

Copyright Litigation

The first edition of this publication aimed to provide practical guidance to anyone involved in multi-jurisdictional copyright litigation. This second edition has been updated to include more topical issues such as liability of internet service providers and protection of computer software.

Laws and procedures regarding copyright are so different worldwide, that endless opportunities for forum shopping exist both when bringing a claim for infringement or when countering a third party's claim. This book is intended as an easy reference guide to the differing regimes in some of the world's most important jurisdictions.

After the great success of our two previous books, *Patent Litigation* and *Trade Mark Litigation*, we were proud to be able to include a record number of top level contributors.



SECOND
EDITION
2015

Copyright Litigation

General Editors:
Thierry Calame, Lenz & Staehelin &
Massimo Sterpi, Studio Legale Jacobacci & Associati

THE EUROPEAN LAWYER
REFERENCE

Copyright Litigation

Jurisdictional comparisons

Second edition 2015

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Foreword

**Thierry Calame, Lenz & Staehelin
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COPYRIGHT IS THE NEW STEEL

In recent years, copyright has taken a central role in the global economy.

Creativity, once the elitist domain of artists, has become the bread and butter of daily life. Anyone posting a comment or a snapshot online can be an author for copyright purposes. In addition, virtually every digital start-up is based on copyrightable contents, such as graphic design, texts, images or music.

In the job market, what counts is no longer the physical energy of the worker, but rather his creativity. At the same time, trying to enlarge copyright protection for new forms of creations – such as programme formats, culinary recipes or fragrances – is a growing trend.

In such a scenario, copyright takes a fundamental role in protecting one's creativity, and often becomes the basis for one's success.

At the same time, another form of copyright protection becomes increasingly relevant, namely that afforded to databases. When data mining represents an essential prerequisite in decision-making processes, ownership of data becomes the new source of power.

However, circulation and distribution of content also raises serious and yet unresolved issues. Can an Internet Service Provider, who not only takes advantage of the circulation of content but is often actively involved in shaping such circulation, avail itself of exemptions of liability for underlying copyright infringements? Where should the limits be drawn between hosting, granting access to and transporting (infringing) content on the one hand and active participation in the content distribution on the other?

Finally, projects of massive appropriation and distribution of content (such as the scanning of entire libraries) increase the conflict between the public interest to access knowledge and the rights of the authors, originally created to enable authors to live off their creations.

A rising source of power, copyright is the steel of the current world economy.

Rome/Zurich, 29 October 2014

Thierry Calame Massimo Sterpi

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1. SOURCES OF LAW

1.1 What are the principal sources of law and regulation relating to copyright and copyright litigation?

In Vietnam, the principal legal sources regarding copyright are the Civil Code of 2005 (Civil Code) and the Intellectual Property Law of 2005, as amended and supplemented in 2009 (IP Law). The Civil Code provides general provisions related to intellectual property rights, while the IP Law is concretised and provides detailed definitions and mechanisms for protection. While there are many additional regulations, the two most important are Decree No. 100/2006/ND-CP of 21 September 2006, detailing and guiding the implementation of a number of articles of the Civil Code and the IP Law regarding copyright and related rights, and Decree No. 85/2011/ND-CP of 20 September 2011, amending and supplementing a number of articles of Decree No. 100/2006/ND-CP. Although Decree 100/2006/ND-CP and Decree No. 85/2011/ND-CP are considered bylaws, they play important roles in guiding and applying law in accordance with legislators' intent to deal with problems arising from practice.

Vietnam does not consider precedents as a source of law, therefore when trying copyright cases, judges are not bound by prior rulings, and they serve only as reference materials. Courts would comply with and apply existing law to the case.

At present, Vietnam is a member of five international conventions and treaties in copyright: the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention); the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention); the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms (Geneva Convention); the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Convention); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). In addition, Vietnam has signed bilateral agreements and memoranda for closer cooperation and strengthening of copyright protection. Under these international treaties, published works and unpublished works would be granted protection in Vietnam when they meet certain conditions.

1.2 What is the order of priority of the relevant sources, ie which takes precedence in the event of a conflict?

Where Vietnam adheres to or signs international conventions and treaties,

it does not mean that they would automatically become domestic law. The state would transfer the provisions of the conventions and treaties into the domestic laws or decide on the direct application of all or part of the treaties in Vietnam's territory. In addition, Vietnam also makes a conscious effort to fulfil its international obligations in the copyright domain through providing that where the provisions of the international treaties contrast with provisions of Vietnam's law, the provisions of the treaties shall prevail.

2. COURT AND ADMINISTRATIVE SYSTEM

2.1 In which courts are copyrights enforced? Are they specialised copyrights courts? If not, what level of expertise can a copyright holder expect from the courts?

In Vietnam, copyrights are tried in the civil or criminal court of the People's Court system. So far, Vietnam has not established a specialised court for IP. Copyrights, together with other IP issues, are handled in the same courts as other civil or criminal matters. Only a few copyright cases have been tried. Therefore, the court lacks both expertise and experience in copyright.

2.2 Is there any administrative body (eg a copyright office)? If so, does it have any jurisdiction in copyright litigation?

The Copyright Office of Vietnam (COV) is responsible for the administration of copyright. The COV does not have jurisdiction in copyright litigation.

