

IP in business transactions: Vietnam overview

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OVERVIEW OF MAIN IPRS

1. What are the main IPRs in your jurisdiction? How are they protected?

Patents

Patents are available for inventions and utility solutions (petty patents). To receive protection, a patent application must be substantively examined and granted by the National Office of Intellectual Property of Vietnam (NOIP). Provisional rights are available, in which the applicant of a published patent application, on discovering that its invention or utility solution is being used by another person for commercial purposes, has the right to serve a written notice to such user regarding the patent application and has the right to request remuneration from the user when a patent is granted, if such use is not stopped (*Article 131, Law on Intellectual Property*).

Trade marks

In Vietnam, trade marks are protected through registration (directly with the NOIP or via the Madrid system). Well-known trade marks, such as McDonald's, can be protected without registration.

However, it is advisable to register all valuable trade marks; although there are some limited protections for unregistered well-known trade marks, enforcement is time-consuming and difficult.

Vietnam is a member of both Madrid Agreement and Madrid Protocol for trade marks.

Copyright

A copyrightable work has automatic protection if it is fixed in some material form and created personally by the authors through their intellectual labour without copying others' works, irrespective of registration. In Vietnam, copyrights can be registered with the Copyright Office of Vietnam (COV), but this is not mandatory for protection. Nevertheless, registration is recommended to accelerate enforcement.

Under the laws of Vietnam, copyright includes moral rights and economic rights. Moral rights of authors include the right to:

- Title their works.
- Attach their real names or pseudonyms to their works and to have those real names or pseudonyms acknowledged when their works are published or used.
- Publish their works or authorise other persons to publish their works.
- 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, protected indefinitely and non-transferable (except the right to publish his or her work or authorise another person to do so). It is unclear under the law if moral rights can be waived. Even when an author has died or when the work belongs to the public domain, the author's heirs could bring a

lawsuit against infringers to protect the work's integrity and the author's reputation.

Design rights

A design patent application must be substantively examined and granted by the NOIP to be protected. As with invention patents, provisional rights are available, in which the applicant of a published design patent application, on discovering that its design is being used by another person for commercial purposes, has the right to (*Article 131, Law on Intellectual Property*):

- Serve a written notice to such user regarding the design patent application.
- Request remuneration from the user when a relevant design patent is granted if such use is not stopped.

Trade secrets and confidential information

Confidential information can be protected in Vietnam, but it is usually protected as a trade secret. Under Vietnamese law, information that is neither common knowledge nor easily obtained, valuable to business, and provides a commercial advantage can be considered a trade secret, provided that the owner has implemented measures to protect the information.

Protective measures can include:

- Stamping the documents with "confidential".
- Requiring non-disclosure agreements to be signed by those who access the information.
- Generally limiting access to the information.

Under Vietnam's laws, confidential information that is ineligible for protection as trade secrets includes personal identification secrets, state management secrets, national defence and security secrets and other confidential information unrelated to business.

Other

Unregistered trade dress (for example, the look of a product's packaging) can be protected as a commercial/trade indication. Generally, trade dress can be considered a commercial/trade indication if it has become associated in the minds of consumers with the product or product manufacturer.

Vietnam grants protections for satellite signals, circuit board layouts and plant varieties under its Law on Intellectual Property and the Brussels Convention.

Trade names are protected in Vietnam, with rights to trade names established based on the lawful use of them.

Vietnam also protects geographical indications if the product bearing the geographical indication:

- Originates from the area, locality, territory or country corresponding to such geographical indication.
- Has a reputation, quality or characteristics mainly attributable to geographical conditions of the area, locality, territory or country corresponding to such geographical indication.

Vietnam has a domain name registration system, and has regulations on domain name disputes. Nonetheless, early registration of domain names is recommended, because Vietnam's domain name dispute resolution procedures are time-consuming and can be costly.

MAINTAINING IPRS

Search and information facilities

2. What facilities are available to conduct IP searches and obtain IP information on registered IP rights?

Patents

Patent searches including pre-filing searches and freedom-to-operate searches, among others, can be conducted by any party on the National Office of Intellectual Property's (NOIP) official database available on its website (including a general database and an online library of granted patents), or manually in the *Official Industrial Property Gazette of Vietnam*. The online database is not so reliable and not so up-to-date because of the delay in processing. Additionally, for this database, specifications and communications from the patent office are not available. Any searches can also be conducted using the internal database of the NOIP.

