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Vietnam and the piracy problem

The implications of Vietnam's WTO membership and the enactment of TRIPs

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Summary

On January 11, 2007, Vietnam joined the WTO. A requirement for joining the WTO is the adoption of TRIPs, a multilateral agreement whose purpose is to provide effective and adequate protection for intellectual property rights, in order to minimize obstacles to international trade and promote global competition. After joining the WTO, hopes were high that Vietnam's copyright piracy would rapidly decrease. However, these expectations were not met and today, ten years later, copyright piracy is still a big problem in the country. The question is thus what could be done in order to reduce the piracy rates – and what are the reasons behind the vast percentage of piracy?

Intellectual property rights are a relatively new concept in Vietnam, and the first comprehensive intellectual property law was not adopted until 2005. After amendments in 2009, the Law on Intellectual Property can be said to comply with the TRIPs standard in theory. In practice however, opinions differ on whether the law could really be said to live up to the TRIPs requirements. In particular, the enforcement system was deemed insufficient. As the Vietnamese court system is deemed incapable, most copyright infringement cases are referred to the administrative route. Nevertheless, the administrative action route is also criticized for being slow and not sufficiently up-to-date with current technology.

The conclusion of this thesis is that the underlying reason behind the problem of copyright piracy in Vietnam is complex. The thesis concludes that the main reasons behind the problem are the country's situation as a developing country and the fact that intellectual property rights are initially a Western concept. To change a rehearsed behaviour takes time, and this could be one explanatory factor to why copyright piracy decreases so slowly.

To deal with the problem of copyright piracy, this thesis suggests several changes. First, the work on raising public awareness as regards the existence of copyright must continue. Secondly, the country's judges need to be educated on questions relating to copyright infringement. Thirdly, an overview of the existing administrative enforcement agencies should be performed, preferably resulting in a decrease of the number of agencies. Fourthly, an overview of the current Law on Intellectual Property should be performed. As of today, this thesis argues that the existing law does not live up to the standards of TRIPs. Lastly, it would be benefitting for both practitioners, judges themselves and law students if Vietnam decided to start publishing its court cases.

Lastly, this thesis also put forward some alterations that the right owners themselves could perform in order to protect themselves from copyright piracy. It is recommended that the right owners stay pro-active and that they cooperate and put pressure on the Vietnamese Government. Moreover, it is suggested that the right owners try to provide legal alternatives, in an

attempt to try to curb for example online piracy. Lastly, it is proposed that differentiated prices on software might have a positive effect on reducing software piracy.

Sammanfattning

Den 11 januari 2007 blev Vietnam medlem i WTO. Ett krav för medlemskap i världshandelsorganisationen är antagande av TRIPS, ett multilateralt avtal vars syfte är att erbjuda effektivt och adekvat skydd för immateriella rättigheter, för att på så sätt minimera hindren för global handel och främja internationell konkurrens. Efter Vietnams inträde i WTO var förhoppningen att andelen piratkopierade varor skulle sjunka drastiskt. Så blev emellertid inte fallet och idag, tio år senare, är piratkopiering fortfarande ett stort problem i landet. Frågan är således, vad kan göras åt den stora andelen piratkopierade varor – och vad är orsaken bakom denna höga mängd av falska produkter?

Immateriella rättigheter är ett relativt nytt begrepp i Vietnam och den första heltäckande lagen rörande immaterialrätt antogs inte förrän år 2005. Efter substantiella ändringar år 2009 kan Lagen om Immaterialrätt sägas uppfylla TRIPs krav i teorin. Emellertid går åsikterna isär om huruvida lagen verkligen lever upp till TRIPs krav i praktiken. I synnerhet är det möjligheten till verkställighet som brister. Då det vietnamesiska domstolsväsendet bedöms vara otillräckligt väljer många rättighetsinnehavare att gå den administrativa vägen. Emellertid är inte heller den administrativa verkställighetsvägen helt perfekt, och de administrativa verkställande myndigheterna har anklagats för att vara långsamma i sin ärendehantering samt för att inte vara helt uppdaterade på dagens teknik.

Slutsatsen i denna uppsats är att den underliggande orsaken bakom problemet med piratkopiering i Vietnam inte är en utan flera. Slutsatsen som kan dras är att de främsta anledningarna bakom problemet med piratkopiering är landets situation som ett utvecklingsland samt det faktum att immateriella rättigheter ursprungligen är en västerländsk företeelse. Att ändra ett inövat beteende tar tid, detta kan vara en förklarande faktor till varför piratkopiering som företeelse minskar så långsamt.

Denna uppsats föreslår ett flertal ändringar för att hantera problemet med piratkopiering. Först och främst så föreslås fortsatt arbete med att öka allmänhetens kännedom om vad upphovsrätt är och vad det innebär. För det andra så behöver Vietnams domare fortsatt utbildning i frågor som rör upphovsrättsintrång. För det tredje så måste det göras en översikt av de befintliga administrativa verkställande myndigheterna. Förslagsvis bör denna översikt utmyнна i att antalet administrativa verkställande myndigheter minskar. För det fjärde bör en genomgång av Lag om Immaterialrätt ske. Så som lagen ser ut idag, anser denna uppsats att lagen inte når upp till kraven som ställs i TRIPs. Slutligen skulle det gynna både praktiker, domare och juridikstudenter ifall Vietnam började publicera sina rättsfall offentligt.

Avslutningsvis ger denna uppsats även ett par förslag på förändringar som rättighetsinnehavarna själva kan genomföra för att skydda sig mot piratkopiering. Uppsatsen rekommenderar rättighetsinnehavarna att vara proaktiva och att de samarbetar och sätter press på den vietnamesiska regeringen. Vidare föreslås det att rättighetsinnehavarna försöker att erbjuda lagliga alternativt, vilket skulle kunna gynna förekomsten av piratkopiering online. Avslutningsvis föreslås differentierade priser på mjukvara, vilket skulle kunna ha en positiv effekt avseende piratkopiering av mjukvaror.

Preface

Little did I know that first day in Pufendorf that my law school graduation was five and a half years away and that I would be given the opportunity to live and study in not only Lund but also in Hong Kong and London. Neither did I know that ultimately, I would spend parts of my final semester in Vietnam, writing about Vietnamese copyright law.

I am very grateful for the opportunities provided by the Law Faculty at Lund University and for the scholarship I received from SIDA, which enabled this Minor Field Study. I also want to thank my supervisor Hans-Henrik Lidgaard for valuable comments and feedback during the work with this thesis.

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Charlotte Akej

Abbreviations

AFTA	Asean Free Trade Area
ASEAN	Association of Southeast Asian Nations
ICESCR	International Covenant on Economic, Social and Cultural Rights
IIPA	International Intellectual Property Alliance
GATT	General Agreement on Tariffs and Trade
TPP	Trans-Pacific Partnership
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
VBTA	U.S. – Vietnam Bilateral Trade Agreement
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1 Introduction

1.1 Background

When thinking of Southeast Asian countries such as Vietnam, one thinks of perhaps not only the pristine beaches and friendly locals, but also about the vast number of copyrighted goods that could be found sold in corner shops and market stalls along every road in major cities. For a small amount of money, one can buy DVD-boxes, computer games, handbags and many other things. All with one thing in common – namely that it is not genuine goods.

There were hopes that Vietnam's accession to the WTO, and thus its commitment to comply with TRIPs, in 2007, would result in a decline of copyright piracy. However, figures show that this is not the case. Rather, piracy in Vietnam is growing increasingly sophisticated, and as more Vietnamese people get access to Internet and cable TV, online- and mobile piracy is escalating. Moreover, the Vietnamese courts are continuously inactive. To this date, only very few criminal copyright infringement cases have been brought to the courts.¹

The question is thus – what could be done to deplete the percentage of copyright piracy? And what are the underlying reasons for Vietnam to have such a high percentage of copyright piracy to start with?

1.2 Purpose and research question

The purpose of this thesis is to investigate what could be done in order to reduce the existence of copyright piracy in Vietnam, and the reasons behind the vast percentage of copyright piracy. The research questions I seek to address is:

- How come the sales of pirated goods are so high despite Vietnam being a member of the WTO since 2007?
- What are the underlying reasons for the high rates of copyright piracy?
- Could anything be done in order to reduce the existence of copyright piracy?

¹ International Intellectual Property Alliance (IIPA), *Vietnam: 2013 Special 301 Report on Copyright Protection and Enforcement* (IIPA's Special 301 Recommendations, 2013).

1.3 Method and material

1.3.1 Legal Dogmatic Method

The initial chapters of this thesis scrutinizes and analyses the applicable Vietnamese law in relation to copyright piracy by using a legal dogmatic method. A legal dogmatic method is a method, which allows the author to use various sources such as law, case law, doctrine and preparatory work to scrutinize the content of the applicable law. In this thesis, the legal dogmatic method will be used when explaining the relevant legal framework relevant to copyright piracy in Vietnam. For the chapter describing Vietnam's history and legal system, a descriptive method will be applied.

1.3.2 Interview Method

Chapter 5, discussing the actual approach towards copyright piracy, is the result of the minor field study that I am about to carry out in Vietnam in mid October-December. For this chapter, I will use a systematic interview method. Using a systematic interview method is not the easiest; using a systematic interview method in a country where the people being interviewed often answers in how it should be, rather than how it actually is², is even more challenging.

I have chosen to perform 20 interviews with four different groups of people. I will thus interview four foreign officials, four Vietnamese officials, four legal practitioners operating in Vietnam, four university employees and four shop owners at the markets in Ho Chi Minh City and Hanoi.

I will perform in-depth interviews, using a general interview guide approach, which will allow the respondent to describe his or her way to interpret copyright piracy.³ In a general interview with a guide approach, the interviewer uses a basic checklist to ensure that all the relevant topics are covered. However, this approach also gives the interviewer freedom to explore, analyse and ask questions that come up along the interview. The in-depth interview with guide approach is specifically useful when wanting to elucidate information about specific topics, as it allows for in-depth inquiring while allowing the interviewer to keep the interview within the frameworks constituted by the aim of the study.⁴

The reason for choosing a systematic interview method over other kinds of interview methods is due to the aim of my thesis; to investigate why copyright piracy, despite Vietnam being a member of WTO, is so rampant.

² Stefanie Scott, Fiona Miller and Kate Lloyd, 'Doing Fieldwork in Development Geography: Research Culture and Research Spaces in Vietnam' 44 *Geographical Research* 28, pp 28-40.

³ Annika Lantz, *Intervjumetodik*, vol 2 (Studentlitteratur 2007) pp 30-34.

⁴ Ibid and Rita S. Y. Berry, 'Collecting data by in-depth interviewing' (*University of Sussex at Brighton*, 1999) <<http://www.leeds.ac.uk/educol/documents/000001172.htm>> accessed 30 September 2013

To be able to fully answer my research question, I believe it is important for the respondents to be able to answer freely, without me guiding them in their answers or giving suggestions on what to answer. The systematic interview method allows the respondent to nuance and differentiate his or her answer; something that I believe will give me more aspects to analyse in my analysis. Thus, I have chosen to not perform neither survey interviews, as these have predetermined answers, nor standardized open-ended interviews, as I believe that also this type of interviewing would control the outcome too much.

For discussions regarding the outcome of the Minor Field Study, please see chapter 6.1.

1.3.3 Additional Perspectives

In the final chapter I will analyse my findings and suggest some tentative changes, which I believe will improve the copyright piracy situation in Vietnam. In the analysis, several different perspectives will be applied. A law and philosophy perspective is a perspective often used in areas where the case law is indefinite and lacks uniformity. Instead, one can then turn to various legal philosophers when trying to find explanation and support for the legal rule. This perspective will be used when discussing what role Confucianism has played in shaping the Vietnamese copyright laws. When discussing what role the socialistic state has played in shaping the current copyright legislation, a law and politics perspective will be used. That method is used to explain the purpose to why a certain societal matter has been regulated in a certain manner.

Moreover, a law and economics perspective will be used when discussing the importance of Vietnams journey from a least developed country to a developing country, in relation to copyright piracy. The aim of using a law and economic perspective is to analyse the effects of the law from an economic point of view. It can thus be used to examine the economic effects of a law.

1.3.4 Material

As regards the material used in this thesis, evaluation of the sources has been done on a continuous basis. Applying a critical approach, I have tried to make sure that the opinions expressed in the cited material are well balanced and that the result was not biased. The works of Professor Peter K. Yu, an international expert on intellectual property, have been quoted frequently.

Concerning my choice to use a wide variety of articles rather than books, this has mostly to do with the fact that large portions of this thesis was

written in Vietnam where the access to books on this topic was rather scarce.

Whenever possible, I have tried to use Vietnamese legislation as a primary source. As most of the legal documents in Vietnam lack an official interpretation, I chose to use the translated documents available at WIPO's webpage.

1.4 Delimitations

This thesis will focus upon the issues and problems regarding copyright piracy in Vietnam. Albeit an international problem, copyright infringement in other countries will not be discussed. Infringements of other intellectual property rights, such as for example trademarks, will neither be thoroughly discussed.

Moreover, it should be noted that the discussion as regards TRIPs and its potential impact on developing countries is big enough for a master thesis on its own. Consequently, all available standpoints as regards this subject will not be presented. Rather, I have chosen to focus on standpoints relating to Vietnam's situation.

1.5 Outline

This thesis consists of six chapters. The framework of the thesis is presented in this introductory chapter. Following this introduction, chapter two will introduce the origins of copyright law and copyright piracy. In the second chapter, the reader will also be given an overview of the development of an international intellectual property regime. Lastly, the reader will be able to take part of the major arguments in favour of, and against, a strong copyright protection, concluding with the importance of maintaining a balance.

In the third chapter, the key features of Vietnam's legal system will be presented. I believe it is vital for the reader to have a fundamental understanding of Vietnam's complex history, as well as a basic knowledge of how the state apparatus works. Included in this chapter is a brief discussion on the topic of judicial independence. For the rest of this thesis, it is important to keep in mind that this is quite a contested topic, and one that becomes particularly relevant when discussing the enforcement part of the Vietnamese copyright protection.

The fourth chapter provides a detailed discussion of the Vietnamese copyright regulation. After a short introduction of the process of creating a modern copyright law follows a rather extensive review of the current Law

on Intellectual Property, with the aim of going in-depth on the current provisions regarding copyright.

Then, the fifth chapter will analyse the practical approach towards copyright piracy in Vietnam. In this chapter, the reader will be given an extent analysis of the current situation, the underlying reasons for copyright piracy and thoughts regarding a possible future approach to decrease the piracy rates in Vietnam.

Finally, in the concluding sixth chapter, I will share my views on the current situation as regards copyright piracy. Moreover, I will present some tentative changes that I believe would improve the situation in the country. The suggested changes will be aimed towards both the Vietnamese Government as well as towards affected rights owners.

2 Copyright law and the piracy problem

2.1 The concatenated history of copyright law and piracy

The notion of intellectual property is a result of the European Enlightenment. First when starting to accept that knowledge came from the human mind – and not through a divine revelation it became feasible to consider humans as creators, and consequently owners, of new ideas instead of mere transmitters of eternal veracities.⁵

Although no world wide uniformity exists as regards the precise definition of copyright, generally included within the scope of protected subject matter of copyright are works of literary and artistic expression, such as for example books, musical compositions, paintings, photographic works, dramatic works and illustrations. For copyright to be granted, the work must show a certain degree of originality. If this is the case, the copyright owner will be granted an exclusive bundle of rights during a stipulated period of time.⁶

Copyright, and consequently copyright piracy, has its roots in the emergence of the European book trade during the fifteenth century. As a way to encourage the local establishment of printing businesses, governments granted monopolies and other exclusive rights to attract printers to migrate from other cities. Privileges were only regionally valid, thus an exclusive right in Milan did not extend to Rome. A publisher could consequently at the same time be regarded as a respected member of society in his own home country, where his publishing was legal, but as a pirate who disregarded the printing rights of other territories.⁷

In England during the sixteenth century, Elizabeth I granted monopoly privileges over popular texts such as the Bible to certain publishers. This made it difficult for the smaller publishers to make a living, thus creating tensions that would later escalate into a publishing war, where smaller publishers began to pirate protected books, something that would prove very profitable. Proving impossible to suppress, privilege holders had to change course and instead started to buy off some of the pirates. This strategy proved successful and the balance remained until the end of the seventeenth

⁵ Carla Hesse, 'The rise of intellectual property, 700 B.C. - A.D. 2000: an idea in the balance' (2002) 131 *Daedalus* 26, p. 26.

⁶ Compare TRIPs Articles 10-11. See also Doris Estelle Long, 'The Protection of Information Technology in a Culturally Diverse Marketplace' (1996) 15 *Journal of Computer & Information Law* 129, pp. 137-141.

⁷ Bodó Balázs, 'Coda: A Short History of Book Piracy' in Joe Karaganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council 2011), p. 401.

century, when the Licensing Act was scheduled for revision. The Licensing Act served as the legal rudiment for censorship in England, giving the publishers copyright privileges in return for support for Crown censorship.⁸

The lapse of the Licensing Act in 1695 marked a cardinal victory for the freedom of the press in England. As restrictions on imported books were lifted and the number of publishers and printers was uncapped, an aspiring market for a broader range of literature started growing. Smaller publishers began to reprint copyright protected works in large quanta, confronting the existing market structure and the pricing of the current publishers. This resulted in an infected debate, which eventually resulted in the British Parliament passing a law in 1710, the Statute of Anne, normally described as the first modern copyright law. The Statute established the author as the source and original holder of the copyright, and established a short, fixed term for copyright – a novelty that reflected the lawmaker’s intention of using the Statute to regulate trade by preventing everlasting monopolies.⁹

The development in England was also seen in the rest of Europe. Here, pirate networks cooperated and created an international regulatory regime for copyrights, limiting unfair competition in local markets by creating gentlemen’s agreement. On the opposite, the United States was during this period of time one of the chief pirate nations. Refusing to sign the Berne Convention for the Protection of Literary and Artistic Work¹⁰ in 1886, the American copyright law legalized behaviour that was condemned abroad and could thus be said to be a clear-cut case of situational piracy. The American copyright law granted copyrights only to US citizens, giving the US publishers a massive subsidy when importing British titles. The US copyright law approach was claimed to serve the interests of a developing nation and its burgeoning publishing industry, and the US construed its rejection to sign the Berne Convention as a sovereign right and as a precise policy of national improvement. In 1891, the Congress passed the Chase Act, which extended copyright protection to foreigners. Nevertheless, the Act was accused to contain several loopholes, making the extension of copyright almost illusory.¹¹

The conclusive factor in the shift of US policy towards international copyright compliance was the growths of American export industries based on intellectual property, turning the US into an exporter of knowledge goods and services. Finally, in 1989, the US signed the Berne Convention.¹²

⁸ Ibid, pp. 402-403.