2.3 To what extent are courts willing to consider, or are bound by, the opinions of other national or foreign courts that have handed down decisions in similar cases?

Under the Vietnamese judicial system, the courts are not bound by prior court rulings. The court shall consider the case only based on the applicable laws. Opinions of other national courts or foreign courts may be considered as reference materials or pieces of evidence.

2.4 Who can represent parties before the courts handling copyright litigation?

Anyone who has full civil act capacity and is authorised by the parties can represent the parties before the courts handling copyright litigation, except for the defendant in a criminal case.

2.5 What is the language of the proceedings? Is there a choice of language?

The language used in proceedings is Vietnamese. All documents in other languages shall be translated into Vietnamese for submission to the courts.

3. SUBSTANTIVE LAW

3.1 What types of works are copyrightable under your law? Does your national law provide for a closed list of copyrightable works or for an open list?

Under the IP Law, the following types of work are copyrightable:

- Literary and scientific works, textbooks, teaching materials, and other works expressed in the form of letters or other writing characters;
- Lectures, presentations and other speeches;
- Journalistic works;
- Musical works;
- Dramatic works;
- Cinematographic works and works created by similar methods;
- Plastic-art work, applied fine art works;
- Photographic works;
- Architectural works;
- Graphics, sketches, maps, drawing pertaining to topography, architecture, or scientific works;
- Folk literary and artistic works;
- Computer programs and compilations of data.

Vietnam's IP Law provides a closed list of copyrightable works.

3.2 Is software considered copyrightable under your law?

Yes, software, under 'computer programs,' is copyrightable.

3.3 Does the author of a work have to be a national of your country for the work to qualify as copyrightable or does a work qualify for copyright protection irrespective of the nationality of the author?

Vietnam provides copyright protection for both nationals and foreign citizens/organisations who meet the following conditions:

- foreign organisations or individuals whose works were first published in Vietnam and have not been published in any foreign country, or were simultaneously published in Vietnam within 30 days of their publication in other nations; or
- foreign organisations or individuals whose works are eligible for protection in Vietnam in accordance with international treaties to which the Socialist Republic of Vietnam is party.

3.4 What types of rights are covered by copyright? To what extent are moral rights covered by copyright?

Copyrights include personal rights (moral rights) and property rights.

Moral rights of authors include the following rights:

- to title their works;
- to attach their real names or pseudonyms to their works; to have their real names or pseudonyms acknowledged when their works are published or used;
- to publish their works or authorise other persons to publish their works;
- to protect the integrity of their works, and to prevent other persons from modifying, mutilating or distorting their works in any form prejudicial to their honour and reputation.

Moral rights are inherent to authors and protected indefinitely (except the right to publish his or her work or authorise another person to do so). Moral rights are for the authors to protect the integrity of the work, to object to

any alteration, mutilation, distortion or other modification in any form that is prejudicial against his or her honour and prestige. Even when the authors have died or when the works belong to the public domain, their heirs could bring a lawsuit against the infringers to protect the work's integrity and the authors' fame.

Economic rights include the following rights:

- to create derivative works;
- to perform the work for the public;
- to reproduce the work;
- to circulate to the public the original or copies of the work;
- to communicate the work to the public by wire or wireless means, through electronic information networks or by any other technical means;
- to lease the original or copies of a cinematographic work or a computer program.

3.5 What defences are available to an alleged infringer? To what extent can 'fair use' or 'fair dealing' be used as a defence? If these doctrines do not exist, are there any comparable limitations?

In Vietnam, there is no direct legislation providing 'fair use' or 'fair dealing' as the doctrine to be used as a defence. However, the IP Law provides specific exceptions to exclusive rights, permitting the use of published works without obtaining permission and/or paying royalties and/or remunerations if such use neither affects the normal utilisation of such works nor causes prejudice to rights of the authors and/or copyright holders; and must indicate the authors' names, and sources and origins of the works.

Cases of use of published works where permission or payment of royalties and/or remuneration is not required include:

- (i) self-reproducing a single copy for private scientific research or educational purposes;
- (ii) properly quoting the work without altering the author's words for commentary or for illustration in one's own work;
- (iii) quoting the work without altering the author's words for use in articles, periodical publications, in radio and television programmes and documentaries;
- (iv) quoting the work for teaching in schools without altering the author's words, and not for commercial purposes;
- (v) reproducing the work for archives in libraries for research purposes;
- (vi) performing dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns without any form of charges;
- (vii) directly recording the performances for news programmes or educational purposes;
- (viii) taking photos of or televising plastic art, architectural, photographic and applied fine art works already displayed publicly for introduction purposes;
- (ix) translating the works into Braille or the like for visually impaired people;
- (x) importing copies of others' works for personal use only.

The exceptions numbered (i) and (v) above shall not apply to architectural works, plastic art works and computer programs.

In addition, broadcasting organisations using published works, except cinematographic works, for the purpose of launching broadcasts with sponsorship, advertisements or collection of money in any form shall not be required to ask for permission from, but shall be liable to pay royalties or remunerations to the copyright owner. The level of royalties, remuneration, and other material benefits, as well as means of payment shall be mutually agreed by the concerned parties. In cases where a mutual agreement cannot be reached, the concerned parties shall follow the government's regulations or file a lawsuit in accordance with law. If the use is made without sponsorship, advertisements, or collection of money in any form, permission is not required, and the royalties or remunerations to the copyright owner will be in accordance with the government's regulations.