Trade marks

Vietnamese trade mark information is available at the NOIP's public database (<https://iplib.noip.gov.vn>). Additionally, information on Vietnamese trade marks can be found at:

- ASEAN TMview (www.asean-tmview.org/tmview/welcome).
- WIPO's Global Brand Database (<http://www.wipo.int/branddb/en/>).

These are public databases, but are often not up-to-date; therefore, searches of these public databases may not be reliable and exhaustive. For more accurate results, the search must be conducted through the NOIP's internal database, by using an IP advisor's services.

Post-registration searches for infringing marks can also be conducted using the official NOIP database. Further, the *Official Industrial Property Gazette of Vietnam*, which is published monthly, can be searched manually for infringing applications or registrations.

Copyright

There is currently no copyright search system in Vietnam.

Design rights

See above, *Patents*.

Trade secrets and confidential information

There is currently no trade secret/confidential information search system in Vietnam.

Maintenance of main IPRs

3. What steps must a business take to maintain the registration and legally protectable status of its main IPRs?

Patents

To maintain a patent for invention/utility solution, an annuity must be paid to the patent office within six months from the annuity deadline, which is the anniversary of the granting date. A late payment within six months is possible with extra fees.

Trade marks

The steps a business must take to maintain the registration and status of its trade marks include:

- Use the mark within five years of registration to avoid potential cancellation based on non-use. The owner should also gather evidence of use, as if a non-use cancellation action is filed against the mark, the trade mark owner will bear the burden of proof that the mark has been used to defend the registration.
- File a renewal request every ten years. The renewal request can be filed six months prior to and after the expiry date.
- Take actions against the registration of any subsequent marks that are similar or identical to a well-known mark of the business, even if the goods/services bearing such marks are not similar, because the co-existence of these marks will weaken the distinctiveness of the well-known mark.
- Take steps to reduce the risk of genericisation by educating on appropriate trade mark use, avoiding use of the registered mark in a generic manner, and systematically and effectively enforcing the trade mark rights.

Copyright

Moral rights are protected indefinitely, with the exception of the author's right to publish his or her work or authorise another person to do so. The protection period of the right to publish a work or authorise another person to do so, and the economic rights of copyrighted works varies depending on the type of work (*Article 27, Law on Intellectual Property*). For cinematographic works, photographic works, applied art works and anonymous works, the term of copyright protection is 75 years from the date of first publication. If the cinematographic work, photographic work, or applied art work has not been published within 25 years from the date of its formulation, the term of protection will be 100 years from the date of formulation. Other copyrighted works will be protected for the whole life of the author and 50 years after his/her death. When the protection period ends, the copyright will fall into the public domain.

Design rights

For a design patent, the initial term of protection begins at the granting date and ends five years following the filing date. A design patent is renewable for two consecutive five-year terms. A renewal request should be filed within six months before the expiration date. A six-month grace period is available with a surcharge.

Trade secrets and confidential information

Trade secrets are maintained provided that the owner implements necessary measures to keep the information qualified as trade secret as described by the law.

Monitoring infringement

4. What steps can a business take to avoid infringing another party's IPRs and to monitor whether another party is infringing its IPRs?

Patents

To avoid infringing another party's IPRs, a freedom-to-operate search should be conducted regarding pending patent applications and/or granted patents in the field of business.

To monitor whether another party is infringing the IPRs of a business in Vietnam, investigations in the market can be carried out regarding the products/processes protected by the IPRs which are under suspicion.

Trade marks

To avoid infringing another party's IPRs, a business should have its trade marks protected in Vietnam for the goods or services of interest. If an application is not submitted before using the mark, or the application is pending, the business should conduct a search to assess the risk of infringement.

The business should monitor new filings to check whether any third parties are attempting to register confusingly similar or identical trade marks. It is best to oppose such trade marks before registration, because it would be more time-consuming, difficult and costly to cancel a registered trade mark in Vietnam.

The business can also conduct periodic market checks to detect potential infringements of use in the market.