⁹ Ibid, pp. 403-406.

¹⁰ Hereinafter: the Berne Convention.

¹¹ Catherine Seville, ‘Nineteenth-century Anglo-US copyright relations: the language of piracy versus the moral high ground’ in Lionel Bently, Jennifer Davis and Jane C. Ginsburg (eds), *Copyright and Piracy - An Interdisciplinary Critique* (Cambridge University Press 2010) and Balázs, supra n. 7, pp. 408-410.

¹² Seville, supra n. 11, and Balázs, supra n. 7, p. 411.

2.2 The development of an international intellectual property regime

2.2.1 From the Berne Convention to the TRIPs Agreement

The history of the development of an international regime for intellectual property rights coincides with the development of trade and technology. As technology advanced and communication media evolved, a global marketplace for intellectual property-based products was created. The creation of the international marketplace in its turn gave rise to growing concerns over the various levels of protection afforded to the products available at the marketplace. Some countries weak intellectual property protection resulted in the country becoming a haven for pirated products, something that in its turn had an adverse economic impact on the owner of the intellectual property.¹³

The Berne Convention, signed on September 9 1886, was the first multilateral copyright treaty.¹⁴ The Berne Convention sets forth national treatment, providing that national and non-national authors shall be conferred the same rights¹⁵ and does also include a minimum standard of protection¹⁶. However, the Berne Convention was heavily criticized for neither containing any legal remedies by which copyright holders may enforce their rights against copyright infringers, nor any provisions that provide for sanctions against member states that does not uphold their commitments under the Berne Convention.¹⁷

After watching the World Intellectual Property Organization¹⁸ also fail in its efforts to efficaciously deal with the problem of intellectual property infringement, developed countries instead started using the General Agreement on Tariffs' and Trade¹⁹ as a way of providing more effective means to deploy pressure on other countries to amend their intellectual property systems. The shift from WIPO to GATT gave developed countries a powerful prospect to use market access and trade as a way to encourage (or coerce) other countries to adopt stronger intellectual property enforcement regimes, and thus gave worldwide intellectual property protection a rudimentary trade aspect. When GATT later turned into the World Trade Organization²⁰, adoption of the Agreement on Trade-Related

¹³ Long, *supra* n. 6, pp. 149-150.

¹⁴ See generally Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971.

¹⁵ Berne Convention, article 5.

¹⁶ See generally Berne Convention, Articles 5-18.

¹⁷ Evelyn Su, 'The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and its Effects on Developing Countries' (2000) 23 *Houston Journal of International Law* 169, pp. 180-184.

¹⁸ Hereinafter: WIPO.

¹⁹ Hereinafter: GATT.

²⁰ Hereinafter: WTO.

Aspects of Intellectual Property Rights²¹ became a prerequisite to membership of the WTO.²²

TRIPs was adopted on April 15, 1994, and is categorized as a multilateral agreement under the WTO. Consequently, every country that wishes to join the WTO must agree to abide by the TRIPs agreement. The agreement “is to date the most comprehensive multilateral agreement on intellectual property”.²³ Its purpose is to provide effective and adequate protection for intellectual property rights, in order to minimize obstacles to international trade and promote global competition.²⁴ According to its preamble, TRIPs general goal is to “reduce distortions and impediments to international trade ... promote effective and adequate protection of intellectual property rights, and ... ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”²⁵ It is specifically pointed out that the general goals of TRIPs should be understood in conformity with Article 7, which outlines TRIPs’ objectives.²⁶

TRIPs outline the minimum standards of substantive protection that each member country must provide in their national law. The member countries are free to decide themselves how to implement TRIPs within their own legal system. Moreover, TRIPs provides for enforcement measures through its use of civil and administrative procedures and remedies. The inclusion of a dispute settlement mechanism, where disputes between member countries regarding the TRIPs obligations will be subject to the WTO’s dispute settlement procedures, was at the time of TRIPs enactment hailed as one of the biggest benefits compared to the Berne Convention.²⁷

2.2.2 International demands versus national needs and interests

Despite managing to transform the international intellectual property system by bestowing thorough international minimum standards on the enforcement of intellectual property rights for the first time, it is highly contended how

²¹ Hereinafter: TRIPs

²² Michael W. Smith, ‘Bringing Developing Countries’ Intellectual Property Laws to TRIPS Standards: Hurdles and Pitfalls Facing Vietnam’s Efforts to Normalize an Intellectual Property Regime’ (1999) 31 Case Western Reserve Journal of International Law 211, pp. 222-223.

²³ See generally J.H. Reichman, ‘Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement’ [1995] *The International Lawyer* 345, and WTO, ‘Overview: the TRIPS Agreement’ (2013) <http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed October 28.

²⁴ *Ibid.*

²⁵ See the Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization; Annex 1C, Legal Instruments – Results of the Uruguay Round vol. 31, 33 I.L.M. 1125, 1197-1199 [hereinafter the TRIPs Agreement], preamble.

²⁶ According to the TRIPs Agreement, Article 7 “[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

²⁷ Su, *supra* n. 17, pp. 189-191.

successful TRIPs has really been. TRIPs has been criticized for heavily manifesting Western attitudes and conceptions as regards individuality, rights, inventions and discovery, and imposes them upon non-Western countries. Thus, some scholars has even called TRIPs an “effective vehicle of Western imperialism”²⁸, criticizing the agreement for requiring non-Western countries to accept Western conceptions that are cardinaly incompatible with some of the political and cultural underpinnings of other countries.²⁹

TRIPs has also been criticized for its high implementation costs, costing developing countries almost 60 billion USD per year and thus risking to withdraw more scarce resources from competing, and sometimes more important, public needs. Strengthening a country’s intellectual property enforcement standards does insure a wide variety of costs, from building new institutional infrastructure to develop specialized expertise through training personnel. Moreover, the increasing call for public enforcement and criminalization have led to a continuous shift of responsibility from private rights holders to national governments, increasing the burden of the developing countries governments.³⁰

Almost twenty years after its enactment, scholars assert that the initially acclaimed enforcement-provisions have turned out to be the Achilles’ heel of the TRIPs. The creation of the enforcement provisions as broad legal standards rather than narrow rules, mixed with the provisions intrinsic ambiguity makes it difficult for dispute-settlement panels and mediators to pin down clear-cut breaches of international law.³¹ The lack of success as regards the enforcement-provisions might have come as an unpleasant surprise for some of the Western countries, which after all managed to get 95% of what they wanted in the negotiation process and was especially content with the enforcement provisions.³² There are however many reasons to why it is so difficult to enforce an international intellectual property regime.

The debate and lack of consensus regarding the scope of protection of intellectual property rights derive from the fact that we do not live in a single-culture world. Thus, the standpoints taken by various states reflect their conflicting philosophical, historical, political, economic and cultural point of view as regards the need for strong protection of technology and

²⁸ Marci A. Hamilton, ‘The TRIPs Agreement: Imperialistic, Outdated, and Overprotective’ (1996)

²⁹ Vanderbilt Journal of Transnational Law 613, p. 614.

²⁹ Smith, *supra* n. 22, pp. 224-227 and Su, *supra* n. 17, pp. 202-207.

³⁰ Peter K. Yu, ‘TRIPs and its Achilles’ Heel’ (2011) 18 Journal of Intellectual Property Law 479, pp. 487-492 and Peter K. Yu, ‘Are Developing Countries Playing a Better TRIPs Game?’ (2011) 16 UCLA Journal of International Law & Foreign Affairs 311, p. 322.

³¹ J.H. Reichman and David Lange, ‘Bargaining around the TRIPs Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions’ (1998) 9 Duke Journal of Comparative & International Law 11, pp. 34-40, Yu, ‘TRIPs and its Achilles’ Heel’, *supra* n. 30, pp. 483-504 and Ruth L. Gana, ‘Prospects for Developing Countries Under the TRIPs Agreement’ (1996) 29 Vanderbilt Journal of Transnational Law 735, pp. 774-775.

³² Susan K. Sell, ‘TRIPs Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP’ (2011) 18 Journal of Intellectual Property Law 447, p. 448 and Peter K. Yu, ‘TRIPs and its Achilles’ Heel’ 479, *supra* n. 30, p. 484.

other products of the mind. Typically, disagreements concerning the scope and nature of protection afforded to intellectual property emerge between developed and less developed nations. There are however differences of opinions between developed nations as well, as cultural diversity and disparities in the philosophical basis for the protection of intellectual property rights may result in noticeably different treatment.³³ In fact, differentiation in treatment may also occur within a country, as many different competing interests may result in a schizophrenic nationwide intellectual property policy.³⁴

It is also necessary to take into account the fact that Western developed countries have debated and worked out the competing requirements of their respective intellectual property systems, as they relate to international trade, for over a century. These countries are now refusing to give less developed countries the same opportunity, but instead force them to conform to the international standards that have been dictated by a few developed countries. In addition, another complicating feature is the yearning of developing countries for allowing free copying until the developing country's own economies and inventors have a possibility to reach up to the level of development enjoyed by other nations. Less developed countries yearn for free access to patented technology and copyrighted products to aid in their internal economic growth. This is by no means a new phenomenon, but has also occurred in developed countries such as for example the United States whom, before they had their own group of artists and writers, pirated European writers and works. Thus, attempts to restrict a country's internal access to technology and creative works through the ratification of international protection norms are considered by many developing countries "as a direct threat to their ability to play a significant role in the world economy."³⁵

Consequently, a well-functioning intellectual property regime requires a variety of measures. First, international intellectual property regimes cannot only take Western views of intellectual property rights into account, but cultural differences must be incorporated into the international standards. Moreover, the narrow focus of the intellectual property system must be lifted and increased. A well-functioning intellectual property regime relies on the existence of a facilitating environment for the efficient enforcement and protection of intellectual property rights. Therefore, the key preconditions for successful reforms include an awareness of legal rights, an independent and effective judiciary, respect for the rule of law, a well-functioning competition and innovation system, established business practices and a critical mass of local stakeholders. Without an upgraded

³³ Long, supra n. 6, pp. 154-161.

³⁴ Peter K. Yu, 'Intellectual Property and Asian Values' (2012) 16 Marquette Intellectual Property Law Review 329 p. 395.

³⁵ Long, supra n. 6, pp. 161-164, Smith, supra n. 22, pp. 229-231 and Elisabeth Uphoff, *Intellectual Property an US Relations with Indonesia, Malaysia, Singapore and Thailand* (Cornell Southeast Asia Program 1990), p. 1.

judicial system in the country at question, it will matter little what intellectual property laws and treaties provide.³⁶

2.2.3 The return to bilateralism?

The outcome of TRIPs has not only been criticized by developing countries, but also by developed countries that assert that the TRIPs standards are inadequate, ineffective, constrained and primitive. In an attempt to secure stronger protection of intellectual property rights, many developed countries have pushed for the return to plurilateral, bilateral and regional free trade agreements, which enables nations to use economic strengths to coerce their less powerful trading partners to improve their intellectual property protection regimes.³⁷

The use of bilateral agreements to protect intellectual property rights is not a new invention. Rather, it has been used for decades to stabilize economic relations with other countries and to accomplish specific foreign policy goals.³⁸ As such, TRIPs should perhaps rather be said to constitute a significant pause in the historical advancement of bilateral commercial treaties used as tools of foreign relations by developed countries.³⁹ The return to the use of bilateral and plurilateral agreements as a way for the developed countries to increase their bargaining positions could be seen as a response to the increased demands for diversification from developing countries.⁴⁰

As to the difference between multilateral and bilateral agreements, they both have their pros and cons. As to multilateral agreements, they promote efficiency, reduce political and negotiation costs and strengthen international stability as they minimize the disruption of the international trading system. As to the limitations of multilateral agreements, they often result in a stalemate in a multilateral forum. Multilateral agreements also risk being diluted, as they are the result of a compromise between several parties with different agendas.⁴¹

As opposed to this, bilateral agreements are often more efficient in addressing the individual concerns and conditions of the contracting parties. It also allows for side-payments that would not be possible in a multilateral

³⁶ Yu, 'TRIPs and its Achilles' Heel', supra n. 30, pp. 499-504 and Long, supra n. 6, pp. 166-167.

³⁷ Yu, 'Are Developing Countries Playing a Better TRIPs Game?', supra n. 30, p. 326 and Peter K. Yu, 'Currents and Crosscurrents in the International Intellectual Property Regime' (2004) 38 *Loyola of Los Angeles Law Review* 323, pp. 324-325.

³⁸ Ruth L. Okediji, 'Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection' (2004) 1 *University of Ottawa Law and Technology Journal* 125, p. 140.

³⁹ *Ibid.*, pp. 146-147.

⁴⁰ Yu, 'Currents and Crosscurrents in the International Intellectual Property Regime', supra n. 37, pp. 41-42.

⁴¹ Okediji, supra n. 38, pp. 143-144 and Yu, 'Currents and Crosscurrents in the International Intellectual Property Regime', supra n. 37, pp. 42-44.

forum, and enables a controlled and precise opportunity to create a tailor-made agreement.⁴²

However, the use of bilateral agreements are criticized for allowing powerful developed country to push less developed countries to adopt intellectual property provisions whose legal underpinnings might be considered shaky in the developed country. This was the case when the United States pushed Singapore into adopting disputed provisions of the Digital Millennium Copyright Act in their free trade agreements. Moreover, although bilateral agreements officially provide the possibility of a tailor-made agreement, in many cases one of the parties will not have enough bargaining power to negotiate an equal agreement and may have to agree with provisions that are inconsequential to their key national interests. This in its turn enables controversial legislation to be pushed into the international forum using the “negotiation backdoors”.⁴³

2.3 The dilemma of copyright law

2.3.1 Defining copyright piracy

According to TRIPs, pirated copyright goods are defined as “any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.”⁴⁴ Using this definition, copyright piracy could thus be defined as unauthorized use of or making copies of creative works, most commonly without acknowledging the creators intellectual property rights in monetary terms. The word “piracy” itself incorporates the idea of “infringement” and “theft” and does undoubtedly carry negative connotations, which originates from the assumption that the institution of private property rights exists and that such institution is justified. Consequently, any noncompliance is to be perceived negatively.⁴⁵

2.3.2 Justifications for copyright protection

As long as copyright laws have existed, there have been discussions as to how to justify copyright protection. Several different theories of copyright protection exist, the most common one perhaps being the incentive theory.

⁴² Tara Kalagher Giunta and Lily H. Shang, ‘Ownership of Information in a Global Economy’ (1993) 27 *George Washington Journal of International Law & Economics*, pp. 338-340.

⁴³ Yu, ‘Currents and Crosscurrents in the International Intellectual Property Regime’, *supra* n. 37, pp. 44-47.

⁴⁴ TRIPs, Article 51.

⁴⁵ Betty Yung, ‘Reflecting on the Common Discourse on Piracy and Intellectual Property Rights: A Divergent Perspective’ (2009) 87 *Journal Of Business Ethics* 45, pp. 45, 49.

According to the incentive theory, copyright protection is necessary to give creators the incentive to invest time, skill, effort and resources into the creative process. The time-limited monopoly, which prevents others from free riding on the creative efforts, also enables the creators to retrieve their investment.⁴⁶

However, the incentive theory fails to take into account the fact that not everyone needs an economic incentive to create. The prospect theory provides justifications for situations in which the creator's investment is risky and costly and where economic rewards are uncertain. As opposed to the incentive theory, the prospect theory postulates that, just like miners stake out their claims on land not knowing how much gold they will possibly find, intellectual creators stake out their territory defined by their creations, in spite of the instantaneously knowable commercial value. Although originally intended to justify the existence of patents, the prospect theory offers a fully good explanation of the extension of copyright protection to new technologies.⁴⁷

The third theory, the natural rights theory, has two main features. The first feature builds on Hegel's property theory, which considers intellectual creations to be an addition to the creator's personality. Consequently, the creator has an inherent right to protect the integrity of her creation, just as she would have the right to protect her own personality. The second feature builds on Locke's theories and treats intellectual property as the creators "fruit of labour". According to Locke's labour theory, "creators have an inherent right to reap the fruits of their creation and obtain rewards for their contributions to society".⁴⁸

The concluding theory on copyright justifications is the development theory. According to this theory, copyright act as a catalyst for economic development and modernization, and copyright protection is thus a necessity to increase literary and artistic production, attract foreign as well as domestic investment, generate tax revenues and create new jobs.⁴⁹

2.3.3 The causes of piracy

Irrespective of the justifications of copyright law, scholars have identified several reasons as to why copyright piracy takes place. As regards illegal copying of digital goods, the high piracy rates probably depend on the threat of being discovered and the probability of punishment being so low.

⁴⁶ Richard A. Posner William M. Landes, 'An Economic Analysis of Copyright Law' (1989) 18 The Journal of Legal Studies 325, pp. 326.

⁴⁷ Peter K. Yu, 'Digital Piracy and the copyright response' in Idrajit Banaerjee (ed), *Internet and Governance in Asia - A Critical Reader* (AMIC 2007), p. 2.

⁴⁸ Wendy J. Gordon, 'An inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory' (1989) 41 Stanford Law Review 1343

⁴⁹ Yu, 'Digital Piracy and the copyright response', supra n. 47, p. 3.

Consequently, most people downloading a song on the Internet think they will get away with it and are thus not deterred from piracy.⁵⁰

Moreover, illegal copying can be explained by social beliefs and rules that to some degree justify copyright piracy. There is thus a lack of peer pressure to prevent the illegal activity. In some countries, most commonly where the notion of private property is low, the social consensus may even be supportive of piracy.⁵¹

Another important factor is the perceived value relative to price. Movements such as the open source movement may influence feelings of inequality and that software etcetera should be free. An additional reason for widespread piracy might also be the sentiment that piracy has only a negligible harmful effect on the copyright owner, and the perception that the copyright owner is a remote and wealthy corporation.⁵²

Furthermore, illegal copying might be a social response to inadequate supply conditions. That is, the extent to which the original software fits local needs such as offering the software in the countries own language, the availability of software after-sale support and complementary products and services.⁵³ Lastly, one must also take into account the affordability problem. For some people, pirated versions of the original goods are the only way to afford the goods at all.⁵⁴

Consequently, this shows that there is not a single answer as to why copyright piracy occurs. Instead, it is far more complicated than just a "bad guy" not wanting to pay for downloading Justin Bieber's new album. Poorly served markets, products that do not fit local needs and social characteristics are some of the diverse reasons. When finding a strategy dealing with piracy these different factors must be recognized and the copyright owners must thus realize that one solution will not solve the entire piracy problem.