3.6 Are compulsory licences available? If so, under which circumstances?

Compulsory licences are not available in Vietnam.

3.7 Is there a requirement of copyright registration? Is copyright registration required to enforce a copyright, ie to obtain damages or other relief? Is a copyright deposit required? Is a copyright notice required? What are the consequences, if any, for failure to make a copyright deposit or to display a copyright notice?

Under the IP Law, there is no requirement of copyright registration. The work shall have automatic protection if it is copyrightable. In principle, to enforce a copyright, copyright registration is not required. However, the certificate of copyright registration shall be *prima facie* evidence of the copyright ownership. As such, it is highly recommended to obtain the certificate of copyright registration. There is also no requirement for deposit or notice of copyright work.

3.8 How long does copyright protection last?

Personal rights (moral rights), except for the publication right, shall be protected indefinitely.

In general, publication rights and property rights last throughout the life of the author and the 50 years following the year of the author's death; in respect of works created by co-authors, the term of protection shall end in the 50th year after the year the last surviving co-author dies.

Cinematographic works, photographic works, applied fine art works, and anonymous works shall have the term of protection of 75 years from their first publication. Works which still remain unpublished 25 years after their fixation shall be protected for 100 years as from their fixation date. With regard to an anonymous work, when information on the author becomes available, the protection term shall last throughout the life of the author and the 50 years following the year of the author's death.

Terms of protection shall end at midnight of December 31 of the expiry year of the copyright's protection term.

3.9 How is copyright infringement assessed? Is actual copying to be proved or is substantial similarity sufficient to establish infringement?

Vietnam's IP Law provides a closed list of infringing acts. An act will only be considered as an act of copyright infringement if such act falls within the list. The list does not fit comfortably with other provisions on rights conferred to the right holders and the exceptions.

The law and regulations do not specifically provide if actual copying needs to be proved or only substantial similarity is sufficient to establish infringement. In practice, the right holder shall establish proof of copying either by direct or circumstantial evidence, which often includes access to the protected work and substantial similarity.

3.10 Are there any particularities for assessing copyright infringement for specific types of works (eg software)?

As mentioned above, the exceptions (i) self-reproducing a single copy for private scientific research or educational purposes; and (v) reproducing the work for archives in libraries for research purposes do not apply to architectural works, plastic works and computer programs. Other than this provision, there are no particularities of assessing copyright infringement for specific types of works (eg software).

3.11 Can a copyright be enforced against a trade mark, a domain name, a trade name, a pseudonym or other distinctive signs?

A trade mark is expressed in a visible sign that can be in the form of letters, words, pictures, photographs, including three-dimensional images, or a combination of the above factors, with one or more colours. Under some circumstances, it would be related to or similar to copyrighted works. Therefore, copyright could be enforced against a trade mark.

Naturally, a domain name, a trade name, a pseudonym or other distinctive signs are not copyrightable, and thus copyright could not be enforced against them.

3.12 On what grounds can a copyright be declared invalid?

A copyright registration can be invalidated in the following cases:

- where the grantee is not the author, copyright holder or related right holder;
- where the registered work, phonogram, video recording or broadcast is ineligible for protection;
- where the grant of registered copyright certificates and/or registered related rights certificates is contrary to the provisions of the IP Law.

3.13 To what extent can enforcement of a copyright expose the copyright holder to liability for an antitrust violation?

Vietnam competition law provides a set of articles to prohibit abuse of a dominant or monopoly position on the market. If enforcement of a copyright may distort competition, the copyright holder may be held liable for antitrust violation.

3.14 Are there any grounds on which an otherwise valid copyright can be deemed unenforceable, owing to misconduct by the copyright holder, or for some other reason? Is there a time limit for bringing an infringement action?

The IP Law does not have any provisions regarding unenforceable valid copyright works. The IP Law, however, does have a general statement that the exercise of intellectual property rights must neither be prejudicial to the state's interests, public interests, legitimate rights and interests of other organisations and individuals, nor violate other relevant provisions of law. In circumstances where the achievement of objectives related to defence, security, and people's lives and other interests of the state and society specified in this law should be guaranteed, the state may prohibit or restrict the exercise of intellectual property rights by the holders or compel the licensing by the holders of one or several of their rights to other organisations or individuals with appropriate terms.

For civil and administrative action, the statute of limitation is two years from the date the copyright holders are aware of the infringement.

For a criminal action, the statute of limitations is five years counting from the date a crime is committed. The limitation would be extended if the offender commits a new crime, and the time already past must not be counted, and the statute of limitations for the previous crime shall be recalculated from the date the new crime is committed.

3.15 Can a copyright holder bring a lawsuit claiming both copyright infringement and unfair competition for the same set of facts?

In administrative procedures, an infringing violation shall only be sanctioned once. As such, a copyright holder may not be able to request the authority to take actions against an alleged infringer based on both copyright infringement and unfair competition for the same set of facts.

For civil actions, copyright holders could bring a lawsuit claiming both copyright infringement and unfair competition for the same set of facts but could not claim damages twice.

4. PARTIES TO LITIGATION

4.1 Who can sue for copyright infringement (copyright holder, exclusive licensee, non-exclusive licensee, distributor)? Does a licensee need to be registered to be eligible to sue?

