**Infringement of Intellectual Property Rights in Vietnam**

**and the Current Situation for Dealing therewith**

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**Protection of intellectual property rights is meaningless if such rights are not practically enforceable**

Intellectual property rights are property rights protected by the Constitution and laws of Vietnam. Intellectual property rights are not one right but a bundle of different types of rights established under different rules prescribed by law to allow right holders[[1]](#footnote-1) to exclusively use and exploit these rights existent in various forms, namely inventions, industrial designs, trademarks, geographical indications, new plant varieties, copyrights and related rights.

Similar to other assets such as objects, money and valuable papers, intellectual property rights – as a type of property rights - are also a kind of property protected by law through the fact that the law grants the owner of intellectual property rights all three rights: the right to possession, the right to use, and the right to disposal[[2]](#footnote-2). Therefore, enforcing intellectual property rights is the protection of intellectual property rights by utilizing various legal tools or measures recognized by the State to enjoin others from infringing those intellectual property rights.

It would be meaningless if merely recognizing the existence of intellectual property rights without having a legal mechanism to help the right holder enforce those rights. The WIPO said that “*all intellectual property systems need to be underpinned by a strong judicial system for dealing with both civil and criminal offenses,...Without a proper system for both enforcing rights and also enabling the grant of rights to others to be resisted, an intellectual property system will have no value”*[[3]](#footnote-3).

**Infringement of Intellectual Property Rights in Vietnam and the Current Situation for Dealing therewith**

Infringement of intellectual property rights in Vietnam is currently at an alarming degree. A report titled "*Promoting and Protecting Intellectual Property in Vietnam*" issued at the initiative of the International Chamber of Commerce ICC (“ICC Bascap”) in cooperation with the Vietnam Chamber of Commerce and industry (VCCI) and Vietnam International Arbitration Center (VIAC) show three notable aspects: (a) the status of counterfeit and pirated goods at an alarming rate contributes positively to the underground economy. The underground economy (unobserved economy) is valued at tens of billions of dollars, leaving the state without tax revenue and consumers suffering from health risks in which counterfeit goods appear in all areas from textiles, cosmetics, pharmaceuticals, spirits, food and software; (b) intruders are increasingly sophisticated because they use sophisticated counterfeiting technology to disable detection, with a focus on faking big brands; and (c) IPR infringement is growing rapidly and is popular in the internet environment focusing on pirated websites, distributing, distributing copyrighted or copyrighted products, cracking, smuggling, livestreaming[[4]](#footnote-4).

According to a 2019 Special 301 Report released by the Office of the United States Trade Representative (USTR), Vietnam is in the fourth consecutive year of the list of countries to watch on intellectual property (Watch List). Based on the results of the survey and evaluation, Vietnam is not considered to provide adequate and effective border protection measures against counterfeit and pirated goods, failing to adequately address newly emerging and persistently-continuous challenges in relation to copyright infringement, including piracy in the online environment[[5]](#footnote-5).

Regarding the copyright field, Mr. Gary Gan - Director of Asia-Pacific Compliance Program of Software Alliance (BSA) said: “*the rate of installing non-copyrighted software in Vietnam at the highest among the APAC region is 78%, which is 4/5 cases. By comparison, the best performing country in APAC region is New Zealand with 18% and the leading country in the world is USA with 17%”[[6]](#footnote-6)*.

Vietnam has been showing a certain effort in preventing smuggling, trade frauds and counterfeit goods by the Prime Minister's issuance of Decision 389 from 2014 which is referred to as the National Steering Committee 389 (“*Ban chỉ đạo 389*”) headed by a Deputy Prime Minister. Through the coordination and coordination between the law enforcement forces of different ministries and branches, the National Steering Committee 389 has achieved some initial successes, such as dealing with 223,262 cases, in particular, within only 9 months of 2016 with a collection budget of VND 225,563 billion and a total of 1,561 cases involving 1,863 violators were prosecuted, most of which involved in the production and trading of counterfeit goods[[7]](#footnote-7).

However, the reality of enforcing intellectual property rights in Vietnam is generally still limited. Most of the current infringements of intellectual property rights in Vietnam are handled by administrative measures. According to the General Department of Market Management under the Ministry of Industry and Trade of Vietnam, although the laws and regulations have relevant statutory provisions on enforcement of intellectual property rights by civil, criminal and administrative measures, the enforcement of intellectual property rights in practice is not really effective because administrative measures are applied mainly. However, even the administrative measures are applied, its effectiveness is relatively limited due to the participation of many forces such as Customs, specialized Inspectors, Market Management and Economic Police but it cannot clearly identify which agency is the major[[8]](#footnote-8).