2.3.4 The cumbersome balancing act

When debating whether or not to enforce a strong copyright protection regime, the arguments rendered demonstrates the wide gap between copyright owners, wanting to enforce a strong copyright protection regime, and those arguing for a more accessible and balanced copyright protection regime.

⁵⁰ Charles W. L. Hill, 'Digital piracy: Causes, consequences, and strategic responses' (2007) 24 Asia Pacific Journal of Management 9, pp. 10-11.

⁵¹ Carlos A. Osorio, *A Contribution to the Understanding of Illegal Copying of Software - Empirical and analytical evidence against conventional wisdom* (Working Paper, 2002), p. 6 and Hill, supra n. 50, p. 12.

⁵² Hill, supra n. 50, p. 12.

⁵³ Osorio, supra n. 51, p. 3.

⁵⁴ Dong Ngo, 'Vietnam: Where pirated apps match personal budgets' CNET <http://news.cnet.com/8301-17938_105-10122530-1.html> accessed October 31, 2013.

As regards the copyright owners, they often try to balance piracy using unambiguous arguments that emphasizes economic downturn, public safety risks and growth suppression. The economic downturn argument claims that governmental concern and support for the international enforcement agenda is justifiable for a number of reasons, especially in countries such as the United States where copyright industry is a major contributor to the GDP and employs more people than any single manufacturing sector. The economic downturn argument stresses that copyright protection provides a competitive advantage for countries with large copyright industries, and also reduces the risk of losing government tax profits to illegal trade.⁵⁵

The harm and fear arguments are based on the prospect for pirated goods to cause damage to enterprises and individuals. According to these arguments, copyright piracy has a deep link to organized crime and trade in pirated goods threatens security, health and safety of consumers globally, especially in developing countries. Consequently, by using these kinds of arguments government expenditures on enforcement programs to battle copyright piracy and prevent public harm can be easier justified.⁵⁶

Finally, the growth-suppression argument is founded on the opinion that piracy impedes the growth of new and existing markets. Furthermore, according to the other facet of this argument, illegal file-sharing activities corner Internet Service Providers bandwidth, undermining their existing business by damaging the effectiveness of their networks.⁵⁷

On the other hand, those arguing for a more balanced copyright protection assert that all impositions by copyright that prevents or limits access to cultural content interfere with the ability of individuals to enhance their understanding of society and culture in general. Copyright owners whom impose hefty fees or simply denies the personal use of copyright protected content does not only impede with cultural participation and access to knowledge but does also limit creativity and threaten the freedom of expression. To expand the scope of copyright to also include personal use would threaten to destroy the underlying justifications for copyright.⁵⁸

Additionally, the adversaries of a stronger copyright protection regime maintain that copyright protection threatens to interfere with essential human rights. Although the acknowledged individual rights to participate in culture contained in both the Universal Declarations of Human Rights⁵⁹ and

⁵⁵ Eric H. Smith, *Letter from Eric H. Smith, Intellectual Property Alliance, to Stanford McCoy, Acting Assistant, U.S. Trade Representative* (February 11, 2008), available at <http://www.iipa.com/pdf/2008SPEC301COVERLETTER.pdf>.

⁵⁶ Ibid, p. 9 and Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play* (PIJIP Research Paper no 15 American University Washington College of Law, Washington DC, 2010), pp. 16-19.

⁵⁷ Smith, *Letter from Eric H. Smith, Intellectual Property Alliance, to Stanford McCoy, Acting Assistant, U.S. Trade Representative*, supra n. 55, p. 12.

⁵⁸ Tanya Woods, 'Copyright Enforcement at all Costs? Considerations for Striking a Balance in the International Enforcement Agenda' (2009) 37 *AIPLA Quarterly Journal* 347, pp. 380-384.

⁵⁹ Hereinafter: the UDHR.

the International Covenant on Economic, Social and Cultural Rights⁶⁰ are not given much attention in discussions concerning trade, they should be considered important, seeing as how human rights obligations are to receive primacy over all agreements and economic policies.⁶² States wishing to adopt higher protection standards on intellectual property treaties must consequently not unjustifiably restrict the delight of others of their rights under the ICESCR.⁶³

The question is thus, how does one strike a balance between these different arguments? After all, balance is the key to a successful copyright regime. Some scholars assert that the balance today has been distorted, as no country has been able to balance corporate interests with human rights, privacy concerns and culture in an effective way.⁶⁴ Others stress that enforcement is a two-sided concept, intended not only to enforce copyright owners right, but also envisaged to enforce “balance, exceptions and limitations, fair use, civil rights privacy rights and antitrust”.⁶⁵

Consequently, more protection cannot be equated with better protection. In fact, giving copyright owners too much protection may lead to the creation of monopolies and may limit the spread of new ideas. This could obstruct rivals to enter the market and may thus result in reduced incentives for developing and exploiting future innovations. This is particularly important as regards developing countries, where little research and development and innovation is undertaken. To provide strong intellectual property protection to foreign companies risks paralyzing the domestic industries that previously relied on pirated technologies. This would in turn cause a transfer of profits to companies outside of the developing country, rather than stimulating domestic innovative activity. However, it is important to notice that intellectual property protection “could help reward creativity and risk-taking even in developing economies, with countries that retain weak [intellectual property] protection remaining dependent on dynamically inefficient firms that rely on counterfeiting and imitation.”⁶⁶

To sum up, there is no consensus in the debate regarding what approach should be taken as to intellectual property enforcement. In the literature,

⁶⁰ Hereinafter: the ICESCR.

⁶¹ See Article 27 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), 76, U.N. Doc. A/810 (December 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>, and Article 15 of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) art. 15, U.N. Doc. A/6316 (December 16, 1966), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>.

⁶² United Nations Economic & Social Council, *Sub Commission on the Promotion and Protection of Human Rights, Report of the High Commissioner: The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights* (UN Doc E/CN4/Sub2/2001/13, June 27, 2001), para 13.

⁶³ Woods, *supra* n. 58, p. 386.

⁶⁴ Mira Sundara Rajan, ‘Copyright: Let’s take ownership’ (*The Globe and Mail*, July 31 2009) <<http://www.theglobeandmail.com/globe-debate/copyright-lets-take-ownership/article1200899/>> accessed November 4

⁶⁵ Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play*, *supra* n. 56, p. 22.

⁶⁶ Rod Falvey, Neil Foster and David Greenaway, *Intellectual Property Rights and Economic Growth* (University of Nottingham Research Paper Series No 2004/12, 2004), pp. 2-3.

however, there seems to be a consent that a “one size fits all” approach is not sensible when it comes to nations that have no existing enforcement procedures, no intellectual property interests to protect and no practical intellectual property systems or markets. In these nations, a noticeable groundwork including education and policy development as regards the advantages of intellectual property is indispensable before the international enforcement agenda can be put fully into practice.⁶⁷

⁶⁷ Woods, *supra* n. 58, p. 386-390, Falvey, Foster and Greenaway, *supra* n. 66, p. 3, Hill, *supra* n. 50, p. 20 and Long, *supra* n. 6, pp. 169-170.

3 The Vietnamese legal system

3.1 A historic odyssey

3.1.1 The legal system prior to Doi Moi

Remnants of Chinese, French Communist and, to some extent, U.S. law overlay Vietnam's own ancient tradition of law. As most of East Asia, Vietnam has been heavily influenced by Chinese cultural and legal traditions. During the Lê and Nguyen dynasties (1482-1845), Vietnam inherited the Chinese Imperial Code, with its Confucian beliefs of harmony, hierarchy and authority as its three pillars.⁶⁸

Unlike Western law, the Imperial code interacted only vertically, from the state to the individual, but not horizontally, between individuals. Moreover, the Imperial Code infused the Vietnamese legal system with a strong punitive orientation as well as a detailed and complex codification, making the Imperial Code incomprehensible for the ordinary citizen. During this period of time, resort to courts were unusual, as it exposed a person, and by extension that person's family or clan, to loss of proper virtue. Instead, disputes were referred to clan- or village leaders whose aim was to restore stability and harmony, rather than decide whom had the best case.⁶⁹

During the French colonial period (1862-1954), the French tried to introduce their own individual rights-based legal system. However, this did not go well with the existing neo-Confucian system with its significance on authority of the state. To overcome this problem, the French imposed a parallel legal system where the civil law system governed French as well as other European citizens and the Imperial code and customary practice governed the Vietnamese citizens.⁷⁰

Following their declaration of independence, North Vietnam, now called the Democratic Republic of Vietnam, introduced a Soviet-style command economy. Land was nationalized and redistributed and industries were brought under state and collective ownership. In 1961, the Ministry of Justice was eliminated and the Vietnamese government ruled by decree, rather than by legislation. Following the U.S. - Vietnam War and the subsequent reunification of the country, the Vietnamese government introduced the state-planned economy and Soviet-style legal system to the southern parts of the country. Following the reunification, the Vietnam

⁶⁸ John Gillespie, 'Private Commercial Rights in Vietnam: A Comparative Analysis' (1994) 30 *Stanford Journal of International Law* 325, pp. 326-327; Carol V. Rose, 'The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study' (1998) 32 *Law & Society Review* 93, p. 96.

⁶⁹ Gillespie, *supra* n. 68, pp. 326-327; Rose, *supra* n. 68, p. 96.

⁷⁰ Gillespie, *supra* n. 68, pp. 329-330; Rose, *supra* n. 68, pp. 96-97.

Communist Party embraced anti-legal and anti-colonialist attitudes⁷¹ and little legislative alterations were made during the first two decades as a reunited country.⁷²

3.1.2 Doi Moi

In the middle of the 1980's, Vietnam's economy was dysfunctional. There was a constant shortage of common goods and the country had an annual inflation of more than 100 percent. The budget deficits grew larger and the foreign debt rose. To revitalize the stagnant economy the congress at the Sixth Party Congress in 1986 initiated the Doi Moi policy, renovation.⁷³

The purpose of the policy was to transform Vietnam from a centrally planned economy into a limited market-based system. With the main goal of stimulating an increase in foreign investment, price controls were lifted on numerous goods, a considerable decrease took place in the reach of central planning and rural land became de-collectivized.⁷⁴

However, it soon became evident that legal structures were required to attract foreign investment. During 1987-1995, over 100 laws including a Civil Code, as well as a new constitution was adopted. However, despite the aim to increase the skills of lawmakers and to run the country by law rather than by bureaucratic management, the result of Doi Moi was mixed. A lack of regulations and guidelines, ineffective dispute settlement mechanisms and a lack of competition in many areas of the economy continued to create frustration and impeded with foreign investments.⁷⁵

3.1.3 The U.S. - Vietnam Bilateral Trade Agreement⁷⁶

It soon became obvious that Doi Moi alone was not sufficient to improve the status of the Vietnamese economy. In an attempt to compete with China, whom at the time was highly successful in alluring foreign investment, Vietnam joined the Association of Southeast Asian Nations⁷⁷ in 1995 and thus became partner to the ASEAN Free Trade Agreement^{78, 79}.

⁷¹ Hereinafter: the VCP.

⁷² Rose, supra n. 68, pp. 97-99; David A. Gantz, 'Doi Moi, the VBTA and WTO Accession: The Role of Lawyers in Vietnam's No Longer Cautious Embrace of Globalization' (2007) 41 *The International Lawyer* 873, pp. 875-876.

⁷³ Phong Tran, 'Vietnam's Economic Liberalization and Outreach: Legal Reform' (2003) 9 *Law and Business Review of the Americas* 139, pp. 139-140.

⁷⁴ Gantz, supra n. 72, p. 876.

⁷⁵ Rose, supra n. 68, pp. 99-101; Tran, supra n. 73, pp. 143-161 and Gantz, supra n. 72, p. 877.

⁷⁶ Hereinafter: the VBTA

⁷⁷ Hereinafter: ASEAN.

⁷⁸ Hereinafter: AFTA.

⁷⁹ Gantz, supra n. 72, p. 879.

As opposed to other ASEAN member countries, due to the lack of most favoured nation treatment⁸⁰ for its exports Vietnam had only restricted access to the highly remunerative U.S. market, making exports excessively expensive. To lift the trade embargo, Vietnam and the United States started negotiating a bilateral treaty. Negotiations took four and a half years, but on December 10, 2001, the VBTA became effective.⁸¹

Unlike most other commercial agreements negotiated by the United States, the VBTA was a comprehensive accord including not only trade in goods but also protection of intellectual property rights, possible investments and trade in services. The U.S. negotiators saw the VBTA as a step toward Vietnamese WTO accession and would not accept anything but a comprehensive agreement where Vietnam accepted WTO-disciplines such as non-discrimination/national treatment and the evading of import quotas and government subsidies. The VBTA's intellectual property chapter has been proven to be the most difficult to implement, although the agreement as a whole initially constituted a massive implementation challenge, forcing the Vietnamese government to revise dozens of legal instrument for compliance with the provisions of the VBTA.⁸²

3.1.4 Accession to the WTO

With a membership in the WTO comes much desired trade relations with international super powers such as the United States and Great Britain. Moreover, a membership comes with the capability of breaking down trade barriers, procuring national treatment from member nations and the possibility to break down trade barriers. Nevertheless, a membership also requires the contracting parties to alter their internal laws to adhere to WTO standards. The accession process is normally straightforward, requiring the potential member-country to pass a four-part test.⁸³

Notwithstanding, in the case of Vietnam, the process of WTO accession has been long, complex and frustrating. Despite making its initial application in 1995, no major progress towards accession was made until 2001, when the VBTA was signed.⁸⁴

Not until 2004 the focus changed from the VBTA per se to what Vietnam was doing internally as regards to enacting national laws, ordinances and regulations that would be compulsory for the country to observe for WTO membership. For membership in the WTO, the country had to enact all the legislation that the Working Party deemed imperative for implementing Vietnam's accession obligations before accession was even granted for

⁸⁰ MFN-treatment is awarded to members of WTO and to countries concluding a bilateral trade agreement with the United States.

⁸¹ Gantz, *supra* n. 72, p. 880.

⁸² *Ibid.*, pp. 880-883.

⁸³ Nicholas R. Monlux, 'Copyright Piracy on the High Seas of Vietnam: Intellectual Property Piracy in Vietnam following WTO Accession' (2009) 37 *AIPLA Quarterly Journal* 135, pp. 151-152.

⁸⁴ Gantz, *supra* n. 72, p. 883.

review. Consequently, in 2004-2006 Vietnam altered and enacted hundreds of laws, regulations and decrees, including key statutes.⁸⁵

The concluding accession package included not only the requirements of the VBTA but also elimination of almost all tariff quotas, extension of trading rights to all duly registered persons, major commitments in service and immediate compliance with WTO disciplines under various agreements, including trade-related intellectual property. Finally, on January 11 2007, Vietnam became a member of the WTO.⁸⁶

3.2 The state apparatus

3.2.1 Introduction

The Vietnamese legal structure is based on Soviet ideology, where law embodies the will of the ruling class and is an instrument to alter social relations. Dissimilar to countries abiding to the rule of law, in Vietnam no separation of power exists, as state power is regarded as inseparable. The state utilizes its power through three branches, the judiciary, the executive and the legislative.⁸⁷ All three of these derive their power from the National Assembly.⁸⁸

3.2.2 The Communist Party

Founded in 1930, the Communist Party of Vietnam is the founding and ruling political party of the Socialist Republic of Vietnam. The Communist Party is the leader of the ruling class and party supremacy over both state and law is recognized as a constitutional principle.⁸⁹ Consequently, the policies decided upon by the Communist Party influence both the legal and the political system, and the Communist Party thus maintains firm control over government and legal institutions at all levels. Every fifth year a National Congress is held where delegates decide upon the policies of the party and the Government. At the National Congress, The Central Committee is elected. The Central Committee is then responsible for appointing the president, the prime minister and the chairman of the

⁸⁵ Ibid, pp. 886-887.

⁸⁶ WTO, 'Vietnam to join WTO on 11 January 2007' (2007) <<https://docsonline.wto.org/dol2fe/Pages/FormerScriptedSearch/directdoc.aspx?DDFDdocuments/t/W/T/ACC/VNM48.doc>> accessed 16 October.

⁸⁷ Bui Thi Bich Lien, 'Legal Interpretation and the Vietnamese Version of the Rule of Law' (2011) 6 National Taiwan University Law Review 321, p. 324.

⁸⁸ Brian J.M. Quinn, 'Vietnam's Continuing Legal Reform: Gaining Control Over the Courts' (2003) 4 Asian-Pacific Law & Policy Journal 431, p. 436.

⁸⁹ 1992 Constitution of the Socialist Republic of Vietnam, as amended by Resolution 51-2001-QH10 of Legislature 10 of the National Assembly at its 10th Session, 25 December 2001, Article 4.

National Assembly. In between the meetings of the Central Committee, which are held twice a year, the Politburo is in charge.⁹⁰

3.2.3 The legislative

The unicameral National Assembly is the supreme state authority in Vietnam, delegating all the state powers to lower bodies in the hierarchy. Thus, all other state bodies are accountable to the National Assembly. The National Assembly is the only body with the power to enact laws and the Constitution. In its present-day term, the National Assembly consists of 500 delegates, meeting for two sitting sessions each year. During sessions, decisions are made by majority votes, except for specific matters, such as altering the Constitution, which require a two-thirds majority.⁹¹

When the National Assembly is not in session, the Standing Committee of the National Assembly is empowered to act. Being a permanent body of the National Assembly, the main functions of the Standing Committee include acting on matters including the appointment of Deputy Prime Ministers and other members of the government and ratifying ordinances on subject matters for which it is not yet feasible for a law to be approved by the National Assembly.⁹² The Standing Committee is sanctioned to interpret the Constitution, however this has never been done.⁹³

3.2.4 The executive

The government is responsible for executing the legal instruments enacted by the National Assembly. It is the government's duty to ensure the effectiveness of the State apparatus from the central level down to the grass-roots level. The government encompasses the Prime Minister, Deputy Prime Minister and Ministers leading ministries and ministerial equivalent bodies. The government holds monthly meetings in which decisions are settled by majority vote. The Prime Minister and the Ministers have the authority to disseminate regulations, resolutions and decrees and is thus responsible for most of the laws drafted in Vietnam. It is also up to the Government to ensure that the Constitution as well as other laws are implemented by State offices and that education and information concerning the laws and the Constitution reaches the Vietnamese people.⁹⁴

Subordinate to the central government are the provincial governments, each controlling one of the 64 provinces in Vietnam. Each provisional

⁹⁰ Brian J.M. Quinn, 'Legal Reform and its Context in Vietnam' (2001) 15 Columbia Journal of Asian Law 219 p. 225.