In civil litigation, the following persons/entities can sue for copyright/related right infringement:

- authors;
- owners of copyright and related rights;
- legal inheritors of the authors/owners of copyright and related rights;
- individuals or organisations to whom the rights of the owners of copyright and related rights are transferred;
- individuals or organisations using the works under contract;
- performers;
- producers of audio/visual recordings;

- broadcasting organisations;
- empowered copyright/related rights collective management organisations;
- relevant state authorities and organisations, within their competence and obligations, shall have the right to take civil proceedings to request the courts to protect the public and state interests in the field of copyright and related rights.

The law does not require a licensee to be registered to be eligible to sue.

4.2 Can copyright collecting societies sue for copyright infringement to enforce their members' rights? If so, can copyright holders sue in parallel with the collecting societies or do collecting societies have an exclusive right to sue for certain types of infringement?

Organisations acting as collective representatives of copyright or related rights can initiate a lawsuit to enforce their members' rights if they are vested with a power of attorney to do so. As a case can only be heard once, the copyright holder and the collecting societies cannot in parallel bring the same case to court.

4.3 Under what conditions, if any, can an alleged infringer bring a lawsuit to obtain a declaratory judgment on non-infringement?

The Vietnam legal system does not confer rights on alleged infringers to initiate a lawsuit to obtain a declaratory judgment on non-infringement.

4.4 Who can be sued for copyright infringement? Can the company directors be sued personally? Under what conditions, if any, can someone be sued for inducing or contributing to copyright infringement by someone else?

For civil cases, any person (individual or organisation) who violates copyrights can be sued for copyright infringement. Company directors – with status as individuals – could be sued personally if they personally infringe copyrights. Inducers and contributors to a copyright infringement, except for Internet Service Providers which are separately regulated, may not be sued directly for copyright infringement, but may be jointly liable under tort action.

For criminal cases, only individuals can be sued for copyright infringement. If a company is involved in a copyright infringement, an individual who is proved to have committed a wrongdoing – which could be the CEO or a member of the board of directors – could be held responsible. Inducers and contributors could be sued for complicity in a copyright infringement.

4.5 How is the liability of Internet Service Providers (ISPs) treated? Under which conditions may they be considered jointly liable with the copyright infringer?

ISPs have the duty to remove and delete digital content which violates copyright and related rights, and cut, stop or suspend the internet/

telecommunication line under the state agencies' order. In addition, ISPs shall be directly responsible for paying damages due to violation of copyright and related rights in the following circumstances:

- being the source to start publishing, transmitting or supplying digital content by internet or telecommunication network without permission of the right owner;
- editing, truncating, copying digital content in any manner without permission of the right owner;
- intentionally cancelling or disabling technical measures performed by the right owner for protection of copyright and related rights; or
- operating as a source of secondary distribution of digital content obtained through violation of copyright and related rights.

ISPs may also be considered jointly liable with copyright infringers where they supply technical means to abet copyright infringement.

4.6 Is it possible to add or subtract parties during litigation?

Based on the request of the parties or the prosecutors, the court may consider adding or subtracting more parties during litigation in a copyright infringement case, in both criminal and civil proceedings.

5. ENFORCEMENT OPTIONS

5.1 What options are open to a copyright holder when seeking to enforce its rights in your country?

Copyright holders are open to self-defence remedies or may request an enforcement agency to handle the IPR infringement through civil, administrative or criminal remedies and border control measures.

5.2 Are criminal proceedings available? If so, what are the sanctions?

Criminal proceedings are available for copyright piracy on a commercial scale. Offenders can be subject to a fine from 50 million to 500 million VND or non-custodial reform for up to two years. In addition, they can be subject to an additional fine from 20 million to 200 million VND and banned from holding certain posts or practicing certain professions or performing certain jobs for between one and five years. Offenders shall be imposed a fine of between 400 million and 1 billion VND or sentenced to between six months and three years of imprisonment for committing the crime in either of the following circumstances: in an organised manner; or committing the crime more than once.

In addition, the copyright infringer may also be prosecuted for 'manufacturing and/or trading in fake goods' prescribed under Article 156 in the Penal Code of 1999 (as amended and supplemented in 2009). Under this article, offenders shall be sentenced to from six months to 15 years of imprisonment and may also be subject to a fine of between 5 million and 50 million VND, the partial or entire confiscation of property, and a ban on holding certain posts, practicing certain occupations or doing certain jobs for one to five years.

5.3 Are border measures available?

Under the IP Law, border control measures are available for importation. The law and regulations are not consistent on whether border measures are available for exportation.

5.4 Are proceedings for fast removal of infringing content from the internet available?

There is no specific procedure for fast removal of infringing content from the internet. Under the current law, preliminary injunctions are available for civil actions. However, they are rarely awarded. For administrative actions, ISPs must remove and delete the infringing content under the state agencies' order.

5.5 Are 'graduated response'-type sanctions (such as bandwidth reduction or temporary suspension of internet access) available against infringers online? If so, which authorities (administrative bodies or courts) are competent? How long does the procedure typically last?

Where receiving a written request from the inspector of the Ministry of Information and Communications or the inspector of the Ministry of Culture, Sports and Tourism or other competent state agencies as prescribed by law about the infringing content on the internet, enterprises providing intermediary service have the duty to remove and delete digital content which violates copyright and related rights, and to cut, stop or suspend the internet/telecommunication line. The procedure may last from several weeks to several months depending on the complexity of the case.