Resolving non-criminal intellectual property cases or disputes in Vietnam's court system is rarely used by rights holders. Calculated after the effective date of the IP Law (from July 1, 2006), according to the statistics of the Supreme People's Court from July 1, 2006 to June 22, 2009, the entire system of court only accepted 108 cases of intellectual property dispute (of which the majority were copyright disputes with 90 cases; disputes of industrial property rights accounted for 10 cases; disputes over contracts for use of works accounted for 5 cases; disputes over technology transfer contracts accounting for 3 cases). Assuming that only the Supreme Court of Appeal in Hanoi was recalled, from July 1, 2006 up to now, the Supreme Court of Appeal in Hanoi has only accepted 7 cases, but in fact only is 5 cases, because there are 2 cases to hear appellate for the 2nd time. The number of cases is still too limited shows that IP rights holders are still afraid of initiating a lawsuit to the court but instead, they choose the handling of violations by administrative measures. The fact in this period comes from (i) the asymmetry of the substantive law on copyright and industrial property rights, (ii) the inadequacies of the procedural law for resolving disputes about intellectual property rights, and (iii) the incompetence as to expertise capacity of the judges, as a result, the court has not really become a convincing and preferred settlement channel for IP disputes[[9]](#footnote-9).

Regardless of the above limitations, resolving an intellectual property case at a civil court or economic court may also bring some significant material benefits to the right holder, especially the compensation for damages that inclines to increase. The judicial view and decision on the amount of damages ruled by the courts in the period after 2012 are noteworthy with the court's acceptance of a claim asking the defendant to return reasonable cost of retaining lawyers at a record of up to VND 630 million (roughly US$29,000). By 2015, there was a court accepting claims for actual damages up to over VND 2.2 billion, which the plaintiffs proved to exist in all 3 forms: losses of business opportunities, illegal profits, and the cost of hiring a lawyer but then afterwards the appellate court dismissed all the illegal profits claimed over VND 1.1 billion (US$ 450,000) and only accepting a small part of the loss of business opportunity is VND 22 million compared to the originally claimed number of over VND 430 million[[10]](#footnote-10).

For cases with criminal signs, ie. infringement of intellectual property rights such as the crime of manufacturing and trading in counterfeit goods, crimes of infringing upon industrial property rights, crimes of infringing copyright, related rights, according to a report of the General Department of Police - Ministry of Public Security in September 2007 for the period from 2002 to 2007, there were only 1092 cases involving practitioners but only 162 cases were prosecuted for criminal cases. However, among these criminal cases, most of the procedure-conducting agencies only prosecuted the crime of producing and trading in counterfeit goods instead of infringing upon industrial property rights or infringing copyright. Until September 2008, there were only a few criminal prosecutions under Article 171 of the 1999 Penal Code for industrial property rights infringement[[11]](#footnote-11)

Nevertheless, recently there was a bright spot on Vietnam's legislature that for the first time in the history of criminal legal jurisprudence, Vietnam accepted to introduce an entirely new legal regime as criminal liability of commercial legal entities (for-profit legal person) which have been approved by the National Assembly by the Criminal Code No. 100/2015 / QH13 are amended and supplemented by a number of articles under Law No. 12/2017 / QH14. It is thought that expanding the ability to pursue criminal liability with a commercial entity can be considered a significant attempt by Vietnam to properly punish criminals that infringe intellectual property rights. In practice, for the first time, a legal entity was prosecuted and investigated for an infringement of industrial property rights under Article 226 of the 2015 Penal Code as amended in connection with the arrest of 42,405 pieces of aluminum profile ( approximately 170 tons) in Trung Ha Industrial Zone, Tam Nong, Phu Tho province, with the fake trademark "Viet Phap Shal Aluminum", and then first-instance court was heard by the People's Court of Phu Tho Province in January 2020[[12]](#footnote-12).

*Bross & Partners have had experience in criminal litigation and civil litigation in cases involving intellectual property rights as well as experience in handling infringements of intellectual property rights by administrative measures. Should you have specific needs, please contact:****vinh@bross.vn****; cellphone****84-903 287 057, 84-4-3555 3466****; Wechat:****wxid\_56evtn82p2vf22****; Skype:****vinh.bross****.*

*Bross & Partners, a renowned and qualified Patent, Design, Trademark and Copyright agent of Vietnam, constantly ranked and recommended by the Managing Intellectual Property (MIP), World Trademark Review (WTR), Legal 500 Asia Pacific, AsiaLaw Profiles, Asia IP and Asian Legal Business, is providing clients all over the world with the reliable, affordable contentious and non-contentious IP services including enforcement, anti-counterfeiting,  litigation regarding trademark, trade name, industrial design, patent, copyright and domain name.*