⁹¹ The Constitution of Vietnam, Articles 83-100.

⁹² The Constitution of Vietnam, Articles 83-100.

⁹³ John Gillespie, 'The juridification of state regulation in Vietnam' in Albert H.Y. Chen John Gillespie (ed), *Legal Reforms in China and Vietnam - A Comparison of Asian Communist Regimes* (Routledge 2010), p. 87.

⁹⁴ The Constitution of Vietnam, Articles 109-117.

government has an administrative body, called the People's Committee and a representing body, called the People's Council. The People's Council consequently acts as the State authority in respective localities, and are among other things responsible for ensuring the observation of the Constitution and the laws in their localities.⁹⁵

3.3 The judiciary

3.3.1 The courts

The judicial bodies of Vietnam consist of various courts such as a military court, civil courts, criminal courts, economic courts and a set of appeal courts. First instance cases are organized at the provincial and county levels where the seriousness of the offense determines which court has the jurisdiction over the case. As regards the courts of appeal, there are multiple levels. First, courts at the provincial level act as the primary court of appeals for cases emerging from the county courts. Second, there are three regional appellate courts in Danang, Ho Chi Minh City and Hanoi. Finally, there is the Supreme People's Court, located in Hanoi.⁹⁶

As mentioned above, Vietnam has a long standing tradition of choosing informal dispute resolution, for example in the form of conciliation with the assistance of village elders, rather than resorting to the courts. Still today, informal pacifying arrangements holds a prominent position in society and research has shown that about thirty percent of the disputes brought to court result in cordial settlements.⁹⁷

Normally, civil disputes are first dealt with by the county courts.⁹⁸ However, in cases involving foreign parties or properties in foreign country, courts at the provincial level act as the court of first instance.⁹⁹ Disputes regarding intellectual property rights are also to be first dealt with by a court at the provincial level.¹⁰⁰

3.3.2 Judicial independence

Generally, there seems to be an opinion that the level of professionalism among jurors and judges in Vietnam is still low. The poor reputation may be attributed to the history of the Vietnamese judiciary. Until 1992, judges were selected by local government and Party officials, and almost always

⁹⁵ The Constitution of Vietnam, Articles 118-125.

⁹⁶ The Constitution of Vietnam, Article 127 and Quinn, 'Legal Reform and its Context in Vietnam', *supra* n. 90, pp. 228-229.

⁹⁷ ASEAN Law Association, 'Legal Systems in ASEAN: Vietnam's Judicial System' (2010) <http://www.aseanlawassociation.org/papers/viet_chp2.pdf> accessed November 14, p. 2.

⁹⁸ The Civil Procedure Code, Article 33.1.

⁹⁹ The Civil Procedure Code, Article 33.3.

¹⁰⁰ The Civil Procedure Code, Article 34.1(a).

due to their political loyalty. As a consequence, they often had no or little training in the law. Today, judicial candidates are required to have at least a Bachelor's Degree in law and must pass through a judicial training course.¹⁰¹ However, unlike most civil servants, judges are only employed for a limited period of five years. At the end of this five-year term, each judge must submit a petition for re-employment. A committee, including delegates of various governments departments, the People's Court and the People's Council, then reviews the petition and submits recommendations to the People's Council on what judges to reappoint. Consequently, uncooperative judges risk not being reappointed, especially at the provincial level.¹⁰²

The question of judicial independence has always been a sensitive topic in Vietnam. It is an area in which the words of the constitutional texts differ sharply from the reality. In each of Vietnam's twentieth century constitutions, judicial independence or autonomy is guaranteed in logically strong terms. Nevertheless, the real state of judicial independence in the country has been very different from the rhetoric of the constitutional covenants. Vietnamese courts and judges have always been indebted to the party and government, and both political and administrative involvement and control has been common.¹⁰³

The political and administrative interference with and control of the judiciary has taken two broad forms. First, local as well as national authorities have often had straight control over courts at their respective level, either alone or in collaboration with national authorities. This has resulted in the well-known fact that both local and national courts are exposed to substantial control by both state bodies and the Communist Party. Second, there have been cases of direct interference in the trial process. This has occurred on both local and national level and in a wide variety of crime, specifically in sensitive political cases.¹⁰⁴

Since the middle of the 1990s there have been efforts taken to upgrade the status, conditions and skills available to the judiciary, in order to furnish the judiciary with the tools necessary for better work and more autonomy. This has resulted in a better-trained judiciary, however it is still difficult to assess how much more autonomy the judiciary has in each case.¹⁰⁵ Even the Politburo recognizes that, despite some years of reform, the broader problems in the legal system remain:

”[I]n general, our legal system still has many shortcomings. The system is still not comprehensive and consistent; its viability is still low; and its implementation in practice remains slow. The

¹⁰¹ Quinn, ‘Vietnam's Continuing Legal Reform: Gaining Control Over the Courts’, supra n. 88, pp. 455-456.

¹⁰² Quinn, ‘Legal Reform and its Context in Vietnam’, supra n. 90, pp.239-240.

¹⁰³ Mark Sidel, *The Constitution of Vietnam - A contextual analysis* (Hart Publishing 2009), pp. 161-162.

¹⁰⁴ Ibid, pp. 162-163.

¹⁰⁵ Ibid.

mechanism for making and amending laws has many deficiencies and is still not properly observed. The speed of lawmaking activities is slow. The quality of the laws is not high. There is lack of attention paid to the research and implementation of international treaties to which Vietnam is a party. The effectiveness of legal dissemination and education is limited. Institutions for law implementation are still inadequate and weak.”¹⁰⁶

Consequently, the big gap between the constitutional rhetoric of judicial independence and the reality at local as well as provincial and national levels turns the process of achieving more judicial autonomy in the country into a long and burdensome task.¹⁰⁷

¹⁰⁶ Communist Party Central Committee, Resolution of the Politburo on the Judicial Reform Strategy to 2020, No. 49-NQfFWV at 1 (June 2, 2005), translation in Gantz, *supra* n. 72, p. 889.

¹⁰⁷ Sidel, *supra* n. 103, p. 163.

4 The Vietnamese regulation of copyright

4.1 Early legislations

Due to its history as a centrally planned command economy where creativity and intellectual property was given little attention, the field of intellectual property is comparatively new in Vietnam.¹⁰⁸ Early copyright laws in Vietnam are best described as paper tigers – laws that the Vietnamese public did not comply with and the Vietnamese Government neither enforced nor implemented.¹⁰⁹

The first endeavour to provide an enhanced copyright protection for both foreign and domestic works took place in 1986 when the Vietnamese Government issued the Decree on Copyright Protection¹¹⁰. The Decree was said to symbolize the interest of Vietnam in offering efficient copyright protection. The underlying aim of the Decree was not only to offer copyright protection, but also to educate the general public about intellectual property rights. The Decree however failed in two critical areas. First, it did not provide any protection for computer software. Secondly, it did not rise to the level of a law, as the Vietnamese Government failed to promulgate implementing regulations. In Vietnam, ordinances, decrees and codes have modest efficacy or force if implementing regulations does not support them. By failing to promulgate these implementing regulations, the Vietnamese Government disclosed its lack of commitment to effectively protect copyrights. Consequently, the Decree proved to be insufficient in scope and useless in application. Copyright piracy thus remained both rampant and largely unregulated.¹¹¹

Nearly a decade later, the Vietnamese Government made a vigorous attempt to sort out the “copyright epidemic”. In December 1994, the Vietnamese Government passed the Ordinance on Copyrights, an Ordinance specifically drafted to conform to international copyright standards. The Ordinance granted more comprehensive and detailed protection for an increased number of works, including computer software, and it also addressed copyright duration and remedies. However, the Ordinance contained many loopholes and several of its provisions considerably contravened basic principles standardized in the Berne Convention and TRIPs. Just as with the Decree, no effectuating regulations were passed to enforce the Ordinance.

¹⁰⁸ Nguyen Nhu Quynh, *Trademark exhaustion and proposals for an improvement of Vietnamese Trademark Law* (Dissertation, Lund University, Lund: Studentförlaget, 2011), pp. 133-134.

¹⁰⁹ Luu Than Nguyen, ‘How to Slay a Paper Tiger: Closing the Loopholes in Vietnam’s New Copyright Laws’ (1995-1996) 47 *Hastings Journal of International Law* 821, p. 822.

¹¹⁰ Decree No. 142/HDBT of the Council of Ministers of 14 Dec. 1986 on copyright protection.

¹¹¹ Julie Siefkas, ‘Copyright piracy in Vietnam: The Impediments of Weak Enforcement Policies on the Country’s Economic Reform’ (2002) 14 *Florida Journal of International Law* 475, pp. 488-489 and Than Nguyen, *supra* n. 109, p. 834.

Neither did the Ordinance direct the People Committees, the State or the Ministry of Culture and Information the duty to enforce the Ordinance. Consequently, legal enforcement agencies had no obligation to enforce the Ordinance, nor any authority to act.¹¹²

In an attempt to end the dysfunctional application and to meet the TRIPs standards – a requirement for membership of the WTO, starting in 1995 Vietnam began to enact several laws on regulations on intellectual property rights protection. On October 28, 1995, the National Assembly approved a new Civil Code, containing provisions governing copyright protection. At its enactment, the Civil Code superseded previous regulations on copyright. The Civil Code and its implementing guidelines noticeably improved and restructured the existing copyright protections and did also introduce additional international copyright standards, in an attempt to advance the country towards compliance with TRIPs.¹¹³ Nevertheless, just as the Decree and the Ordinance, the intellectual property provisions in the Civil Code contained several weaknesses and also lacked a comprehensive and effective enforcement system. The numerous implementation documents resulted in too many documents functioning as basic laws, a structure that showed too burdensome and complex, resulting in a minimally efficient system.¹¹⁴

Notwithstanding the difficulties of enacting a law that actually resulted in improvements of the enforcement of intellectual property infringements, the Vietnamese Government were very aware of the importance of science and technology in driving the development of a knowledge-based economy and in establishing a healthy competitive environment. Consequently, in its Strategy for socio-economic development 2001-2010, the Vietnamese Government asserted that one of the nations goals were “[t]o develop a science and technology market, create a competitive environment, protect intellectual property ownership and copyrights by stimulating people to increase investments in scientific and technological development, promote innovations, improve techniques, and rationalize production.”¹¹⁵ The Strategy was reflected through the installation and enactment of many intellectual property laws during the period of 2001-2010.¹¹⁶

¹¹² David Lange, ‘Vietnam’s 1994 Ordinance on Copyright Protection: A Survey and Preliminary Analysis’ (1995) 3 *Journal of Intellectual Property Law* 1, p. 24, Than Nguyen, *supra* n. 109, p. 835 and Siefkas, *supra* n. 111, pp. 489-491.

¹¹³ Siefkas, *supra* n. 111, pp. 491-492.

¹¹⁴ Quynh, p. 135 and Nguyen Nhu Quynh, ‘The Law on Intellectual Property: An Important Milestone in the Development of Vietnam’s Intellectual Property Legal System’ (2007) 10 *IP Community* 71, pp. 80-81.

¹¹⁵ Quynh, *Trademark exhaustion and proposals for an improvement of Vietnamese Trademark Law*, *supra* n. 108, p. 135.

¹¹⁶ *Ibid.*

4.2 Current framework

In 2005, the National Assembly finally promulgated the Law on Intellectual Property¹¹⁷, the country's first comprehensive law on intellectual property rights. The event signified an important milestone in Vietnam's development of an intellectual property legal system.

The law consists of 222 Articles divided into six parts, where General provisions are contained in Article 1-12, Copyrights and Related Rights in Articles 13-57 and enforcement of intellectual property rights in Articles 198-219.

Just as its predecessors, the Law on Intellectual Property contained some defects. Some stipulations were inconsistent with international conventions, some stipulations revealed their shortcomings first in the implementation process and some stipulations encompassed technical mistakes causing inconsistencies with some of the international treaties that Vietnam is a member of.¹¹⁸ To deal with these shortcomings, The Law Amending and Supplementing a Number of Articles of the Law on Intellectual Property¹¹⁹ was promulgated in 2009.

It should be stressed that intellectual property related issues are not only governed by the Law on Intellectual Property but also in other legal documents, such as for example the Competition Law¹²⁰, the Customs Law¹²¹, the Ordinance on Settlement of Administrative Infringement¹²², the Criminal Code¹²³ and the Civil Procedure Code¹²⁴.

4.2.1 General provisions

As to the priority in the application of laws, Article 5 of the Law on Intellectual Property asserts that the provisions of the Law on Intellectual Property shall prevail in situations where there exist differences between the Law on Intellectual Property and other laws. However, if any provision in

¹¹⁷ Law on Intellectual Property, No. 50/2005/QH11 of Dec. 25, 2001, of the 10th National Assembly, the 10th session.

¹¹⁸ Quynh, *Trademark exhaustion and proposals for an improvement of Vietnamese Trademark Law*, supra n. 108, p. 136.

¹¹⁹ The Law Amending and Supplementing a Number of Articles of the Law on Intellectual Property, Order No. 12/2009/L-CTN of June 29, 2009, of the 12th National Assembly at its 5th session.

¹²⁰ The Competition Law No. 27/2004/QH11, of Dec. 3, 2004, of the 11th National Assembly on its 6th session.

¹²¹ The Customs Law No. 29/2001/QH10 of June 29, 2001, of the 10th National Assembly on its 9th session.

¹²² The Ordinance No. 29/2006/PL-UBTVQH11 Amending and Supplementing a Number of Articles of the Ordinance on Procedures for the Settlement of Administrative Cases, of the 9th National Assembly, on its 8th session.

¹²³ The Penal Code, No. 15/1999/QH10 of Dec. 21, 1999, of the 10th National Assembly, on its 6th session.

¹²⁴ The Civil Procedure Code, No. 24/2004/QH11 of June 15, 2004, pursuant to the 1992 Constitution of the Socialist Republic of Vietnam, which was amended and supplemented under Resolution No. 51/2001/QH10 of December 25, 2001 of the 10th National Assembly, on its 10th session.

the Law on Intellectual Property contravenes an international treaty to which Vietnam is a contracting party, the treaty provision shall apply.

The limitations on intellectual property rights are contained in Article 7, asserting that the exercise of intellectual property rights should neither detriment the State's interests, legitimate rights, public interests and interests of other organizations and individuals, nor violate any other provisions of law. In cases where the achievements of security, people's livelihood, defence or other interests of the State and society needs to be guaranteed, the State have the power to restrict or prohibit the exercise of intellectual property rights by the holders.

Article 7 has been criticized by the International Intellectual Property Alliance¹²⁵ for potentially giving the State "unchecked power to decide when a right holder may exercise rights and under what circumstances, without taking into account the balance already created through exceptions to protection".¹²⁶ The IIPA asserts that the Article could violate the Berne Convention, WIPO Treaties and TRIPs, and that it consequently should be deleted.¹²⁷

Article 8 of the Law on Intellectual Property demonstrates the State's active policies towards intellectual property rights. According to the Article, the State "recognize[s] and protect[s] intellectual property rights ... on the basis of harmonizing benefits of intellectual property rights holders and public interests"¹²⁸, "encourage[s] and promote[s] the creation and utilization of intellectual assets in order to contribute to socio-economic development and improvement of the people's material and spiritual life"¹²⁹, provides financial support and incentives for the creation and protection of intellectual property rights, prioritizes investment in training of public employees and civil servants in the protection of intellectual property¹³⁰ and mobilizes "social resources for investment in raising the capacity of the system to protect intellectual property rights"¹³¹. It is noteworthy that according to Article 8, intellectual property objects that are conflicting with social ethics and public orders and are detrimental to defence and security should not enjoy protection.¹³²

Just like Article 7, Article 8 has also received critique from the IIPA, requesting for the removal of the Article, as it "establishes impermissible content-based restrictions of protection under copyright."¹³³ The IIPA further stresses that a corresponding provision of the Copyright Law of the People's Republic of China, denying copyright protection based on the

¹²⁵ Hereinafter: IIPA.

¹²⁶ International Intellectual Property Alliance (IIPA), *Vietnam: 2010 Special 301 Report on Copyright Protection and Enforcement* (IIPA's Special 301 Recommendations, 2010), p. 370.

¹²⁷ *Ibid.*

¹²⁸ See the Law on Intellectual Property, Article 8.1

¹²⁹ *Ibid.*, Article 8.2.

¹³⁰ *Ibid.*, Article 8.3-8.4

¹³¹ *Ibid.*, Article 8.5.

¹³² *Ibid.*, Article 8.1.

¹³³ (IIPA), *Vietnam: 2013 Special 301 Report on Copyright Protection and Enforcement*, p. 294.

content, was found inconsistent with Article 5(1) of the Berne Convention, by the World Trade Organization's Dispute Settlement Body.¹³⁴

In comparison with the old regulations, the Law on Intellectual Property mean less strict requirements for practising in the intellectual property rights area. Unlike earlier decrees and ordinances, the new Law on Intellectual Property did not include a provision forbidding foreign invested enterprises to practice in the field.¹³⁵

The Ministry of Science and Technology is responsible towards the Government for coordinating with the Ministry of Culture, Sports and Tourism and the Ministry of Agriculture and Rural Development in performing the state management of intellectual property. As regards copyright and related rights, it is the Ministry of Culture, Sports and Tourism whom are responsible for performing the state management of these issues.¹³⁶

4.2.2 Copyright provisions

Regarding the specific provisions governing copyright, these stipulations are found in the second part of the Law on Intellectual Property. Concerning the criteria for the protection, Article 13 provides that Vietnamese nationals, foreign individuals and organizations are entitled to copyright protection for works that are either (i) published for the first time in Vietnam but not in any other countries, or published concurrent in Vietnam within 30 days from the first publication in other country; or (ii) protected under international conventions of which Vietnam is a member.

Article 14 declares what types of works that are covered by copyright, providing a clear distinction between original and derivative works by declaring that derivative works are to be protected only if they are not detrimental to the original works. In Article 15 one finds the subject matters that are not covered by copyright protection. Amongst the kind of works that can not receive protection under the Law on Intellectual Property one finds, among other things, legal documents, processes, press information and operation methods.