5.6 Is it compulsory to send a cease and desist letter to an alleged infringer before commencing copyright infringement proceedings? What are the consequences, if any, for making unjustified threats of copyright infringement?

It is not mandatory to send a cease and desist letter to an alleged infringer before commencing copyright infringement proceedings.

For unjustified threats, the alleged infringers may bring a civil lawsuit against the alleged to recover the damages to compensate for any losses they have suffered as a result of the threats.

5.7 To what extent are courts willing to grant cross-border or extra-territorial injunctions?

The courts cannot grant worldwide injunctions in the copyright fields.

5.8 To what extent do courts recognise the blocking effect of 'torpedo' actions abroad?

According to the legal instruments and in practice in Vietnam, 'torpedo' actions are not available and the courts do not recognise the blocking effect of 'torpedo' actions abroad.

5.9 To what extent are alternative dispute resolution (ADR) methods (such as arbitration or mediation) available to resolve copyright disputes? How widespread are ADR methods and in which sectors?

ADR methods are available for copyright holders. The court also encourages parties to resolve the disputes through conciliation or mediation. In the course of settling civil cases, courts still accept settlement. Arbitration is also available for copyright disputes related to commercial matters. In practice, arbitration is not widely used; mediation and conciliation are more popular.

6. PROCEDURE IN CIVIL COURTS

6.1 What is the format of copyright infringement proceedings?

To initiate a copyright infringement proceeding, a plaintiff will need to file a petition and necessary documents to the people's courts of rural districts, urban districts, provincial capitals or provincial towns within two years from the date on which he discovered that his rights had been infringed. The court will then consider the complaint, and within five working days (in practice it could be one to two months) from the date of receiving the petition, the court must issue a decision on whether to accept the case, to transfer the lawsuit petition to other competent courts or to return the lawsuit petition to the litigator. See Civil Procedure Code (CPC), Article 167. If the court deems that the case falls within its jurisdiction and the lawsuit petition suffices, the court will notify the plaintiff thereof in writing and officially accept the case after the plaintiff submits the court fee advance payment receipts (CPC, Article 171). Within three working days from the date of receiving the cases, the court must send written notices to the defendant and to the Procuracy of the same level on their acceptance of the case (CPC, Article 174). Within 15 days from the date of receiving the notice, the defendant must submit his written opinion on the plaintiff's claims and the supporting evidence, if any (CPC, Article 175.1). The trial preparation time should not exceed six months in cases that do not involve profitable purposes and should not exceed three months in cases involving profitable purposes. During this preparation time, the court will carry out conciliations for the involved parties to reach agreement on the resolution of the case and only after a settlement cannot be reached, will the court proceed with the hearing.

6.2 Are disputed issues decided by a judge or a jury?

At the first instance court, the disputed issues will be tried by a panel consisting of one judge and two people's jurors. In special cases, the trial panel may consist of two judges and three people's jurors. It should be noted that a judge or people's juror must refuse to conduct the procedures or be replaced in cases where: (i) they are concurrently the involved parties, the representatives or relatives of the involved parties; (ii) they have participated in the capacity as defence counsels of the legitimate rights and interests of involved parties, witnesses, expert witnesses or interpreters in the same cases; or (iii) there are clear grounds to believe that they may not be impartial in performing their tasks. See CPC, Article 46.

6.3 To what extent are documents, affidavits, witnesses and/or (court-appointed or private) experts used? Is it possible to cross-examine witnesses?

In Vietnam, the court relies heavily on testimonies or opinions of expert witnesses due to the judges' limited knowledge and experience in the field of intellectual property. According to Article 67 of the CPC, expert witnesses are persons who have law-prescribed necessary knowledge and/or experience in the fields of the objects requiring expertise. Upon the optional agreement of the involved parties, or at the request of one or more of the involved parties, judges may issue decisions calling on expert witnesses for their expertise (Article 90). The court might also consider relevant documents, affidavits and witness testimonies to decide on the case. According to Article 65 of the CPC, persons who know details related to the contents of cases may be summoned by courts to participate in the procedures in the capacity as witnesses. There is no provision in Vietnam's national legislation regarding the cross-examination of witnesses.

6.4 To what extent is survey evidence used (eg to prove substantial similarity)? What is its relevance in proceedings (eg party allegation, evidence)? Who decides which consumers are questioned in the survey (eg the court, court expert)? What level of cost should one expect to incur to carry out a survey? Are these costs recoverable from the losing party?

Vietnam's national legislation does not have any provision that prohibits the use of survey evidence. The CPC only stipulates that evidence shall be gathered from the following sources: (i) readable, audible or visible materials; (ii) exhibits; (iii) involved parties' testimonies; (iv) witnesses' testimonies; (v) expert conclusions; (vi) on-site appraisal minutes; (vii) practice; (viii) property evaluation results; (ix) other sources prescribed by law. The costs of carrying out the survey would only be recoverable from the losing party if the winning party can prove that these costs are parts of the actual damages that they incur.

6.5 Is evidence obtained for criminal proceedings admissible in civil proceedings, and vice versa?

There is no provision in Vietnam's national legislation that prohibits the use of evidence obtained for criminal proceedings in civil proceedings and *vice versa*.