To avoid infringing another party's IPRs, a clearance search/similarity search should be conducted regarding the pending trade mark application and/or granted trade marks of other third parties in the field of business.

Copyright

To avoid infringing the copyright of another party, a business must ensure that any works created by the company and/or its employees are original and not copied from any other sources.

A business also needs to conduct periodic market checks to inspect the market for potential infringements.

Design rights

See above, *Patents*.

Trade secrets and confidential information

To avoid infringing another party's IPRs, a business should ascertain that its trade secret is lawfully acquired.

A business should also conduct periodic market checks to inspect the market for potential infringements.

EXPLOITING IPRS

5. What are the main steps in conducting an IP audit in your jurisdiction to determine the content of an IP portfolio?

The main step in an IP audit in Vietnam to determine the content of an IP portfolio is to verify that the patents/trade marks are still in force through a search at the National Office of Intellectual Property (NOIP). Additionally, attention must be paid to determining whether all licence agreements, assignments and amendments have been properly recorded with the NOIP. The business must request a search of all registrations or applications in the name of the target company or owner.

ASSIGNMENT

Scope of assignment

6. On what basis can the main IPRs be assigned?

Patents and design rights

Patent and design rights can be assigned in whole or the patent owner can share the whole patent rights with others by an assignment to become co-owners. The assignment contract must be registered with the patent office to be effective.

Additionally, pending applications can also be assigned.

Trade marks

Trade mark rights can be assigned in whole or in part (entire list of goods/services or some goods/services) within the scope of protection of the mark. The assignment of the rights to marks must not cause any confusion as to properties or origins of goods or

services bearing such mark, and can only be transferred to entities that satisfy conditions to register such marks.

Copyright

Copyright assignment can be made in whole or in part. The moral rights, except for the right of publication, cannot be assigned. Performers are not permitted to assign the moral rights (*Article 29.2, Law on Intellectual Property*).

Where a work, performance, audiovisual fixation, or broadcast is under joint ownership, the assignment of copyright or related rights therein must be agreed upon by all co-owners. In a case of joint ownership of a work, performance, audiovisual fixation, or broadcast which is composed of separate parts detachable for independent use, copyright holders or related right holders may assign their copyright or related rights in their separate parts to other organisations or individuals.

Formalities for assignment

7. What formalities are required to assign each of the main IPRs?

Patents/trade marks must be assigned via a written assignment. The assignment will be only valid when it is recorded with the National Office of Intellectual Property (NOIP). For the purpose of recordal, the assignment agreement must be signed by both parties. Notarisation is not required if the original deeds of assignment are submitted. The assignment agreements must contain mandatory information/terms, which are listed in the following section.

A copyright assignment must be in written form and contain the required information, namely (*Article 46, Law on Intellectual Property*):

- Names and addresses of the assignor and the assignee.
- Assignment basis.
- Payment price and mode.
- Rights and obligations of the involved parties.
- Liability for contract breaches.

The law is silent on the issue of recordal of copyright assignments.

Main terms for assignments

8. What main terms should be included in an assignment of IPRs?

There are several mandatory terms for the assignment of an IPR, including:

- Price (consideration), which must be specifically indicated.
- Names and addresses of the parties.
- Grounds for the assignment (details on the assigned subjects).
- Rights and obligations of the respective parties.

LICENSING

Scope of licensing

9. On what basis can the main IPRs be licensed?

Patents

Patent licences can be made in whole or in part, and can be made with territorial and term restrictions. Licence agreements can be exclusive or non-exclusive.

Compulsory licensing is available. A pending application cannot be licensed.

Trade marks

Licences can be made in whole or in part (entire list of goods/services or some goods/services), provided that the licence will not cause confusion to customers as to the owners of the mark after licensing, and can be made with jurisdictional and territorial restrictions. Licence agreements can be exclusive or non-exclusive.

The licence agreement is valid against the two parties upon signing. However, the licence agreement is only valid against third parties if it is recorded with the National Office of Intellectual Property (NOIP).

Copyright

Copyright licences can be made in whole or in part. The moral rights are not permitted to be licensed except for the right of publication. Performers are not permitted to license the moral rights specified in Article 29.2 of the Law on Intellectual Property.