Copyrights of works include economic rights and moral rights.¹³⁷ In particular, the moral rights include the right to: name one's own work; attach one's real name or pseudonym in the work; have one's real name or pseudonym acknowledged when his or her work is published or used and to prevent others from modifying one's work in a way that is harmful to one's

¹³⁴ (IIPA), *Vietnam: 2010 Special 301 Report on Copyright Protection and Enforcement*, supra n. 126, p. 370.

¹³⁵ Quynh, 'The Law on Intellectual Property: An Important Milestone in the Development of Vietnam's Intellectual Property Legal System', supra n. 114, p. 78. See the Law on Intellectual Property, Articles 56-57.

¹³⁶ The Law on Intellectual Property, Article 11.

¹³⁷ The Law on Intellectual Property, Article 18.

honour and reputation.¹³⁸ The economic rights encompass the prerogative to, amongst other things: create derivative works; display one's work to the public; reproduce one's work, distribute or import original works or copies thereof and to lease original computer programs or copies thereof.¹³⁹ According to Article 27, the moral rights are protected for an indefinite term, except for the right to publish one's work which are protected for either fifty years from the date of first publication, or for the whole life of the author and for fifty years after his or her death, depending on what kind of work it is. With regards to economic rights, these too are protected for fifty years from the date of first publication or from the death of the author.

In contrast to the earlier copyright provisions, contained in the 1995 Civil Code, the stipulations in the new Law on Intellectual Property are more coherent and more in compliance with Article 6bis¹⁴⁰ and 14ter¹⁴¹ of the Berne Convention. In the 1995 Civil Code, copyrights to works were implemented inexactly and complicated. Copyrights to works were also divided into three different categories with varying rights.¹⁴²

As opposed to industrial property rights, copyrights do not require a registration to become valid.¹⁴³ Nevertheless, in case of a dispute, the owner of a registered copyright might find it easier to prove to the court that he or she is the legitimate owner of the copyright at dispute.¹⁴⁴ Lastly, it is worth to notice that the Law on Intellectual Property is the first law to explicitly

¹³⁸ The Law on Intellectual Property, Article 19.

¹³⁹ The Law on Intellectual Property, Article 20.

¹⁴⁰ Article 6bis, the Berne Convention: *Moral Rights*: 1. To claim authorship; to object to certain modifications and other derogatory actions; 2. After the author's death; 3. Means of redress]

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

¹⁴¹ Article 14ter, the Berne Convention: (1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

¹⁴² Quynh, 'The Law on Intellectual Property: An Important Milestone in the Development of Vietnam's Intellectual Property Legal System', *supra* n. 114, p. 76.

¹⁴³ Compare the Law on Intellectual Property, Article 49 regarding registration of copyright or related right and Articles 86 -92, containing the process for registration of an industrial property right.

¹⁴⁴ See The Law on Intellectual Property, Article 203.2(a), concerning the right and burden of proof of involved parties.

determine what constitutes a copyright infringement.¹⁴⁵ In Article 28, one finds a list of acts that are regarded as infringing acts.

4.2.3 Enforcement provisions

4.2.3.1 Initial remarks

The provisions governing the enforcement of copyrights are found in the Law on Intellectual Property's fifth section. Copyright holders whose right is being infringed upon have the right to self-protection by various means, among others the owner have the right to request that the organization or individual committing the infringing act terminates, make public apologies and pay damages. The copyright holder may also request the competent state agency to handle acts of infringement.¹⁴⁶

To assist them in cases of infringement, the competent state agency may request the use of an organization or an individual to assist them in the case and to share their professional knowledge and expertise. The request may also come from the copyright holder himself. It is noteworthy that the organisation may not be a foreign law-practicing organisation, and the individual must be a Vietnamese citizen with a permanent residency in Vietnam.¹⁴⁷

The remedies available for copyright infringement consists of three types – civil, criminal and administrative measures¹⁴⁸. Competent state agencies may also apply provisional urgent measures, measures to control intellectual property-related imports and exports and measures to secure the administrative sanctioning.¹⁴⁹

Courts, inspectorates, market management offices, custom offices, police offices and People's Committees of all levels are all competent to handle copyright infringement cases within the ambit of their tasks and powers. Whereas civil and criminal remedies fall within the jurisdiction of courts, the application of administrative measures are within the ambit of inspectorates, police offices, market management offices, custom offices and People's Committee's of all levels.¹⁵⁰

4.2.3.2 Civil litigation

As regards civil remedies, it follows from Articles 25.4 and 29.2 in the Civil Procedure Code that civil disputes regarding intellectual property rights fall under the courts' jurisdiction. If an infringement has taken place, the court

¹⁴⁵ Quynh, 'The Law on Intellectual Property: An Important Milestone in the Development of Vietnam's Intellectual Property Legal System', supra n. 114, p. 79.

¹⁴⁶ The Law on Intellectual Property, Article 198.

¹⁴⁷ The Law on Intellectual Property, Article 201.

¹⁴⁸ Including border control measures.

¹⁴⁹ The Law on Intellectual Property, Article 199.

¹⁵⁰ The Law on Intellectual Property, Article 200.

can compel the following remedies: the termination of infringing acts, the performance of a public apology, the performance of civil obligations, the payment of damages and destruction, distribution or use for non-commercial purposes of goods or materials used largely for the production of intellectual property rights infringing goods.¹⁵¹

Concerning the burden of proof during a civil dispute regarding a copyright infringement, Article 79 of the Civil Procedure Code proclaims that the parties must introduce evidences to prove that a request to protect a legitimate interest is well grounded and lawful. The plaintiff must prove that he or she is the owner of the copyright at dispute, either by providing a copy of the copyright registration certificate or by providing necessary evidence that provides the basis for establishment of copyright. Moreover, when making a claim for compensation of damage, the plaintiff must prove his or her actual damage.¹⁵²

The Law on Intellectual Property contains detailed provisions on how to calculate damages in a copyright infringement. Damages include material damage and moral damage, where material damage is determined on the basis of actual loss. In cases where the actual loss cannot be determined, the compensation level shall be determined by the court and may not exceed VND 500 million. The proportion of the moral damage is decided on a compensation level ranging from VND 5 million to VND 50 million, depending on the damage extent.¹⁵³

In cases where there exists a danger of irreparable damage to the copyright holder or where suspected infringing goods are likely to be dispersed or destroyed, the copyright holder may file a request for the court to apply provisional urgent measures. These measures may include seizure, distraint, sealing and ban from ownership transfer. Persons requesting a provisional urgent measure must deposit a security, in case the accused infringer is found not having infringed upon the copyright.¹⁵⁴

4.2.3.3 Criminal prosecution

To reproduce works, phonograms or video recordings or to distribute copies of these to the public without the permission of the copyright holder and on a commercial scale constitutes copyright infringement, which is criminalized in Article 170a of the Penal Code¹⁵⁵. Offenders are imposed a fine of between VND 50 million to VND 500 million or subject to non-custodial reform for up to two years. If the infringement is conducted in an organized matter or if the infringer is a repetitive offender, the infringer shall be sentenced to between six months to three years of imprisonment and shall also be imposed a fine of between VND 400 million to VND 1

¹⁵¹ The Law on Intellectual Property, Article 202.

¹⁵² The Law on Intellectual Property, Article 203.

¹⁵³ The Law on Intellectual Property, Articles 204-205.

¹⁵⁴ The Law on Intellectual Property, Articles 206-208.

¹⁵⁵ See the Law Amending and Supplementing a Number of Articles of the Penal Code, No 37/2009/QH12 of June 19, 2009, of the 12th National Assembly, in its 5th session.

billion. Additionally, the court may chose to impose a fine of between VND 20 million to VND 200 million dong and may ban the offender from holding certain posts or practice certain professions for between one to five years.

According to The Criminal Procedure Code, a case involving an offense described in Article 170a of the Penal Code can only be instituted at the request of victims. If the victim withdraws his or her criminal case institution request, the victim has no right to file a new request, unless the withdrawal of the institution request is due to coercion or force.¹⁵⁶

4.2.3.4 Administrative measures

The administrative measures are a rather unique feature in the Vietnamese intellectual property enforcement system. Administrative measures is applicable in (i) cases of infringement of a copyright causing damages to authors, owners, consumers or society and (ii) when producing, importing, trading or transporting counterfeit goods or assigning others to do so.¹⁵⁷

If administrative measures are deemed applicable, the competent administrative authority may choose between either caution and fine as the principal sanction. The administrative authority may also choose to confiscate the counterfeit goods, to suspend the business activity for a maximum of 90 days, to confiscate the copyright registration certificate and to deprive the infringer the right to use a copyright assessor card. As additional remedies, the administrative authority may choose from a wide range of measures, such as for example restoration of the right to title, destruction of infringing goods, destruction of raw materials used in the production of the infringing goods and compelling infringing imported or transit goods to be transported out of Vietnamese territory.¹⁵⁸

As in a civil litigation, the competent administrative authority may apply administrative preventive measures, such as temporary custody of persons or infringing goods, body search, search of means of transport and objects and search of placher where infringing goods are hidden. For a preventive a measure to be granted, it requires that (i) the infringing acts are likely to cause serious damages to consumers or society, (ii) infringement material evidence is likely to be dispersed, or to (iii) secure the enforcement of decisions on sanctioning of administrative violations.¹⁵⁹

According to Decree 131/2013 on Sanctioning Administrative Violations in Copyright and Related Rights, which enters into force on December 15 2013, the highest fine level to be imposed on a copyright infringing organization is VND 500 million. For an individual copyright infringer the maximum fine is VND 250 million.

¹⁵⁶ The Criminal Procedure Code, Article 105.

¹⁵⁷ The Law on Intellectual Property, Article 211.

¹⁵⁸ The Law on Intellectual Property, Article 214 and Decree no 131/2013/ND-CP on Sanctioning Administrative Violations in Copyright and Related Rights.

¹⁵⁹ The Law on Intellectual Property, Article 215.

5 The practical approach towards copyright piracy

5.1 The development of Vietnam's copyright regime

When asking the interviewees about the development of Vietnam's copyright regime, it is stressed that the concept of intellectual property rights is something relatively new in the Vietnamese legal culture, not emerging until 1986. Before this, creative works were not considered as a property right, and the creator was rewarded only a moral right to his or her work.¹⁶⁰ However, there is a mutual accord among the interviewees that there have been improvements as regards the protection of copyrights during the last years. Improvement of the legislation, improved legislative enforcement as well as campaigns and workshops trying to raise public awareness regarding copyright piracy are mentioned as some of the efforts performed by the Vietnamese Government in an attempt to decrease the vast percentage of copyright piracy.¹⁶¹

Nevertheless, the opinions differ as regards the question of how interested the Vietnamese Government really is in its attempts to address the problem of copyright piracy. Some interviewees proclaim that there is a genuine will at the governmental level to deal with the problem of copyright piracy.¹⁶² The determination by the Vietnamese Government is manifested in various ways; for example, in 2008 the Prime Minister of Vietnam issued an instruction on how to strengthen the management and implementation of copyright and related rights protection¹⁶³. Moreover, in recent years the issue of copyright piracy has been discussed more frequently in newspapers as well as at governmental organized events.¹⁶⁴

Notwithstanding these efforts, some interviewees maintain that the development is very limited and question whether the Vietnamese Government genuinely cares about the problem of copyright piracy. One practitioner asserted that the Vietnamese Government passes legislation solely in order to comply with international treaties, and that there is no honest intention to actually improve the current situation.¹⁶⁵ A foreign official contended that sufficient efforts have not been performed and that

¹⁶⁰ Interview Practitioner 1.

¹⁶¹ Interviews Practitioner 1, Practitioner 2, Practitioner 3, Foreign Official 1, Foreign Official 2, Foreign Official 4 and the Cooperative Discussion on IPR Enforcement.

¹⁶² Interviews Foreign Official 1, Cooperative Discussion, Foreign Official 2, Practitioner 1, Practitioner 4 and Teacher 1.

¹⁶³ Instruction on strengthening the management and implementation of copyright and related rights protection, No 36/2006/CT-TTg, published on December 31, 2008.

¹⁶⁴ Interviews Foreign Official 1, Cooperative Discussion on IPR Enforcement, Foreign Official 2, Practitioner 1 and Practitioner 4.

¹⁶⁵ Interview Practitioner 1.

additional financial resources are necessary for the development of the copyright protection regime to continue successfully.¹⁶⁶ Another Vietnamese practitioner maintain that, despite being aware of the problem of copyright piracy and despite being pressured by both foreign governments and foreign enterprises, the Vietnamese Government does not seem to care too much. As intellectual property rights are private rights, the Vietnamese Government believes that it is primarily up to the rights-owner to protect his or her rights.¹⁶⁷

In conclusion, the performed interviews show that there has been an improvement and a development of the approach towards copyright protection in Vietnam. However, the interviewees differ as regards their opinions towards the attitude of the Vietnamese Government concerning copyright piracy, with some being more inclined to believe that the Vietnamese Government are doing their best in their attempts to develop the countries copyright protection regime.

5.2 The current situation

5.2.1 Statistics

Despite the interviewees positive assertion that the situation of copyright piracy has improved, there is no doubt that there are many areas that can be enhanced. In the World Economic Forums Global Competitiveness Report 2012-2013 Vietnam was ranked as number 70 out of 148 countries when measuring the countries available intellectual property protection. Vietnam was placed below all its neighbouring countries except for Laos¹⁶⁸. As a comparison, China was ranked 29th, Thailand 37th and Malaysia 24th. It should however be noted that the 70th place placed the country five positions higher than in the 2012 report.¹⁶⁹

Likewise, in its 2013 Intellectual Property Rights Report, the Property Rights Alliance ranks Vietnam on place 112 of 130 when it comes to protection of intellectual property rights. As regards copyright piracy specifically, the organization ranks Vietnam 91 of 130, placing the country on place 13 out of 18 participating countries on the regional ranking.¹⁷⁰

In its 2011 software piracy study, the Business Software Alliance reports that the piracy rate in Vietnam, as regards PC software piracy, is 81%. The unlicensed software has a commercial value of USD 395 million. However,

¹⁶⁶ Interview Foreign Official 3.

¹⁶⁷ Interview Practitioner 5.

¹⁶⁸ However, all countries did not participate in the report. For example, there was no statistics regarding Cambodia.

¹⁶⁹ World Economic Forum Klaus Schwab, *The Global Competitiveness Report 2013-2014* (2013-2014).

¹⁷⁰ Property Rights Alliance and Americans for Tax Reform, 'International Property Rights Index 2013' (2013) <<http://www.internationalpropertyrightsindex.org/profile?location=vietnam>> accessed November 28.

albeit being a shockingly high number at a first glance, it must be kept in mind that the software piracy rates are steadily decreasing; in 2004 the piracy rate was 92%. Consequently, in seven years there has been a 9% decrease.¹⁷¹

5.2.2 Foreign companies perception of the situation

Is copyright piracy something that deters foreign companies from settling in the country? The answers provided by the interviewees were almost unison; the high rate of copyright piracy is not something that completely deters companies from settling in Vietnam. However, copyright piracy is a key concern among foreign companies and something that three of the four foreign officials interviewed held as a prioritized question amongst foreign companies in Vietnam.¹⁷² On the other hand, the foreign official interviewed that did not think of it as a key concern held that copyright piracy was not something that the companies he was in contact with discussed and worried about. He asserted that if the companies felt it was an issue, the question would have been raised, but this has not happened.¹⁷³ Nevertheless, this was strongly contended by the other three interviewees.

As regards the relationship between copyright piracy and a company's willingness to establish in the country, one foreign official held that although it might not be something that keeps an enterprise from settling in the country, it is still a concern that affects the amount of investments that a company undertakes in the country. Moreover, the foreign official admitted that there might be hidden cases where the issue of copyright piracy has deterred companies from expanding their business to Vietnam. Logically, the interviewees were mostly in contact with companies that are already established in Vietnam.¹⁷⁴

The foreign companies that are established in Vietnam all have their own strategies when it comes to battling copyright piracy. The strategies seems to be independent of where the company comes from, and is more likely dependent upon what sector the company operates within. As a result, the interviewees could not see that there was any uniform approach towards handling the problem. Rather, this depended greatly upon the size and method of, and damage caused by, the actual infringement.¹⁷⁵

¹⁷¹ Business Software Alliance, 'BSA Global Software Piracy Study' (2011) <<http://globalstudy.bsa.org/2011/>> accessed November 28.

¹⁷² Interviews Foreign Official 2, Foreign Official 3 and Foreign Official 4.

¹⁷³ Interview Foreign Official 1.

¹⁷⁴ Interview Foreign Official 2.

¹⁷⁵ Interviews Foreign Official 1, Foreign Official 2, Foreign Official 3 and Practitioner 1.

5.2.3 The origin of the counterfeit goods

Another interesting question that might shed some light on the problem is the question of the origin of the counterfeit goods. The unanimous answer amongst the interviewees was: China.¹⁷⁶ Some of the interviewed then added other countries to the list, for example Cambodia, Malaysia¹⁷⁷ and Thailand¹⁷⁸. Nevertheless, there seemed to be a complete compliance regarding the opinion that most of the counterfeit goods are made in China and then smuggled through the borders into Vietnam.

It is however difficult to provide a totally clear answer to the question of the origin of the goods. Many of the interviewed mentioned that much the counterfeit goods were in fact produced domestically in Vietnam.¹⁷⁹ According to one practitioner, the counterfeit goods produced domestically seemed to increase.¹⁸⁰ Another practitioner contended that only goods such as fake DVD's and photocopied books were produced domestically, whereas counterfeit goods in bigger quantities were produced in other countries, mainly China¹⁸¹

Consequently, the question of sufficient border control seems to be another dimension to add to the question of why copyright piracy is so common in Vietnam. Vietnam has a vast land- and coastal border. The Vietnamese customs themselves admit that it is a challenge to guard the entire border, and assert that they understand that customs play a crucial role in terms of intellectual property rights protection. According to the Vietnamese customs, the people involved in smuggling counterfeit goods use sophisticated tactics, often avoiding transporting too much counterfeit goods at one time, in case they will get caught.¹⁸²

In the opinion of the Vietnamese customs, the smuggling of counterfeit goods is also a question of resources; the customs do not have enough officers to seize and prevent every shipping or transport. As a consequence, cooperation with rights owners is extremely important. The rights owners must provide the customs with information as regards suspected shipments of counterfeit goods. The rights owners must also help educate the customs officers and must provide guidance for the customs officers when investigating a seized transport containing suspected counterfeit goods.¹⁸³

However, not all of the interviewed believed that the Vietnamese customs were doing their best in order to prevent the counterfeit goods to enter the country. Although admitting that some of the forbidden goods might enter the country not at the official border controls but at unsupervised parts of

¹⁷⁶ Interview: All interviewees.