6.6 To what extent is pre-trial discovery permitted? If it is permitted, how is discovery conducted? If it is not permitted, what other, if any, mechanisms are available for obtaining evidence from an adverse party or from third parties?

The term 'pre-trial discovery' is not found anywhere in the domestic statutes. The law only stipulates that the burden of proof falls on the parties requesting the courts to protect their legitimate rights and interests and the parties involved have the responsibility to seek, discover and submit to courts

evidence to prove that their requests are well-grounded and lawful. See CPC, Article 79. Litigants have the right to study the evidence submitted by the other party to the court. For collecting evidence that is under the control of the other party, either the plaintiff or the defendant has the right to request the court to compel the party to produce such evidence.

6.7 What level of proof is required for establishing infringement or invalidity?

Vietnam's national legislation does not have any specific regulation on the level of proof required. However, there is no obligation to submit evidence that proves the offence beyond a reasonable doubt.

6.8 How long do copyright infringement proceedings typically last? Is it possible to expedite this process?

Copyright infringement proceedings typically take from six to 18 months for a final decision to be made.

6.9 What options, if any, are available to a defendant seeking to delay the proceedings? Under what conditions, if any, can proceedings be stayed? How can a plaintiff counter delaying tactics of a defendant?

In practice, the defendant usually uses absence from trial as a delaying tactic since if he does not show up at the first hearing, the court will grant him one more chance to re-appear. However, a plaintiff can always counter this delaying tactic since if the defendant still does not appear after being summoned for the second time, the court will conduct the hearing *ex parte*. Moreover, the time limit for postponing a court session must not exceed 30 days beyond the issue of the decision to postpone the court session. See CPC, Article 208.1.

7. FINAL REMEDIES

7.1 What remedies are available against a copyright infringer (final injunction, delivery up or destruction of infringing goods, publication of the decision, recall-order, monetary remedies, etc)?

In Vietnam, a copyright-infringing act, depending on the level and seriousness, or upon the copyright holder's request, can be handled in accordance with administrative, civil, or criminal remedies.

Decree No. 131/2013/ND-CP of 16 October 2013 on sanctioning of administrative violations in copyright and related rights (Decree 131) guides in detail the available forms of administrative remedies. According to Decree 131, the infringer will be compelled to cease the infringing acts and shall receive a warning or have imposed on him a monetary fine. The highest fine level to be imposed on an individual copyright infringer is VND 250 million. The maximum fine level applicable to an organisation committing the same infringement is VND 500 million.

In the case of civil remedies, Article 202 of the IP Law promulgates five types of civil remedies that courts shall apply against a copyright

infringer: (i) compelling the termination of infringing acts; (ii) compelling a public apology and rectification; (iii) compelling the performance of civil obligations; (iv) compelling the payment of damages; (v) compelling destruction, distribution or use for non-commercial purposes of goods, raw materials, materials and means used largely for the production or trading of IPR-infringing goods, provided that such destruction, distribution or use does not affect the exploitation of rights by intellectual property right holders.

Criminal penalties for copyright infringement are set forth in Article 170a of the Penal Code (as amended in 2009). According to the Penal Code, the offenders can be imposed a fine between 400 million and 1 billion VND or be sentenced to between six months and three years of imprisonment if they commit the crime: (i) in an organised manner; or (ii) more than once. In addition, the offenders may also have imposed on them a fine of between 20 million and 200 million VND, and be banned from holding certain posts or practicing certain professions or performing certain jobs for between one and five years.

7.2 To the extent it is possible to obtain a final injunction against future infringement, is it effective against the infringer's suppliers or customers?

There is no provision in Vietnam's national legislation stipulating this.

7.3 What monetary remedies are available against a copyright infringer (reasonable royalty, lost profits, account of profits, or some other basis)? Are punitive damages available? If so, under what conditions? Are liability and quantum of monetary remedies assessed at the same time by the court or is the quantum assessed at a separate, later stage from liability?

Pursuant to Article 204 of the IP Law, the types of monetary remedies available against a copyright infringer are remedies for material damage and spiritual damage. Material damage includes property losses, decreases in income and profit, loss of business opportunities, reasonable expenses for prevention and remedying of such damage. Spiritual damage includes damage to honour, dignity, prestige, reputation and other spiritual losses caused to performers or authors of literary, artistic and scientific works.

The plaintiff can request the court to decide on the compensation level of the above damages on one of the two following bases: (i) total material damage calculated in an amount of money plus profit gained by the defendant as a result of an act of IP infringement where the reduced profit amount of the plaintiff has not yet been calculated into such total material damage; (ii) the price of the licensing of an IP object with the presumption that the defendant has been licensed by the plaintiff to use that object under a licence contract within a scope corresponding to the committed infringing act. If it is impossible to determine the level of compensation on those two bases, such compensation level will be set by the court, but must not exceed VND 500 million (USD 23,000).

Punitive damages are not available under Vietnam law. It is also not

provided under the law whether or not liability and quantum of monetary remedies are assessed at the same time by the court.

8. PRELIMINARY RELIEF

8.1 Is preliminary relief available? If so, what preliminary measures are available (eg preliminary injunction) and under what conditions? Is urgency a condition for the court to grant preliminary relief? If so, how is it determined?