Where a work, performance, audiovisual fixation or broadcast is under joint ownership, the licensing of copyright or related rights therein must be agreed upon by all co-owners. In case of joint ownership of a work, performance, audiovisual fixation or broadcast which is composed of separate parts detachable for independent use, copyright holders or related right holders may license their copyright or related rights in their separate parts to other organizations or individuals.

Design rights

Design licenses can be made in whole or in part, and can be made with territorial and term restrictions. Licence agreements can be exclusive or non-exclusive.

Pending applications cannot be licensed.

Formalities for licensing

10. What are the formalities to license each of the main IPRs?

Licence agreements in Vietnam must be in writing. Recordal of the licence agreement at the National Office of Intellectual Property of Vietnam (NOIP) is not obligatory, and an unregistered licence agreement is valid between the parties. However, a licence agreement must be registered with the NOIP to be enforceable against third parties (which may be interpreted to include a bank or a party who challenges the mark for non-use, among others).

Importantly, only registered trade marks can be licensed. If the trade marks are licensed to a regional master licensee before being sublicensed to a Vietnamese entity, then both the master and sublicense must be registered with the NOIP.

As for copyright and related rights, a contract for licensing must be made in writing and include the following principal contents:

- Full names and addresses of the licensor and the licensee.
- Grounds for the licence.
- Scope of the licence.
- Price and method of payment.
- Rights and obligations of the parties.
- Liability for contractual breach.

The performance, amendment, termination or cancellation of a contract for the licensing of copyright or related rights must comply with the provisions of the Civil Code.

Main terms for licences

11. What main terms should be included in an IP licence?

A licence agreement must comprise at least the following (*Article 140, Law on Intellectual Property*):

- Names and addresses of the parties.
- Information to identify the IPR.
- Type, scope (including territorial scope), term and price of the licence.
- Rights and obligations of the respective parties.
- Signatures of the representatives of the both parties.

TAKING SECURITY

12. What are the key issues in taking security over the main IPRs?

Security taken over IPRs in Vietnam is rare, but not legally prohibited. The taking of security over copyrights and trade marks has taken place in the jurisdiction. Vietnam has no guidelines on valuing such assets, and authorities are often sceptical of valuations. Decree 102, which was issued in late 2010, affirmed that IPRs are considered an asset and can be used to contribute capital to a company.

13. What are the main security interests taken over IPRs?

In Vietnam, the registration of a security interest on IPRs is possible and required. The security interest should be registered at the National Registration Agency for Secured Transactions (NRAST) under the Ministry of Justice.

The required documents for registering a security transaction are:

- Request following the prescribed form.
- Executed documents signed between the securing party and the secured party in which the patent was pledged/mortgaged. These documents can be:
 - security agreement;
 - security transactions; and
 - notification of distrained assets.
- Power of attorney if the request is filed by an IP agent.

M&A Due diligence

14. What IPR-related due diligence is commonly carried out in both a share sale or merger and an asset sale?

The same type of due diligence is carried out regardless of whether there is a share sale or an asset sale.

In general, due diligence exercises include:

- Check of validity of IP registrations.
- Reviews to determine whether the products of the company tend to infringe third-party IPRs.
- Licence agreements scrutinised to ensure that they have been properly registered.

It is advisable to examine whether a trade mark has been used in Vietnam, because it can be subject to a cancellation action for non-use if it is not used within five consecutive years before the date of a request for its cancellation based on non-use.

Additionally, product registrations with health authorities for products such as cosmetics, food and pharmaceuticals should be checked for validity.

Warranties/indemnities

15. What IPR-related warranties and/or indemnities are commonly given by the seller to the buyer in both a share sale or merger and an asset sale?

In general, a warranty of proper title is provided in both cases.

Transfer of IPRs

16. How are the main IPRs transferred in both a share sale or merger and an asset sale?

Under Vietnam's current practice, the transfer of IPRs in a share sale or an asset sale is often treated as an assignment of IPRs, while the transfer of IPRs in a merger is treated as an amendment of IPR owners. After such transfer, if the owner of the IPR is changed, the assignment/amendment must be recorded with the National Office of Intellectual Property of Vietnam (NOIP). If there is no change in the name of the owner of the IPR, and there is only a change in the ultimate shareholder of the entity holding the IPR, it may not be necessary to record such assignment/amendment agreement with the NOIP.