1. Clause 6, Article 4 of the Intellectual Property Law stipulates: "*Intellectual property right holders are owners of intellectual property rights or organizations or individuals transferred by intellectual property owners*" [↑](#footnote-ref-1)
2. According to Article 158 of the 2015 Civil Code, ownership includes three powers: the right to possession, the right to use, and the right to disposal, of the owner against a property under the law. Due to the intangible nature of property rights - intellectual property rights - the IP Law, as a specialized law, clarifies the three powers as mentioned above, in particular, such as Article 123 stipulating the rights of the owner of the industrial property object:

   1. Owners of industrial property objects have the following property rights:

   a) Using and permitting others to use the industrial property object as prescribed in Article 124 and Chapter X of this Law;

   b) Prohibiting others from using industrial property objects as prescribed in Article 125 of this Law;

   c) Dispose of industrial property object in accordance with Chapter X of this Law. [↑](#footnote-ref-2)
3. See *WIPO Intellectual Property Handbook: Policy, Law and Use*, *Chapter 4: Enforcement of Intellecual Property Rights*, page 207 [↑](#footnote-ref-3)
4. See the full report titled “ICC Bascap promoting and protecting intellectual property in Vietnam” that can be downloaded from the link: <https://iccwbo.org/publication/icc-bascap-promoting-and-protecting-intellectual-property-in-vietnam/> [↑](#footnote-ref-4)
5. See 2019 Special 301 Report released by the Office of the United States Trade Representative (USTR) at the link: <https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf>. USTR ranks countries that need to be concerned about intellectual property as the two lists: Watch List and Priority Watch List. [↑](#footnote-ref-5)
6. Source (Vietnamese only): <https://enternews.vn/ty-le-vi-pham-ban-quyen-phan-mem-o-viet-nam-len-den-78-phan-tram-127879.html> [↑](#footnote-ref-6)
7. According to the speech by a Representative under the Standing Office of the National Steering Committee 389 at the conference "*Improving the effectiveness of enforcement forces in the fight against counterfeiting and infringement of intellectual property rights*" in Hanoi , Vietnam, October 20, 2016 reported by ICC Bascap at footnote 75 [↑](#footnote-ref-7)
8. ## See the presentation "Implementing Intellectual Property Rights in the context of EVFTA Agreement" by Mr. Tran Huu Linh, General Director of General Department of Market Management, presented at the conference on August 27, 2019 “Vietnam - EU Free Trade Agreement: Important commitments on intellectual property and things to keep in mind” or view at the link: <http://evfta.moit.gov.vn/default.aspx?page=news&do=detail&category_id=13caec66-a1f8-4b9c-9066-b25657f4d36d&id=a9d47fd0-3f7e-463d-8958-6a48c41705f1>

   [↑](#footnote-ref-8)
9. See Dr. Nguyen Van Luat, Deputy Chairman of the National Assembly's Judicial Committee, Needs to establish an intellectual property court in Vietnam, Journal of Legislative Studies - Legislative Research Institute under the Standing Committee of the National Assembly or see the link: <http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=210379> [↑](#footnote-ref-9)
10. See ***[Part 2/2] The Amount of Non-contractual Damages in Intellectual Property Disputes Accepted by Vietnamese Courts Inclines to be Higher over the Last Decade* at the link:** [http://bross.vn/newsletter/ip-news-update/[Part-22]-The-Amount-of-Noncontractual-Damages-in-Intellectual-Property-Disputes-Accepted-by-Vietnamese-Courts-Inclines-to-be-Higher-over-the-Last-Decade](http://bross.vn/newsletter/ip-news-update/%5bPart-22%5d-The-Amount-of-Noncontractual-Damages-in-Intellectual-Property-Disputes-Accepted-by-Vietnamese-Courts-Inclines-to-be-Higher-over-the-Last-Decade) [↑](#footnote-ref-10)
11. See “*The law and practice of fighting against crime of infringement of intellectual property rights in Vietnam*”, Associate Professor, Dr. Tran Van Nam, Faculty of Law, National Economics University. [↑](#footnote-ref-11)
12. Source (only Vietnamese): <http://cand.com.vn/Lan-theo-dau-vet-toi-pham/Vu-an-xam-pham-quyen-so-huu-cong-nghiep-duoc-phat-hien-nhu-the-nao-572863/>; <http://bross.vn/newsletter/ip-news-update/Bo-Luat-hinh-su-2015-lieu-co-kha-nang-hien-thuc-hoa-no-luc-trung-tri-thich-dang-cac-doi-tuong-xam-pham-quyen-so-huu-tri-tue-o-Viet-Nam-1328>; <http://bross.vn/newsletter/ip-news-update/Hang-gia-va-hang-hoa-gia-mao-so-huu-tri-tue-o-Viet-Nam> [↑](#footnote-ref-12)