Preliminary relief is available. In Vietnam's national legislation, preliminary relief is referred to as 'provisional measures'. The plaintiff is entitled to request the court to apply provisional measures when: (i) there is a threat of irreparable damage to him; (ii) there is a threat of dispersal or destruction of goods suspected of infringing upon IP rights and relevant evidence if they are not protected in time. See IP Law, Article 206.

Pursuant to Article 207 of the IP Law, the provisional measures available are: (i) seizure; (ii) distraintment; (iii) sealing; ban from alteration of original state; ban from movement; (iv) ban on ownership transfer. In addition, other provisional measures stipulated by the CPC may also be applied by the court at the request of the plaintiff when necessary. In particular, one or a combination of the following forms of provisional measures may also be taken: (i) blockading of accounts or assets; (ii) forbidding the defendant from conducting a certain action or forcing the defendant to conduct a certain action. To request the application of the provisional measures, the plaintiff shall be requested to: (i) pay a deposit amounting to 20 per cent of the value of the articles being the subject of the request or at least VND 20 million (USD 950) if it is impossible to determine the value of the articles being the subject of the request; or (ii) provide a bank guarantee.

However, it should be noted that regardless of the detailed regulations on provisional measures set forth by the law, practical application of these measures is limited since Vietnamese judges rarely issue injunctions.

8.2 Is ex parte relief available, where defendant is given no notice at all? If so, under what conditions?

Ex parte relief is available in Vietnam, but only under the condition that there exists a danger of irreparable damage to the plaintiff, or there is a significant risk that the defendant/infringer will destroy or disperse the evidence.

8.3 Is it possible to file a protective writ, ie a letter setting out possible defences by a potential defendant, at the court at which an ex parte application may be filed against that defendant? If so, is the protective writ communicated to the plaintiff and what effect does it have on the preliminary injunction proceedings? For how long does the court take the protective writ into consideration? Can the protective writ be renewed?

There is no regulation regarding protective writs in Vietnam's national legislation.

8.4 Is the plaintiff entitled to ask for an order that the defendant's premises are searched and a description of the infringing goods (and the accounting data relating thereto) is made in order to establish proof of infringement? If not, what other mechanisms, if any, are available for seizing and preserving evidence for trial?

Pursuant to Article 206 of the IP Law, the plaintiff is entitled to request the court to apply provisional measures to seize and preserve evidence for trial where the goods suspected of infringing IP rights or evidence related to the act of infringing upon IP rights are likely to be dispersed or destroyed unless they are protected in time. In addition, the plaintiff can also request competent administrative authorities to conduct a search of places where infringing goods, material evidence and means are hidden. See IP Law, Article 215.2.d.

8.5 Can the defendant put the validity of a copyright at issue in preliminary injunction proceedings?

There is no provision in Vietnam's national legislation which prohibits the defendant from questioning the validity of the copyright at issue in preliminary injunction proceedings or during any other part of the copyright litigation proceedings.

8.6 What is the format of preliminary injunction proceedings?

To start the preliminary injunction proceedings, the plaintiff must file the request for application of provisional measures to the competent courts. Depending on the request, the plaintiff will be asked to provide the courts with evidence to prove the necessity to apply such provisional emergency measures. The plaintiff will also be asked to deposit a security bond of 20 per cent of the value of the goods subject to the application of provisional measures. Within three days after the receipt of the request, the judges assigned to settle the cases must issue decisions on whether to apply the provisional emergency measures or not. If the request is rejected, the judges must notify this in writing to the plaintiff and clearly state the reasons for rejection. In some certain cases, the judges might even grant the decisions immediately upon receipt of the request. See CPC, Article 117 and IP Law, Article 206-210.

8.7 If a preliminary injunction is granted and the main infringement action is finally lost, can the defendant claim damages for the unjustified preliminary injunction? If so, how are the damages calculated? Must the plaintiff provide some form of bond/guarantee to compensate the defendant in the event that the preliminary injunction is later held to have been wrongly imposed?

Pursuant to Article 208.2 of the IP Law, the plaintiff will be obliged to pay compensation for damage caused to a defendant who is subject to the provisional measures in cases where the latter is found to have not infringed upon the plaintiff's copyrights. Therefore, to secure the performance of this obligation, the plaintiff will have to deposit at the beginning of the

preliminary injunction proceedings: (i) a sum of money equal to 20 per cent of the value of the goods subject to the application of urgent provisional measures, or at least VND 20 million (USD 950) where it is impossible to value such goods; and (ii) a guarantee deed issued by a bank or another credit institution.

8.8 To what extent are documents, affidavits, witnesses, survey evidence, and/or (court-appointed or private) experts used in preliminary injunction proceedings?

As discussed in question 7 above, Vietnamese judges rely heavily on testimonies or opinions of experts in every stage of copyright litigation proceedings. Other types of evidence such as documents, affidavits or testimonies of witnesses are also considered. Survey evidence is rarely seen presented before courts.

8.9 What level of proof is required for establishing infringement or invalidity in preliminary injunction proceedings?

Regulations regarding the level of proof required are not available in Vietnam's national legislation. However, there is no obligation to submit evidence that proves the offence beyond a reasonable doubt. It should be noted that evidence that is legalised by bailiffs is highly valued.

8.10 How long do preliminary injunction proceedings typically last?

According to Article 117 of the CPC, the preliminary injunction proceedings might be very short in certain cases where the judges decide that it is necessary to grant the injunction immediately upon receipt of the plaintiff's request. In principle, normally it would take three days for the judges to issue the decisions.

