cautious in taking appropriate measures to protect any trade secrets that they may have.

There are various but simple confidentiality measures available and include non-disclosure clauses in employment contracts, the adoption of passwords or codes to restrict access to designated individuals or marking the documents as confidential.

Documents relating to the trade secret confidentiality policy should be drafted in both English and Vietnamese to ensure that all employees fully understand the extent of such obligations and the bilingual documents may further be used before the courts.

Limits to trade secrets protection

Unlike most IPR, trade secrets cannot be protected by registration in order to establish ownership of a trade secret. The trade secret owner has no monopoly over the trade secret and other competitors may lawfully

discover it by their own independent efforts, even through reverse engineering by analyzing or evaluating lawfully distributed products, unless otherwise agreed upon by analyzers and trade secrets owners.

Furthermore, disclosure of secret data may be allowed in certain circumstances, such as when such disclosure is required to protect the public or when confidential information is unlawfully acquired.

Enforcement

It is important to bear in mind that trade secret protection is still new in Vietnam. Official statistics have not yet tracked any disputes in relation to trade secret protection.

Therefore, it is crucial for investors in Vietnam to be aware of the risk of having trade secrets stolen or leaked and to adopt appropriate self protection measures.

Furthermore, some trade secrets, depending on their nature, may be protected by other forms of intellectual property (invention, industrial design, copyright etc.) which allow for registration and provide stronger protection.

It should equally be noted that transfer of some trade secrets may also be deemed as technology transfers and protected by the Law on Technology Transfer dated November 29, 2006 (No. 80/2006/QH11) which regulates the registration, approval and content of a technology transfer agreement.

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