JOINT VENTURES

17. Is it common for companies to set up joint ventures in your jurisdiction to develop projects that heavily involve IPRs?

Generally, it is not common for companies to set up joint ventures, unless they are operating in a field where the government requires a joint venture, such as telecommunications.

Most companies that are heavily involved with IPRs set up 100% foreign-owned companies. This serves not only to protect their IPRs, but more importantly to ensure complete control over the management of the company.

In cases in which a joint venture is made, there are often acknowledgements in the joint venture contract affirming that ownership in IPRs is not transferred to the joint venture partner but remains under the sole ownership of the original owner.

COMPETITION LAW

Main provisions and common issues

18. What are the main provisions of your national competition law that can affect the exploitation of the main IPRs?

Vietnamese competition law is not yet well developed for IPRs. However, there are a few provisions related to IPRs, namely:

- Comparative advertising is not allowed (see *Question 21*).
- Misappropriation or imitation of a commercial indication of a competitor's product or services can be considered an act of unfair competition, and subject to an administrative fine or civil action. A commercial indication can include:

- trade dress;
- a trade mark; or
- other aspects of a product.

- Appropriation of a domain name can also be considered an act of unfair competition under Vietnamese law.

19. What are the most common national competition law issues that arise in the exploitation of the main IPRs?

Vietnamese competition law is not well developed for IPRs (see *Question 18*). However, authorities often refuse to record licence agreements if there are terms and conditions that are considered unfair. Under the Law on Intellectual Property, a licence agreement must not contain provisions that unreasonably restrict the right of the licensee, and in particular the following provisions that do not derive from the rights of the licensor:

- Prohibiting the licensee from improving an industrial property object (other than marks); compelling the licensee to transfer free of charge to the licensor improvements of the industrial property object made by the licensee or the right of industrial property registration or industrial property rights to such improvements.
- Directly or indirectly restricting the licensee from exporting goods produced or services provided under the industrial property object licence contract to territories where the licensor neither holds the respective industrial property right nor has the exclusive right to import such goods.
- Compelling the licensee to buy all or a certain percentage of raw materials, components or equipment from the licensor or a third party designated by the licensor not for the purpose of ensuring the quality of goods produced or services provided by the licensee.
- Prohibiting the licensee from complaining about or initiating lawsuits with regard to the validity of the industrial property rights or the licensor's right to license.

If a licence agreement contains any of the above provisions, such provision(s) will be automatically invalid.

Additionally, products produced under a licence must clearly indicate on their packaging that the product was produced under a licence agreement.

Exclusions/exemptions

20. What exclusions or exemptions are available for national competition law issues involving the exploitation of the main IPRs?

As competition law is not well developed for IPRs, not many exemptions are available (see *Question 18*). Under the Law on Intellectual Property, parallel imports are allowed in Vietnam. Despite this, many rights holders can still find grounds to take action against parallel imports on non-IPR grounds, such as improper labelling or failure to meet registered product quality or specifications.

ADVERTISING

21. To what extent do advertising laws impact on the use of third party trade marks?

Generally, the use of a third party's trade marks without its consent is illegal. Further, the Law on Competition prohibits comparative

advertising as it constitutes an act of unfair competition. Therefore, the use of a third party's trade mark in advertising is not permitted.

EMPLOYEES AND CONSULTANTS

22. Who owns each of the main IPRs created by an employee in the course of his employment? Must compensation be paid to the employee? What main steps can an employer take to ensure it owns each of the main IPRs?

Ownership

Generally, the employer owns the IPRs created by an employee during his or her employment if the employer has assigned the task of creating the work to that employee.

However, the employee can retain moral rights, including the right of attribution and the right to have the integrity of the work protected. It is unclear whether moral rights can be waived, but it is prudent to ask the employee to sign a waiver of any moral rights.

Compensation

The Law on Intellectual Property does not require employers to make any compensation to employees for ownership of copyright to works created by the employees during the course of trade. As for patents, the law requires the owner of an invention or industrial design patent to provide the creator of such IPR with:

- 10% of the profits received from use of the invention or industrial design.
- 15% of licensing royalties received from licensing the invention or industrial design.