¹⁷⁷ Interview Practitioner 3.

¹⁷⁸ Interview Practitioner 2.

¹⁷⁹ Interviews Practitioner 1, Practitioner 3 and Teacher 1.

¹⁸⁰ Interview Practitioner 3.

¹⁸¹ Interview Practitioner 1.

¹⁸² Cooperative Discussion on IPR Enforcement.

¹⁸³ Ibid.

the border, two of the foreign officials stressed that corruption is a big problem at the border, and as long as you have the money it is possible to get any kind of goods into the country.¹⁸⁴

5.2.4 The practical application of the Law on Intellectual Property Rights

As regards the Law on Intellectual Property Rights, in theory the law complies fully with TRIPs. In practice however, opinions differ as to how applicable the Law on Intellectual Property Rights really is. Whereas some people claim that the actual law is very good and that it is the enforcement system that is not working¹⁸⁵, others stress the importance of more subordinate regulations and the need of further clarification and official guidance on the implementation of certain provisions.¹⁸⁶

Most critical is a former Vietnamese official, claiming that the Law on Intellectual Property Rights is poorly written. This is due to two things: first, as the knowledge of intellectual property rights in general and copyright in particular is very low, there are very few experts to consult when drafting a law. Consequently, the people in charge of drafting the Law on Intellectual Property Law lacked both skills and knowledge. Secondly, the drafters relied too heavily on the opinions of people who did not participate in the drafting process themselves. These people were often biased to say that the law was carefully and thoughtfully written. The former Vietnamese official holds the poorly constructed Law on Intellectual Property Rights as the primary reason to the high copyright piracy, asserting that the public should not be blamed. However, it is often easier to blame high copyright rates on the public, claiming that they do not care about the law, rather than accusing the government for not creating laws that are sufficiently clear for people to actually adhere to.¹⁸⁷

Some of the foreign officials interviewed question how deterrent the posed fines actually are, asserting that the vendors of counterfeit goods earn such large amounts of money that paying an occasional fine of maximally a couple of hundred million VND is not deterrent enough.¹⁸⁸ Moreover, some of the interviewed practitioners question the new decree, entering into effect on December 15, 2013, fearing that the diversion of the fine level, where individuals can be charged a maximum fine of VND 250 million whereas enterprises can be charged VND 500 million, may in practice result in individuals taking the blame for an infringing activity that in reality was undertaken by an enterprise.¹⁸⁹

¹⁸⁴ Interviews Foreign Official 1 and Foreign Official 3.

¹⁸⁵ Interviews Practitioner 4 and Vietnamese Official 1.

¹⁸⁶ Interview Practitioner 1.

¹⁸⁷ Interview Vietnamese Official 2.

¹⁸⁸ Interviews Foreign Official 3 and Foreign Official 4.

¹⁸⁹ Interviews Practitioner 2 and Practitioner 3.

It should be noted that the WTO in its latest Trade Policy Review on Vietnam does not mention anything about the Law on Intellectual Property Rights not living up to TRIPs standards. Rather, the WTO asserts that “[The Law on Intellectual Property Rights] covers comprehensively the full range of full [intellectual property rights]. Implementing provisions are generally regulated by decrees and circulars.”¹⁹⁰

However, it does seem as if although the TRIPs standards might be adhered to in theory, in practice it works differently. One example mentioned by a Vietnamese practitioner is preliminary injunctions, granted according to Article 206 of the Law on Intellectual Property Rights. According to the practitioner’s knowledge, no preliminary injunction has ever been issued as regards intellectual property cases. The reason for this is, according to the practitioner, the Vietnamese judges reluctance to take responsibility for their decisions.¹⁹¹

Moreover, as some provisions lack official guidance and clarification, it makes them unusable in practice, as practitioners simply do not dare to invoke them in a civil or criminal procedure. It is deemed to be too risky, since the outcome is so unclear.¹⁹²

5.2.5 Enforcement issues

The importance of an efficient enforcement mechanism cannot be stressed enough when talking about ways to battle copyright piracy. The question of enforcement was brought up in all of the interviews and seminars. It is evident that the opinion as to what categorizes a good enforcement system varies, depending on whom one talks to. One government official propounded that the government or the government agencies could not be accused for not enforcing the law. Rather, this is primarily the responsibility of the intellectual property holders themselves.¹⁹³

Although the Law on Intellectual Property Rights gives the rights owners three different courses of action: civil litigation, criminal procedure or administrative measures, in practice the administrative route is by far the most common one. There are three main reasons for this. First, the confidence for the Vietnamese court system in general is very low. All of the interviewed practitioners asserted that they preferred administrative action to resorting to court.¹⁹⁴ It seems to be a common view that in general, the Vietnamese judges lack sufficient skills and experience in order to handle an intellectual property infringement case in a satisfactory way. Consequently, resorting a case to the court was seen as more time consuming and precarious. The interviewed practitioners normally advise

¹⁹⁰ World Trade Organization, *Trade Policy Review: Vietnam* (Published August 13, 2013), p. 89.

¹⁹¹ Interview Practitioner 3.

¹⁹² Interviews Practitioner 2 and Teacher 1.

¹⁹³ Interview Vietnamese Official 1.

¹⁹⁴ Interviews Practitioner 1, Practitioner 2, Practitioner 3 and Practitioner 4.

their clients to choose the administrative route, unless the client wanted damages, in which case a civil action is a must.¹⁹⁵

The low confidence in the court is something that the Vietnamese judiciary is aware of. Nevertheless, one representative contends that it is important to be aware of the fact that the number of cases referred to court is increasing. There is however a capacity problem within the court. In order to handle the increasing amount of cases, the judiciary has started to educate specific people in each court that will then be given the main responsibility to handle cases regarding intellectual property. Moreover, the judiciary has also begun investigating the possibility of building a specific intellectual property court.¹⁹⁶

The second reason as to why people choose the administrative route rather than resorting to court is the difficulty to bring forward a criminal proceeding. Today, there are almost no cases where an intellectual property infringement has resulted in a criminal verdict. The reason for this is the lack of clarification of certain provisions in the Penal Code. According to Article 131 of the Penal Code, only infringements amounting to an infringement on a “commercial scale” qualifies as a criminal offence. However, the term “commercial scale” is not further interpreted and it is consequently unclear what amounts to an “infringement on a commercial scale”. This uncertain threshold makes a criminal action a very unpredictable road to go down. Fearing that they might lose the case, rights owners prefer to resort to administrative action. This uncertainty also has to do with the fact that Vietnam does not have a case law system, and the judgements are not public. As a result, it will not help to “take a chance” and bring a case forward, as the outcome of the next case might be totally different.¹⁹⁷

One practitioner asserted that, besides the lack of guidelines, one of the reasons for the low number of criminal cases relating to intellectual property infringements might be the Vietnamese history. As explained above, intellectual property is a rather new concept in the country. Consequently, the practitioner believed that the enforcement authorities might be somewhat hesitant to imply criminal penalties against the infringers. Rather, they preferred to choose administrative actions such as monetary fines or issuance of a warning.¹⁹⁸

At the Cooperative Discussion on Intellectual Property Rights Enforcement, the representative from the People’s Court assured the participants that the court was in the process of drafting a guiding circular. The judiciary is thus aware of the problem with lacking guidance. However, the representative also noted that it is not necessary to wait for guiding documents before enforcing the law.¹⁹⁹

¹⁹⁵ Ibid.

¹⁹⁶ Cooperative Discussion on IPR Enforcement.

¹⁹⁷ Interviews Practitioner 1, Practitioner 2, Practitioner 3 and Practitioner 4.

¹⁹⁸ Interview Practitioner 1

¹⁹⁹ Cooperative Discussion on IPR Enforcement.

Nevertheless, one government official asserts that there might be a reason for not providing a guideline on the term “commercial scale”. In case such a guideline existed and it was deemed to be unsatisfactory, other WTO members could bring a case against Vietnam for not complying with TRIPs. However, with no guideline, this is less of a risk. The non-existing guideline could consequently be seen as part of a strategy. The government official denies that there is something wrong with this. Rather, he contends, it is a way to use the flexibilities available in TRIPs in order to balance the right of the copyright holder and the right of the people whom would like to have free access to copyright and information.²⁰⁰

The third reason for choosing administrative action is the opinion that the administrative enforcement agencies are deemed to be the most competent in dealing with infringements. In general, the enforcement agencies are described as competent, time efficient and experienced. Usually, an administrative action takes one to three months to settle, which is seen as very reasonable when compared to court cases, which can take between eight to twenty-four months to settle. Administrative action is deemed particularly suitable for dealing with small-scale infringements, which is the most common type of infringements.²⁰¹ In spite of that, the general opinion amongst the interviewees is that there are still a lot of improvements to be made as regards the enforcement agencies. The Copyright Office, one of the enforcement agencies responsible for administrative action against copyright infringers, are criticised for being understaffed, for a lack of financial resources and for not being updated enough as regards new ways of copyright infringements, for example Internet infringements.²⁰² Moreover, the Copyright Office is criticised for taking too long to deliver their decisions, with one practitioner telling about a blatant copyright infringement case that nevertheless took one year for the Copyright Office to resolve.²⁰³

Another concern is the lack of cooperation between the various enforcement agencies. This factor, combined with the rather complex structure of the administrative enforcement system²⁰⁴, makes it difficult for rights owners to know where to turn and what agency to approach when detecting an infringement.²⁰⁵ One Vietnamese official contend that within the current enforcement system, certain agencies focus on the aspect of the problem, rather than on the problem itself. For example, if a rights owner is trying to notify the police that counterfeit t-shirts are being sold at a football game it is quite probable that the police will tell the rights owner that this is the

²⁰⁰ Interview Vietnamese Official 1.

²⁰¹ Interviews Practitioner 1, Practitioner 2, Practitioner 3 and Practitioner 4.

²⁰² Interviews Practitioner 1, Practitioner 2, Practitioner 3, Practitioner 4, Foreign Official 3 and Foreign Official 4.

²⁰³ Interview, Practitioner 1.

²⁰⁴ For a comprehensive overview of the different enforcement authorities, see Supplement A.

²⁰⁵ Interviews Foreign Official 3 and Foreign Official 4.

responsibility of the Market Management Office, and that the police will not do anything about it.²⁰⁶

The poor cooperation also becomes a risk when trying to perform grand raids, requiring the cooperation between several different agencies. One Vietnamese official argue that only the enforcement agency that is firstly informed should be involved in the raid, in order to avoid leaks.²⁰⁷ However, according to the enforcement agencies themselves this is not possible at the moment, due to the scarcity of sufficiently trained personnel.²⁰⁸

One thing that is requested by the foreign officials is an increased transparency in the administrative process as well as accurate and complete records of all of the administrative fines, destructions, product confiscations and other administrative sanctions that are imposed on the infringer.²⁰⁹

Having said that, the enforcement agencies seem to be aware of the critique towards them, and call the lack of cooperation for one of the challenges facing the administrative enforcement agencies. At the Cooperative Discussion on Intellectual Property Rights Enforcement it was held that the partially poor cooperation mostly was due to the fact that cooperation between the enforcement agencies is voluntarily. Consequently, it is up to the discretion of each agency whether they want to cooperate with other agencies or not. To improve the situation, nine agencies have signed a memorandum of cooperation, with the primary goal to share information and to cooperate.²¹⁰

Something that came up in several interviews was the need for the rights owners to pay certain “unofficial fees” to the enforcement agency involved in the case. Although officially, the enforcement agency is supposed to fund their operations with money from the state budget, in practice it seems to be common for the rights owner to pay for the enforcement agencies travel expenses, accommodation and living expenses in cases where the agency for example must travel to remote places in order to inspect a factory suspected for producing counterfeit goods.²¹¹ It is unclear how widespread the custom of charging “unofficial fees” is, however it does not seem as if all enforcement agencies require the payment of these fares in order to take action. It is interesting to note that, when asked about these “unofficial fees”, all of the practitioners interviewed defended the practice, saying that it enabled quicker action, as the enforcement agency did not have to worry about the funding of the action.²¹² One of the interviewed practitioners thought that it was a pity that not all enforcement agencies allowed such “unofficial fees”²¹³, another practitioner asserted that this could not be

²⁰⁶ Interview Vietnamese Official 2.

²⁰⁷ Ibid.

²⁰⁸ Cooperative Discussion on IPR Enforcement.

²⁰⁹ Interviews Foreign Official 3 and Foreign Official 4.

²¹⁰ Cooperative Discussion on IPR Enforcement.

²¹¹ Interviews Practitioner 1, Practitioner 2, Practitioner 4 and Teacher 1.

²¹² Interview Practitioner 1.

²¹³ Interview Practitioner 2.

compared with corruption, rather it must be seen as a way for the rights owners to seize an infringement in an efficient way.²¹⁴

Nevertheless, just as with the implementation of the Law on Intellectual Property Rights, the WTO in its latest Trade Policy Review does not in any way criticize Vietnam for a lack of enforcement. The report does state that the enforcement system is highly complex and that “the number of infringement cases brought before the authorities and the monetary amounts of fines issued by them have fluctuated considerably in recent years.”²¹⁵ The fact that WTO does not criticize Vietnam was something that was brought up in an interview with a Vietnamese official, wanting to explain that the situation as regards the enforcement really is not as bad as some people make it out to be.²¹⁶

Moreover, one government official accent the importance of taking into account the Vietnamese Governments difficulties when it comes to the drafting and implementation of laws and decrees regulating copyright. Being under international pressure, the Vietnamese Government must still take into consideration what is best for the Vietnamese people. As the living standard in Vietnam is rather low, it is extremely difficult for the Government to punish people whom infringe upon intellectual property rights. In developed, rich, countries, people can afford to buy a computer program for hundreds of dollars. That is not however the reality for most Vietnamese people. If the Vietnamese Government were very strict in their enforcement, most Vietnamese people consequently would not have access to computer programs etcetera. This is a paradox, and a difficult task to solve.²¹⁷

5.3 Underlying causes of Vietnam’s piracy problem

5.3.1 Authoritarian rule?

Empirically, strong copyright systems are characteristics of relatively free societies. A close link seems to exist between respecting individual rights and respecting a copyright system that stimulates and respect an individual’s creative achievement. One common argument is thus that authoritarian societies, with government censorship, promote piracy. As copyright protection and the freedom to express ones opinion goes hand in hand, societies without respect for individual rights are unlikely to tolerate private expressions or sensitive activities.²¹⁸

²¹⁴ Interview Practitioner 3.

²¹⁵ The World Trade Organization Trade Policy Review: Vietnam, pp. 93-94.

²¹⁶ Interview Vietnamese Official 1.

²¹⁷ Interview Vietnamese Official 1.

²¹⁸ Peter K. Yu, *Four Common Misconceptions About Copyright Piracy* (Public Law & Legal Theory Working Paper Series, Research Paper No 01-16 Michigan State University DCL College of Law, 2003), pp. 9-10.

Scholars point at China whom, like Vietnam, is a single-party state with an authoritarian rule. China has for many years exercised very strict control over the distribution of media products and the dissemination of information. Due to severe restrictions on for example film, books and the Internet, many media products are unavailable despite heavy demands and consumers must settle for pirated goods or black market products. As time goes by, the market becomes soaked with infringing substitutes, making it difficult for foreign distributors and manufacturers to enter the market, even if the restrictions are eventually relaxed or removed.²¹⁹

It is consequently interesting to note that during the performed interviews, everyone but one foreign official strongly disagreed with the contention that Vietnam's situation as a single-party state was to blame for the high rates of copyright piracy. The interviewees explained their disagreement using various reasons; amongst others it was held that the fact that a state is a democracy does not in itself prevent copyright piracy. Rather, there are several democracies in the world where copyright piracy actually is an issue.²²⁰ Instead, the issue of copyright piracy must be considered as a more complex problem, one that cannot be explained simply by referring to the political system.²²¹

The foreign official whom agreed upon the contention that there is a connection between Vietnam's political system and the copyright piracy problem asserted that due to the lack of pressure from a political opposition, there is no one forcing the government to up its efforts to deal with the problem. Consequently, the only actor putting pressure on the government to act is the businesses affected by copyright infringements.²²²

Finally, an authoritarian rule could be compared to a double-edged sword, in the sense that such a rule could be very effective in eradicating social ills. Once again using China as an example, scholars point to the power demonstration displayed by the Chinese Government in the early 1990s, when they in an attempt to deter pirates and eliminate copyright piracy, imposed death penalty and life imprisonment in severe infringement cases and recruited the help of some of their strictest law enforcers to clean up pirate factories.²²³

5.3.2 The Confucian heritage?

During the past two decades, scholars have frequently characterized copyright piracy in Asian countries as mainly a cultural problem. In

²¹⁹ Ibid.

²²⁰ Interviews Foreign Official 2 and Foreign Official 3.

²²¹ Interviews Practitioner 1, Practitioner 2 and Practitioner 4.

²²² Interview Foreign Official 1.

²²³ William P. Alford, 'Making the world safe for what? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World' (1997) 29 *New York Journal of International Law & Politics* 135, pp. 143-144.

particular, Confucianism has been said to be detrimental to intellectual property reforms.²²⁴ In contrast to Western values, which favour individual rights, Confucian ethics emphasizes hard work, teamwork, submission to authority and the virtue of severity. The Confucian ethics have been said to contribute to the economic developments in Eastern nations such as Japan and Korea.²²⁵

When asked about the underlying reasons for the vast percentage of copyright piracy in Vietnam, none of the interviewees mentioned the Confucian heritage as a possible explanation. The discussion of the Confucian heritage did come up in the interview with a law school lecturer, however this was in conjunction with discussions regarding the Vietnamese peoples unwillingness to resort to court, rather than when discussing the background and rationale of the country's copyright piracy problem.²²⁶

As regards the debate in the literature, the starting point of most discussions regarding the relationship between Confucianism and intellectual property rights is William Alford's influential book *To Steal a Book Is an Elegant Offense*. In his book, Alford contend that Confucian culture hindered copyright protection and thus did not allow intellectual property protection to take root by itself. Moreover, Alford asserts that Confucianism is accountable for the failure of many reforms pushed by foreign nations and intellectual property rights owners to trigger improvements in intellectual property enforcement and protection.²²⁷

However, several scholars have criticized Alford's findings. Wei disputes whether the title of the book has created a deceptive impression about Confucianism. He asserts that the quote "to steal a book is an elegant offence" is by no means a Confucian concept but rather a notion that was made popular in the beginning of the 1900s when a famous Chinese novelist published a popular fictional book where the quote was used to justify the main characters bad behaviour.²²⁸ Another critic is Shao, whom argues that Alford, when constructing his arguments, did not use all the available data of China's copyright history, thus presenting a fragmented picture.