8.11 Where a preliminary injunction is granted, is it necessary to start main proceedings to confirm the preliminary injunction? In the affirmative, what is the deadline?

Unlike other countries, preliminary injunctions only arise under civil action; they are not separate actions from the civil action.

9. APPEAL PROCEDURE

9.1 What avenues of appeal are available for a defeated party in main proceedings or preliminary injunction proceedings? Under what conditions?

In main proceedings, the defendant has the right to appeal the judgment of the first-instance court to the immediate superior court within 15 days from the date of the announcement of the judgment. See CPC, Article 242, 243 and 245. In addition, the director of the Procuracy of the same or immediately higher jurisdiction also has the right to protest that judgment and request the superior court to directly resolve the matter in accordance with the appellate proceedings. See CPC, Article 250.

With respect to preliminary injunction proceedings, the defendant has the

right to complain, and the procuracies have the right to petition to the chief judges of the court handling the case. The time limit for lodging an appeal in the case of preliminary injunction proceedings is three working days after the receipt of the decision. See CPC, Article 124.

9.2 If an appeal is filed, is relief usually stayed pending the outcome of the appeal?

Remedies awarded by the first instance court will stay pending during the appeal proceeding, except for parts of the remedies granted in the first-instance court’s judgement that are not appealed.

9.3 How long do appeal proceedings typically last?

An appeal proceeding typically lasts from one to four months, depending on the complexity of the case in question.

10. LITIGATION COSTS

10.1 What level of cost should one expect to incur to take a case through to a first instance decision, preliminary injunction proceedings and/or appeal proceedings?

The court fee is calculated on the value of the disputed property (or the amount being claimed). According to Ordinance No.10/2009/PL-UBTVQH12 on court fees dated 27 February 2009, the court fee is calculated as follows:

Value of disputed property	Court fee
From VND 40,000,000 and below	VND 2,000,000
From over VND 40,000,000 to VND 400,000,000	5% of value of disputed property
From over VND 400,000,000 to VND 800,000,000	VND 20,000,000 + 4% of value of disputed property over VND 400,000,000
From over VND 800,000,000 to VND 2,000,000,000	VND 36,000,000 + 3% of value of disputed property over VND 800,000,000
From over VND 2,000,000,000 to VND 4,000,000,000	VND 72,000,000 + 2% of value of disputed property over VND 2,000,000,000
More than VND 4,000,000,000	VND 112,000,000 + 0.1% of value of disputed property over VND 4,000,000,000

It should be noted that in practice, this high expense (the costs involved usually exceed the recoverable damages) and the prolonged process of handling disputes lead to a common tendency amongst Vietnamese people toward not bringing copyright cases to court, since the cost that the plaintiff

has to incur includes not only the court fees but also the legal fees and other costs. Typically, the legal fees can range from USD 3,000 to USD 50,000.

10.2 Can attorneys' fees and costs be recovered by the winning party?

According to Article 205.3 of the IP Law, the plaintiff has the right to request the court to compel the defendant to pay reasonable costs of hiring attorneys.

11. FORTHCOMING LEGISLATION

11.1 What are the important developing and emerging trends in your country's copyright law?

In Vietnam, much attention has been paid with respect to copyright enforcement recently. By gradually bringing relevant copyright legislation in line with the TRIPs Agreement, the government has displayed a continued will to strengthen copyright enforcement and protect the legitimate rights and interests of the copyright holders. Accordingly, copyright owners can expect the national legal framework regarding copyright enforcement to improve quickly in the coming years.

11.2 To the extent it relates to copyright enforcement, please outline any major copyright legislation in the pipeline.

Legislators have recently been considering a revision of the CPC with regard to regulations on provisional measures. They also aim to amend certain provisions in the CPC as well as in the IP Law to ease the plaintiff's burden of proof in civil proceedings.

The promising policy of establishing a specialised judicial tribunal to handle IP matters is also in the pipeline. Together with that, Vietnam is also focusing on training judges in IP matters, especially in the application of provisional measures and the calculation and awarding of monetary damages.

12. USEFUL REFERENCES

12.1 Please identify any useful works of reference relating to copyright law and copyright litigation in your country, including useful websites.

Useful references relating to copyright law and copyright litigation in Vietnam include:

IP Law and treaties

- Law on Intellectual Property No. 50/2005/QH11 of 29 November 2005, (promulgated by the Order No. 28/2005/L-CTN of 12 December 2005, of the President of the Socialist Republic of Vietnam) (2005);
- Civil Code (2005);
- Civil Procedure Code (2004);
- Criminal Code (1999);
- Bilateral Trade Agreement between Vietnam and the United States of

America (2000): <http://hanoi.usembassy.gov/econ12.htm>;

- Bilateral Intellectual Property Agreement between Vietnam and Switzerland (1999): www.wipo.int/wipolex/en/other_treaties/text.jsp?doc_id=135433&file_id=184319.

National Organisations

- Copyright Office (Ministry of Culture and Information): www.cov.org.vn;
- National Office of Intellectual Property (Ministry of Science and Technology): www.noip.gov.vn;
- General Department of Vietnam Customs (Ministry of Finance): www.customs.gov.vn/Default.aspx?tabid=765.

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