However, in theory, the parties can agree to waive these statutory licensing rates, or can agree on different rate levels.

Main steps

To avoid disputes with employees as to IPR ownership, a business can enter into an agreement where works created by its employees are work-made-for-hire. This can also be done through the employer's internal labour rules or labour contracts signed at the beginning of the employment, stating that the employer owns all IPRs.

23. Who owns each of the main IPRs created by an external consultant? What main steps can a business take to ensure it owns each of the main IPRs?

Ownership

Generally, a business that enters into a contract with an external consultant who creates the copyrighted work will be the copyright owner of such work.

For other IPRs, ownership of IPRs created by external consultants can be specified in the service contract/agreement between the parties.

Main steps

It is prudent to require an external consultant to sign a quit claim deed, and an agreement affirming that all IP rights are automatically assigned to or vested in the business.

TAX

24. What are the main taxes payable by a licensor on the licensing of the main IPRs?

The main taxes payable by a licensor on the licensing of the main IPRs include:

- Royalty tax, which must be paid by a licensor on IPRs that are licensed in Vietnam.
- Withholding tax, which consists of:
 - value added tax (VAT) (standard rate of 10%); and
 - corporate income tax (standard rate of 20%).

There is no cap on royalty rates in Vietnam at present.

25. What are the main taxes payable by a seller on the disposal of the main IPRs?

IPR sales will be subject to tax similar to other sales of assets in Vietnam (see Question 24). Specifically, the sales will be subject to VAT (standard rate of 10%) and corporate income tax (standard rate of 20%).

CROSS-BORDER ISSUES

26. What major international IP treaties is your jurisdiction party to?

Vietnam has entered into the following intellectual property treaties and conventions:

- WIPO Paris Convention for the Protection of Industrial Property (1883).
- WIPO Berne Convention for the Protection of Literary and Artistic Work (1971).
- WIPO Madrid Agreement Concerning the International Registration of Marks (1891).
- WIPO Protocol relating to the Madrid Agreement (1989).
- WIPO Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1957).
- Patent Cooperation Treaty (1970).
- WIPO Agreement on Trade-Related Aspects of Intellectual Property Rights (1994).
- Brussels Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974).

Vietnam has also entered into:

- A bilateral trade agreement with the US containing many provisions on IP.
- An agreement on IPRs with the government of Switzerland.
- The Vietnam-EU Free Trade Agreement, containing many provisions on IP.

Further, the US and Vietnam have also signed a bilateral agreement on copyright and related rights.

27. Are foreign IPRs recognised in your jurisdiction?

Patents

Foreign patents are not recognised in Vietnam.

Trade marks

Trade mark rights in Vietnam have territorial restriction. Therefore, normally, foreign registration is not recognised in Vietnam. However, unregistered well-known trade marks are protected to a certain extent under Vietnamese domestic law, as well as under international treaties that require the protection of well-known trade marks in Vietnam.

Copyright

Copyright from Berne Convention member states is recognised in Vietnam. As previously mentioned, although copyright subsists on

fixation, a copyright registration from the country where it was created is very useful for copyright enforcement in Vietnam.

Design rights

Foreign design patents are not recognised in Vietnam.

REFORM

28. Are there any proposals for reform?

In the past few years, there have been a number of changes in the regulations for various IP issues in Vietnam, including changes in both prosecution and enforcement procedures. In the near future, Vietnam may revise the Law on Intellectual Property and related legal documents to better address infringement in the digital age, especially online copyright infringement and e-commerce. Nevertheless, while there are many proposals, there has not yet been any concrete plan for such revisions.

ONLINE RESOURCES

National Database of Legal Normative Documents

W <http://vbpl.vn/pages/portal.aspx>

Description. Central database for legal documents maintained by the Ministry of Justice. The information is up-to-date and official, with official English translations (though English translations are not available for every piece of legislation).

Thu Vien Phap Luat (Law Library)

W <https://thuvienphapluat.vn/>

Description. Unofficial source of legal documents in Vietnamese and English. English translations are updated more frequently than on government websites. Some content requires a paid subscription.

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