Yu is another sceptics as regards the correlation between Confucianism and a weak copyright protection regime. Amongst other things, he points at the fact that Confucianism is a continuous evolving philosophy and that today's Confucianism is different from the actual teachings of Confucius. There are also many different strands of Confucianism. Moreover, Yu stresses that by focusing on the separate values in Asia, one risk to underestimate both the historical fractures of colonization and the present forces of global

²²⁴ Yu, *Four Common Misconceptions About Copyright Piracy*, supra n. 218, p. 3 and Yu, 'Intellectual Property and Asian Values', supra n. 34, p. 340.

²²⁵ Wei Shi, 'The Paradox of Confucian Determinationism: Tracking the Root Causes of Intellectual Property Rights Problem in China' (2008) 7 *The John Marshall Review of Intellectual Property Law* 454 p. 455.

²²⁶ Interview Teacher 2.

²²⁷ William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press 1995).

²²⁸ Shi, supra n. 225, p. 458.

interaction. Lastly, Yu questions whether the discussion of the importance of the Confucian influence simply is based on cultural stereotypes. Just as it would be both simplistic and misleading “to attribute the massive unauthorized copying problem on the Internet ... to the communitarian underpinnings of Judeo-Christianity, it is equally problematic to attribute piracy and counterfeiting in Asia to Asian cultures.”²²⁹

5.3.3 A development issue?

Despite being applauded for its quick development and rapid economic growth²³⁰, Vietnam is still a developing country. Could this be a reason for the countries struggle to battle copyright piracy? After all, statistics show that copyright piracy is more frequent in developing countries.²³¹ If this is the case, is time all that a developing country like Vietnam needs to improve their copyright protection regime? Will stricter copyright enforcement follow naturally with an increased economic standard?

The analogy between a countries economic situation and the fact that it cannot satisfyingly control copyright piracy is however contended by Yu, whom asserts that it is misleading to argue that copyright piracy is primarily a development issue. In spite of the fact that copyright piracy is less common in developed countries, there is little evidence showing that deficient economic development is the primary cause of extensive copyright piracy.²³² Rather, in the literature China has been put forward as a paradigm case – proving that forceful economic development is possible despite lacking strong IP protection.²³³ This is however contested, as others point out that China in fact has improved its intellectual property protection in later years and is now following along the same path as other developed countries has before.²³⁴

As noted in earlier chapters describing the development of copyright law,²³⁵ almost every country that eventually has become an economically great nation began with copying. This was considered as a way to develop; a country copied other countries creative works and learnt by doing so.²³⁶ As the country developed and started develop their intellectual property, the phase of widespread intellectual property theft died out. Instead, the country shifted towards enabling more effective intellectual property protection in

²²⁹ Yu, ‘Intellectual Property and Asian Values’, supra n. 34, pp. 345-350.

²³⁰ Worldbank, ‘Vietnam Overview’ (2013)

<<http://www.worldbank.org/en/country/vietnam/overview>> accessed November 26.

²³¹ See International Intellectual Property Alliance (IIPA), *Special 301 Report* (2013).

²³² Yu, *Four Common Misconceptions About Copyright Piracy*, supra n. 218, p. 7.

²³³ Frederick M. Abbott, ‘Toward a new era of objective assessment in the field of TRIPS and variable geometry for the preservation of multilateralism’ (2005) 8 *Journal of International Economic Law* 77

²³⁴ William Kingston, ‘An agenda for radical intellectual property reform’ in Keith Eugene Maskus and Jerome H. Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press 2005), p. 658.

²³⁵ See chapter 2.1.

²³⁶ Kingston, supra n. 234, p. 658.

order to safeguard the domestic intellectual property. These countries were consequently all determined to industrialize before opening up to foreign interests and consequently waited to introduce a strong international intellectual property regime.²³⁷

When asked about whether or not Vietnam's situation as a developing country is given sufficient attention amongst the developed countries strive towards stricter intellectual property standards, the most frequent answer amongst the interviewees were that they believe that other countries are aware and understanding of Vietnam's economic situation, as well as the countries historic development.²³⁸ Consequently, none of the interviewed felt that Vietnam was treated unjust by more developed countries. Moreover, the interviewees did not believe that the fact that Vietnam is a developing country is something that should justify the weak protection and it should not be a reason for allowing the country to fall behind when it comes to enforcement.²³⁹ Since Vietnam has agreed with the high intellectual property protection standards incorporated in for example TRIPs, the country must now comply with these standards.²⁴⁰

5.3.4 Intellectual property rights, a Western concept?

When discussing the underlying causes for copyright piracy in Vietnam, the Vietnamese peoples' inexperience with the concept of intellectual property rights is something mentioned by all of the people interviewed. Intellectual property rights are by most people seen as a foreign feature that has been imported into the society, rather than something that have emerged on its own.²⁴¹

The interviewees stress the importance of remembering that before Doi Moi and the opening up of the Vietnamese economy, there was no such thing as private intangible property. Rather, the Vietnamese government took care of everything, employing artists and composers and having them create works that belonged to all of the Vietnamese people. The system shift consequently created confusion, as the Vietnamese suddenly was supposed to pay to acquire something that used to be free.²⁴²

²³⁷ Assafa Endeshaw, *Intellectual Property Policy for Non-Industrial Countries* (Dartmouth Publishing 1996), quoted in Peter K. Yu, 'Intellectual Property, Economic Development and the China Puzzle' in Daniel J. Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford University Press 2007), p. 175, and Kenneth G. Lieberthal, *Managing the China Challenge: How to Achieve Corporate Success in the People's Republic* (The Brookings Institution 2011), p. 26, quoted in Peter K. Yu, 'The Rise and Decline of the Intellectual Property Powers' [2012] 34 *Campbell Law Review* 525, p. 532.

²³⁸ Interviews Practitioner 1, Practitioner 4, Foreign Official 1, Foreign Official 2, Foreign Official 3, Teacher 1 and Vietnamese Official 2.

²³⁹ Interview Vietnamese Official 2.

²⁴⁰ Interview Vietnamese Official 1.

²⁴¹ Interview Practitioner 1.

²⁴² Interview Practitioner 5.

As regards the question of how aware the Vietnamese people are of the fact that actions such as buying counterfeit goods and downloading movies are illegal activities, the answers amongst the interviewees differ. Whereas some interviewees claimed that most people are aware of the existence of intellectual property laws,²⁴³ others were more nuanced in their answer, maintaining that although it might be a rather well known concept if talking to young, educated, people in the city, most people in Vietnam are still farmers, living in rural parts of the country where the concept of intellectual property rights is far from established.²⁴⁴ One practitioner also stressed that there might be a difference between different acts of infringement; asserting that while most Vietnamese people might be aware of the fact that it is illegal to buy a fake DVD or a bag, there is a bigger ignorance as regards illegal activities taking place online.²⁴⁵

All of the foreign officials interviewed agree that as of right now, the public mindset does not fully respect, encourage and reward intellectual property rights and other products of the human minds.²⁴⁶ One interviewed foreign official believed that this was due to the fact that the Vietnamese Government has not put down enough efforts to change the mindset of the Vietnamese consumers. Moreover, the foreign official was of the perception that most Vietnamese people are aware of the fact that they are doing something illegal when buying counterfeit products. However, when balancing the risks of getting caught when buying a counterfeit product with the value of purchasing the genuine product, the scale tipped over in favour of the counterfeit product. According to the foreign official, it is thus important to change peoples' mindset and increase the value of buying original products.²⁴⁷

5.4 The future approach

In 1996, Professor Glenn R. Butterton proclaimed, when discussing China's struggle to conform to its WTO commitment, that the most efficient way to reduce intellectual property rights piracy was to allow the Chinese population to become part owners of intellectual property rights. Accordingly, Butterton claimed that by allowing a citizen to become a beneficiary of intellectual property rights, it was less likely that this citizen would then be inclined to protect this right, rather than infringe it. A country would thus be more inclined to enforce intellectual property rights once it is in their economic interest to do so. Furthermore, Butterton proclaimed that the greater the nation's interest is in protecting intellectual property rights,

²⁴³ Interviews Practitioner 4 and Foreign Official 3.

²⁴⁴ Interviews Practitioner 1 and Practitioner 3.

²⁴⁵ Interview Practitioner 5.

²⁴⁶ Interviews: All Foreign Officials.

²⁴⁷ Interview Foreign Official 3.

the greater the capacity of the nation's institutions to carry out enforcement work, the greater will the overall enforcement levels be.²⁴⁸

Nicholas R. Monlux asserts that Butterton's theory by extension can be applicable to Vietnam. Nevertheless, he questions what kinds of programs that will create a disincentive to pirate intellectual property material, and how an average citizen in practice can become a beneficiary of intellectual property rights.²⁴⁹

Amongst the interviewees, nothing is mentioned about making the Vietnamese citizen's beneficiary of intellectual property rights. However, the importance of continuing to raise public awareness is, once again, stressed amongst the interviewees. An increased knowledge about the Law on Intellectual Property Right is purported as the key to decreasing the high rates of copyright piracy.²⁵⁰ One practitioner asserts that while the young Vietnamese generation fully understands what copyright and intellectual property rights are, they still choose to not comply with the laws.²⁵¹

Another common thread when discussing ways of repressing copyright piracy is to solve the shortcomings of the enforcement system. This is obviously not something that is done very easily, but will rather be an arduous and time requiring task. Education of the people working in the administrative enforcement agencies – preferably by foreign scholars and experts from developed countries whom can share their experiences, as well as increased financial assets are two things that are deemed necessary in order to improve the enforcement system.²⁵²

One thing that is highly sought after and that might improve the enforcement of intellectual property rights is the initiation of a specialized intellectual property court. At the Cooperative Discussion on Intellectual Property Rights Enforcement, it was confirmed by the representative from the Supreme People's Court that the judiciary is currently investigating the possibility of building a specialized intellectual property court.²⁵³ The news resulted in certain excitement amongst the participants at the seminar. However, not everyone thinks that a specialized intellectual property court is the right way to go. One Vietnamese official contend that as for now, Vietnam cannot afford it as the country lack the competence for running such a specialised court. Rather, the Vietnamese official asserts that a possible solution to increase the number of court cases is to initiate special committees and chambers at some of the already existing courts. These

²⁴⁸ Glenn R. Butterton, 'Pirates, Dragons, and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement' (1996) 38 Arizona Law Review 1081, pp.1117-11122.

²⁴⁹ Monlux, *supra* n. 83, pp. 186-187.

²⁵⁰ Interviews Practitioner 1, Teacher 1, Foreign Official 2, Foreign Official 3, Foreign Official 4, Practitioner 2, Practitioner 3 and Practitioner 4.

²⁵¹ Interview Practitioner 1.

²⁵² Interview, Practitioner 1, Teacher 1, Foreign Official 3, Foreign Official 4, Practitioner 2 Practitioner 4 and Practitioner 3.

²⁵³ Cooperative Discussion on IPR Enforcement.

chambers and committees should then be specially trained to resolve intellectual property cases.²⁵⁴

Increased public awareness and an improved enforcement system are identified as the main ways to address copyright piracy in the future. But, as regards the question of who should be responsible for ensuring that this actually happens, opinion differs. Whereas some of the practitioners and foreign officials interviewed assert that it primarily must be the responsibility of the government,²⁵⁵ one government official opposes, arguing that it is not only the government's responsibility but also the rights owners duty.²⁵⁶

One sector that is considered to be more successful than others as regards dealing with copyright piracy is the software industry. Software piracy in Vietnam has always been rampant, with piracy levels at or near one hundred percent since the mid-1990s. However, as mentioned in chapter 5.2.1, the percentage of software piracy is steadily decreasing. The Business Software Alliance is given credit by a Vietnamese practitioner for doing everything right in order to increase the Vietnamese Governments interest in fighting software piracy. The visit of Microsoft's founder Bill Gates in 2006²⁵⁷ is mentioned as an important example that made the Vietnamese Government more aware of the problem of software piracy. One year later, in May 2007, the Vietnamese Government entered into a Public-Private Partnership Agreement with Microsoft. According to the agreement, the Vietnamese Government would ensure that legitimate copies of Microsoft's Office system would be used on all government computers. In exchange, Microsoft would provide financial as well as other assistance in Vietnam's economy²⁵⁸. By being very proactive, the Business Software Alliance has made sure that software piracy has gotten a lot of attention, and consequently the Vietnamese Government cannot pretend as if the problem does not exist.²⁵⁹

Apropos the Microsoft agreement, this is something that Monlux mentions as an example of a way to create disincentives to infringe upon copyrighted material. By "foster[ing] local innovation and enable jobs and opportunities to sustain a continuous cycle of social and economic growth"²⁶⁰ Monlux asserts that the Vietnamese citizens, in some ways, become beneficiaries who will probably maintain the integrity of Microsoft's intellectual property rights. What is more, Monlux adds that enriching local software entrepreneurs has the most powerful potential to change Vietnam's status as the pirating capital. By encouraging intellectual property development

²⁵⁴ Interview Vietnamese Official 2.

²⁵⁵ Interview Foreign Official 1, Foreign Official 2, Foreign Official 3, Foreign Official 4, Practitioner 1, Practitioner 2 and Practitioner 3.

²⁵⁶ Interview Vietnamese Official 1.

²⁵⁷ BBC NEWS, 'Vietnam gives Gates star welcome' (2006) <<http://news.bbc.co.uk/2/hi/asia-pacific/4933290.stm>> accessed December 2.

²⁵⁸ EE Times, 'Microsoft inks anti-piracy deal with Vietnam' (2007)

<http://www.eetimes.com/document.asp?doc_id=1166178> accessed December 2.

²⁵⁹ Interview Practitioner 5.

²⁶⁰ Monlux, supra n. 83, p. 188.

“from local merchants by turning intellectual property into ‘an export revenue earner’ there is greater incentive for merchants and others to refrain from copyright piracy.” Consequently, the Microsoft agreement provides economic as well as other incentives to both the Vietnamese people and their government.²⁶¹

Concerning the question of whether there any countries whose handling of copyright piracy Vietnam should study and learn from, it is suggested at the Cooperative Discussion on Intellectual Property Rights Enforcement, by a representative from the Motion Pictures of America, that Vietnam should look at Malaysia. Twenty years ago, Malaysia’s copyright piracy rates were a disaster. Over the 1990s the country nevertheless did a tremendous effort in enforcing intellectual property rights on street levels. Now, the Malaysian government is very determined as regards enforcement on the Internet, leading to the shut down of two big torrent-downloading sites.²⁶² To copy the Malaysian approach is also suggested in an article by Julie Siefkas.²⁶³ A representative from the Business Software Alliance contend that Vietnam should learn from countries such as India, China and Thailand, whom already have or are on their way to develop their manufacturing skills in order to begin the journey from being an imitating country to an innovating country.²⁶⁴

A Vietnamese official nevertheless contradicts this, stressing that Vietnam has its own problem to deal with, none of which can be solved by copying a model from another country and imposing it on to the Vietnamese legal system. Vietnam is a unique country, much unlike its neighbouring nations. For example, Thailand has been a democracy for a long time. China is difficult to compare with seeing as how it is such a huge country with an economy much bigger than Vietnam’s. The fact that copyright piracy is so hard to get rid off has caused the Vietnamese citizens to grow accustomed to it, making it very difficult to prevent.²⁶⁵

Regarding Vietnam’s possible future as a destination for high technology value-added manufacturing, one Vietnamese official interviewed does not see it happening. This is not only because of the lack of intellectual property protection, but also because of the lack of sufficient incentives for global companies to invest big money in Vietnam.²⁶⁶ Another Vietnamese official is more positive, asserting that it must be an ambition for the country to strive towards. However, as of today, it is a long way to go, and intellectual property cannot on its own help a country to evolve from an imitating country to an innovating one.²⁶⁷

²⁶¹ Ibid, pp. 188-189.

²⁶² Cooperative Discussion on IPR Enforcement.

²⁶³ Siefkas, supra n. 111, pp. 499-500.

²⁶⁴ Cooperative Discussion on IPR Enforcement.

²⁶⁵ Interview Vietnamese Official 2.

²⁶⁶ Interview Vietnamese Official 2.

²⁶⁷ Interview Vietnamese Official 1.

Lastly, referring to Professor Butterton's claim that countries are more inclined to enforce intellectual property rights when it is in their economic interest to do so. According to an article by Liu regarding copyright piracy in the music industry in China, piracy of foreign works imposes an alarming threat to the livelihood of domestic industries. Whereas copyright piracy in an emerging market has little impact on the multinational companies financial soundness, smaller domestic companies are generally restricted to the home market, where an inability to secure copyrights and make profits would completely cut off the domestic companies sources of livelihood. Consequently, multinational companies in general have better financial capacities to endure piracy in an emerging market for a prolonged period of time, as opposed to domestic companies.²⁶⁸ If Liu's findings are deemed to be transmissible to Vietnam, this if nothing else could work as a motivating fact for the Vietnamese Government to act.

²⁶⁸ Jiarui Liu, 'The tough reality of copyright piracy: a case study of the music industry in China' (2010) 27 *Cardozo Arts and Entertainment Law Journal* 621, pp. 657-658.

6 Conclusion

6.1 Actual outcome of the Minor Field Study

During my eight weeks in Vietnam, I performed a total of twelve interviews. Despite being eight less than I initially planned for, I still feel that the answers I received from the people interviewed gave me a rather clear picture of the complex problem that is Vietnamese copyright piracy.

Unfortunately, I was not able to interview any shop owners. I first thought that this was because of the language barrier. However, when asking around shops selling counterfeit goods in Hanoi, accompanied by a Vietnamese interpreter, no one was particularly willing to answer any questions. Consequently, this is a perspective that will not be displayed in the thesis.

Nevertheless, I did manage to interview four foreign officials, five Vietnamese practitioners, two Vietnamese officials and two university lecturers. Therefore, despite the lack of shop owners and the scarcity of university employees, I still feel that the result of my field study is well balanced, as it gave different sides of the Vietnamese intellectual property community the chance to share their thoughts.

During all my interviews, I used the systematic interview method with a general guide approach. This turned out very well, and I was surprised, and relieved, over how freely the interviewees were in their answers. Contrary to my apprehensions, the interviewees were all willing to share their personal thoughts and opinions on the current situation and suggest possible future changes. I have chosen not to disclose the names of the interviewees, as some of them were quite critical in their opinions. However, all of the interviews, albeit unidentified, can be found in Supplement B of this thesis.

What surprised me the most was the fact that most people had similar answers and that the combined answers presented a rather unanimous, but still highly complex, picture of the situation. I expected the foreign officials to have a more negative attitude towards the progress, or perhaps lack of progress, as regards copyright protection. I also expected the interviewed Vietnamese officials to paint a much more positive picture of the situation, perhaps “blaming” the situation on factors out of their control. Nevertheless, this turned out to be only prejudices from my side and instead I found that all people interviewed were very well aware of the problem, albeit somewhat differing in their suggested solutions.

Besides the interviews, I was also given the opportunity to participate in a workshop arranged by the Ministry of Science and Technology regarding the overlapping protection of trademark, industrial design and copyright, a

cooperative discussion on intellectual property rights enforcement organized by the American Chamber of Commerce and a national workshop on copyright for film industry professionals arranged by WIPO. These workshops gave me an invaluable opportunity to meet and talk to Vietnamese as well as foreign intellectual property professionals, all very willing to share their thoughts on how to battle copyright piracy.

6.2 Vietnam's piracy problem

What this thesis hopefully demonstrates in a clear way is that copyright piracy is a really complex problem with various underlying reasons as well as a myriad of possible solutions. As regards the situation in Vietnam, I do believe that the biggest explanatory factors are the country's economic situation as a developing country and the fact that intellectual property rights initially is a Western concept.

Initially, I was of the opinion that the country's Confucian heritage played an important role in fostering copyright piracy. However, I now agree with the scholars who assert that this is purely a misunderstanding and a result of old cultural stereotypes. After all, countries such as Japan and South Korea have a far stronger Confucian heritage than Vietnam – and in these countries the protection of intellectual property rights works just fine. Moreover, it is easy to forget that Vietnam has not only a Confucian heritage, but its history carry traces of French colonialism as well as communism.

I do not believe that the fact that Vietnam for a long period of time has been under an authoritarian rule is an underlying reason for the high copyright rates. As was stressed in the interviews, copyright piracy exists in democratic countries as well. However, I do contend that the authoritarian rule might be something that impedes the development of intellectual property protection in Vietnam, as it is solely up to the Vietnamese Government whether or not to prioritize the question. With no political opposition, it is up to the companies and foreign countries to lobby for questions that they think the government should deal with.

As regards the question of why the sales of pirated goods are still so high, the probable answer is that it takes time to change a rehearsed behaviour. It would be naïve to think that a WTO membership would magically lead to a decrease of copyright piracy. Rather, this thesis has shown that WTO membership on its own does not reduce piracy rates. Instead, it requires a country to be determined and willing to put down a lot of resources. It is one thing to enact a law that is compliant with the TRIPs standards – it is another thing to make sure that this law is being complied with.

During my two months in Vietnam, counterfeit goods constantly surrounded me. At a first glance, it can thus seem as if the Vietnamese authorities do not

do anything to curb the problem. I am of the opinion that the Vietnamese Government is not genuinely interested in the country's piracy problem.

However, I do not believe that it is solemnly a question of negligence. Rather, I think that the Vietnamese Government is aware of the rather precarious situation they are in. To strike down too hard on copyright piracy would take away many peoples' livelihood and would probably be considered a very unpopular move, especially as many of the small-scale vendors of counterfeit goods are probably unaware of the fact that they are selling something illegal. I think the government are doing the right thing, focusing on the large-scale infringers and at the same time working to change the mindset of the Vietnamese citizens'. If the Vietnamese mindset as regards copyrights and other intellectual property rights changes, I am certain that this will automatically lead to a decrease of the piracy levels.

The fact that the country's piracy levels are still high does, according to me, not mean that the WTO accession has not had any impact on the protection of copyrights. On the opposite, the WTO accession was the reason for the enactment of Vietnam's first intellectual property rights law. Moreover, since becoming a member of the WTO, Vietnam now has other countries eyes upon them and can thus not ignore the existence of copyright piracy. As a consequence, the country has been forced to improve their enforcement level, which has lead to a slow – but steady, decrease of the piracy rates.

Thinking about it, eight years ago Vietnam did not even have a specific law on intellectual property rights. From this point of view, I think that the country's progress is quite astonishing.

6.3 Suggested alterations

What could then be done in order to reduce copyright piracy in Vietnam? As regards the Vietnamese government, I believe that there are several things that could be done. First, although mentioned several times already in this thesis, I must stress the importance of continuing the work of raising public awareness. An increased knowledge about the regulating laws and the concept of copyright is a key in changing the behaviour of the Vietnamese people. I am aware that raising public awareness is a very arduous task and it is important to show understanding towards the Vietnamese Government for not being able to spend all the state's finances on this task. As a developing country, Vietnam understandably has a lot of pressing issues to deal with. On the other hand, one could at the same time argue that when signing the WTO treaty and abiding to implement TRIPs, Vietnam took upon them self to work for a decreased copyright piracy rate. As a consequence, they must now do what it takes to live up to this promise.

Secondly, I believe it is essential to continue the education of judges as regards intellectual property rights. As for right now, I do not think that the initiation of a specialized intellectual property court is a feasible option. The

level of knowledge amongst the existing judges is quite simply too low, the scarcity of resources is too big. Rather, I think it would be better to start in a small scale, as suggested by one of the Vietnamese official interviewed, and initiate specific chambers dealing with intellectual property cases, in certain courts. It would then be possible to focus the professional development on the people working in these chambers. That Vietnam is not ready for a specialized intellectual property court right now does not mean that I do not believe that it is possible in the future.

Thirdly, concerning the administrative enforcement agencies, I think it would be advisable to do an overview of the existing system. Is it really necessary to have such a complex system with so many different agencies, organised in so many different levels? If the number of agencies were decreased, perhaps this would both free resources, decrease the bureaucracy and increase the cooperation between the remaining agencies. To merge some of the existing agencies would also improve co-operation, as the former agencies would then belong to one mutual agency – hence the old habit of not wanting to benefit other agencies than your own would disappear.

However, I do realise that this is easier said than done. This is a question carrying enormous prestige and I must admit that I find it hard to see that any existing agency, or any ministry with an agency, would accept a closure or a merger. A more feasible option is thus to work intensely on improving the co-operation between the agency. Today, it seems as if each agency can choose whether they want to co-operate and share information with other agencies or not. I think that this should be mandatory. The agencies should try to work towards a common goal, rather than merely focusing on their own areas of interest.

The fourth suggested change is to perform another review of the Law on Intellectual Property. Although the law could be said to formally live up to TRIPs standard, I do not think it does in practice. On several provisions, the law is vague and ambiguous. What is more, it lacks clear guidelines, which makes several provisions useless in practice. Having a clear framework to follow would undoubtedly improve the works of many people. This is also a question of legal certainty.

Fifthly, I am of the opinion that Vietnam should start publishing its cases. Although not legally binding, I still think that the publishing would be a great help for practitioners, law students and also for the judges themselves. By studying the judges' actual application of the Law on Intellectual Property Rights, it would be easier to assess whether the law works as it should. Moreover, it would enable a discussion regarding key concepts and it would also force the judges to put in an effort when settling a case.

Moreover, I also believe that it would be beneficial for the development of intellectual property rights in general if the Vietnamese Government started to publish official statistics of the administrative enforcement agencies

whereabouts each year. How many unannounced raids do the agencies carry out? How many administrative cases do they settle each year? To publish official statistics would also enable a greater scrutiny from the public and could be a well-needed push in the right direction for the enforcement agencies that today have a reputation of not doing more than what they are forced to do.

However, one thing that I doubt would have an improving effect is stricter punishments. I do not believe that stricter punishments always result in greater deterrence. For example, of course Vietnam could impose death penalty on severe copyright infringements, but how efficient would this be? Even though it might deter some of the big actors, I do not think it would have any larger effect on the small-scale infringers, for example single households copying and selling DVD's on the market. What is more; harsher punishments do not revoke the underlying reasons for selling or buying counterfeit goods. Consequently, I believe other methods are more efficient than imposing higher fines or harsher punishments.

Beside some well-needed changes from the Vietnamese Government's side, I also believe that there are some changes that the rights owners could do in order to decrease the copyright piracy rates.

Firstly, I think it is important for a company to be very proactive in protecting its intellectual property rights. As shown by the Business Software Alliance, success in battling software piracy lies in having the support from the government. Consequently, it is important to co-operate, and when necessary putting pressure on, the Vietnamese Government. A rights owner should not thus not be of the belief that the rights will protect themselves or that the government will do all that they can in order to protect the rights on behalf of the rights owner. A good way to get the Vietnamese Governments attention is to organize seminars and workshops and to provide education of the judges.

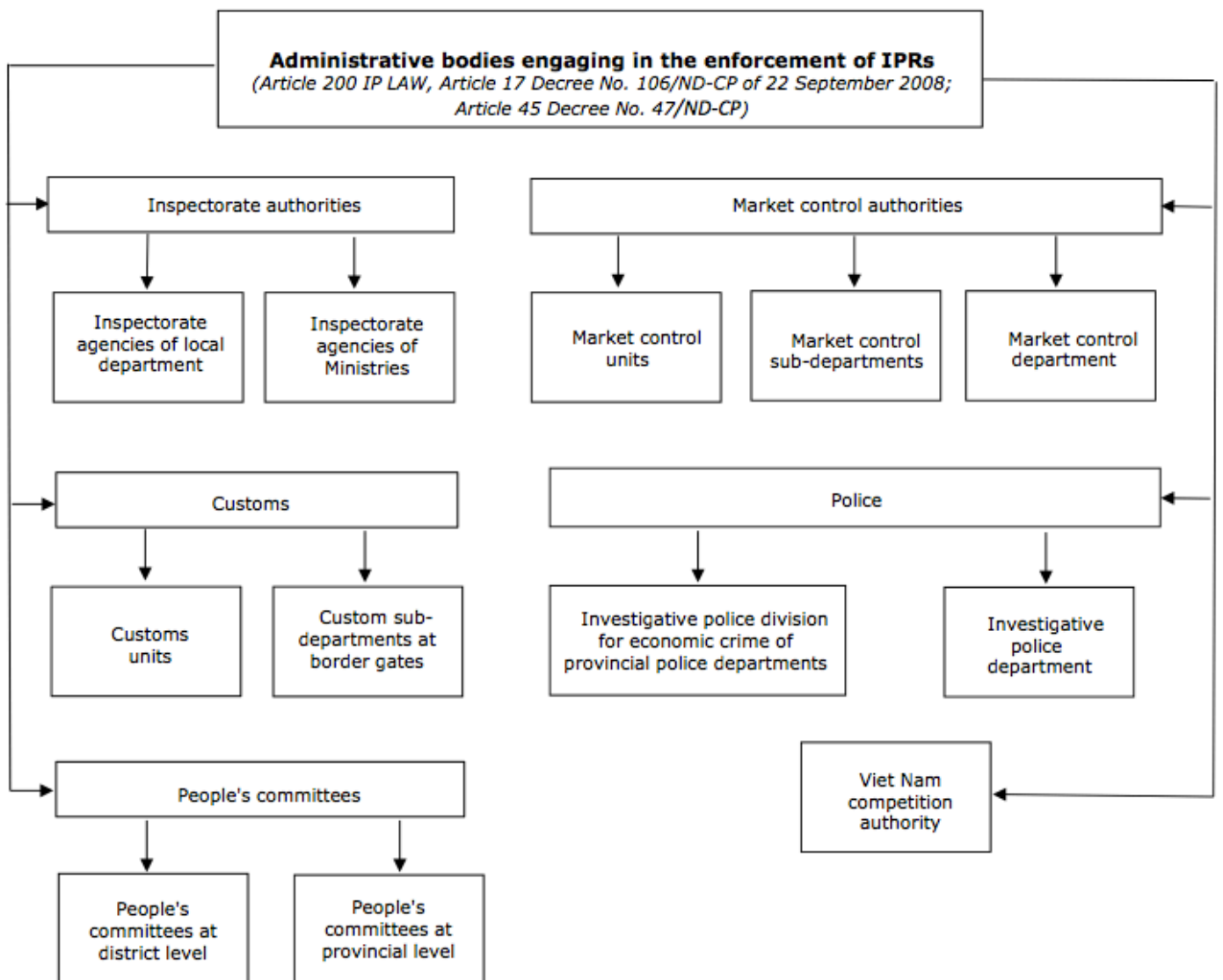
Secondly, I believe it is important to be able to provide legal alternatives. Spotify for online streaming of music and Netflix for online streaming of tv-series and movies are two examples that are available in a lot of countries. However, in Vietnam, services like these do not exist. Consequently, Vietnamese consumers do not in the same way as people in many developed countries have the opportunity to easily access to (almost) unlimited music and films, by paying a small monthly subscription.

Lastly, another thing that I think could have a positive effect on copyright piracy is the establishing of differentiated prices on software. As of today, most Vietnamese people simply cannot afford buying the latest version of Microsoft Office. As a consequence, they are "forced" to buy a counterfeit copy of the software, rather than the original version. Perhaps if the prices were more adapted for Vietnam, people would actually buy the genuine goods rather than the copy. And although having to lower their prices would

mean a loss of income for the software companies, it must be better to sell more genuine goods at a lower price than almost none to a higher price.

Supplement A

An overview of the organisation of the Vietnamese administrative enforcement agencies



Supplement B

Interview with Practitioner 1

1. How would you describe the development of Vietnamese copyright enforcement the last 15 years?

Before the WTO-membership we already had our own legislation on copyright but due to the low public awareness of copyright (the concept of IPR did not exist in Vietnam before 1986). Authors were encouraged to create work but for the use of the whole entire society. They had moral rights but no property rights although they could receive a remuneration from the state. This remuneration was not perceived as a personal right. With the opening of the economy in 1986 and the membership of the WTO the conception of IPR become imported to the country.

By 2006 we had our IP-law and by that time the level of copyright piracy was still high in comparison to other countries. From 2006 until now there is a significant improvement of copyright enforcement in terms of legislative enforcement and public awareness. F.x in 2008 there was an order from the PM to the Copyright Office of Vietnam to respect the copyright of computer programs (computer software) and that the CO must focus their efforts in enforcing and protecting the rights of copyright software.

Several campaigns have been conducted by the Copyright Office, for example workshops to raise public awareness about copyright and also campaigns among state authorities to use legal software. The government received a budget to buy computer programs to be used in the offices of state owned enterprises.

2. What is left to be done?

Much are left to be done in terms of legislative development. We already have a law on IP and different subordinate regulations to implement the law but will still need further clarification and official guidance on how to implement them in practice. That's one issue.

Another issue – continue to raise public awareness. In the fast development of IT mostly the young generation understand of copyright and IP. But they still choose to not fully comply with the laws. Partly because they don't have much money to buy the authorised versions. We should continue to educate them.

3. What is the perception of foreign companies? Is the high rate of copyright piracy something that deters them from settling in Vietnam?

Copyright piracy mostly comes from individuals. Still see in the news reports about big copyrights companies that are still using illegal software. But I think that the part that most foreigners rise a concern about is

copyright piracy on the Internet. There are many websites that offers free stream-lining and downloading.

It is very hard to enforce rights against these individuals. The illegal contents are being offered through the ISPs so they basically (in other countries they allow users to upload and download) – difficult to find the real identity of that users. Often have a nickname that is not their own.

a) Are there any common strategies in battling piracy amongst the companies?

It depends on who are the infringer and the scope and level of infringement that they are conducting. We often advise our clients to send out a cease and desist letter first. Due to the low awareness of the public, certain infringers may not know that they are infringing others rights.

4. What is the common procedure for you as a lawfirm when meeting with a client who has found out that his design is being copied and sold at various stores in Hanoi?

1. Warning notice (a cease and desist letter). If they comply then we can close our case.

If does not complies:

2. Submit a petition to the enforcement authority. There are inspectorates that have rights to control and manage copyright on behalf of the state. They will review our petition and decide that “yes there is a infringement” and then they take action according to the law.

The administrative infringement procedure:

Apart from this the copyright owners may select to initiate a lawsuit (civil action) or when it reaches a commercial scale they can ask the police to investigate and initiate a criminal proceeding.

The most popular way is the administrative action. It is fast, not very expensive (unlike a court case) and suitable to deal with small scale infringement. Also the scale of the infringement – often a household selling fake dvds.

Civil action

Situation is improving although we don't have any specialized IP courts. Mostly the infringement cases in terms of copyright or other IPRs are dealt with by the peoples court – the general court. There are not many cases being initiated in front of the court. Mostly because have no ip court but also because of the experience of the judges. They are more familiar with criminal cases and civil cases and not IP cases. Might take a little while for them to learn about IP laws and to adapt themselves in order to solve IP cases.

Criminal cases

None yet. There are certain provisions in the criminal code codifying the criminal offenses in terms of copyright infringement. In these provisions there are a commercial scale. The laws says “hen the infringement reaches commercial scale” but the word commercial scale is not further interpreted. So we don’t know what scale then.

Traditionally we don’t have any IP rights. Still when other countries perceive that infringing copyrights is stealing. Here the conception is different. It is not stealing. Because of this perception the enforcement authorities are somewhat hesitant to imply criminal penalties against the infringers. May choose other sanctions – administrative sanctions (monetary fines or warnings).

5. Where does the counterfeit goods come from?

Depends – it varies on a case by case basis. We are told that they mostly come from China. There are certain large counterfeit factories in China near the Vietnamese border. A very large and long land border with China. The counterfeit goods may be smuggled over unofficial borders. Not through the official borders via customs. It is quite easy to smuggle counterfeit goods. A lot of hand carrying, f.x. the transporters can carry them by hand and smuggle them over the borders.

We also have the goods that come from within Vietnam, f.x. some small households that can burn DVD’s – they are mostly small infringers.

6. Who is responsible and who can actually provide a higher enforcement of the enacted laws?

I am more inclined to think that we should apply a complex solution to this problem. A mixed solution. It is a duty of this state and the enforcement authorities to commit to take actions against copyright piracy. It is an issue for them to increase the public awareness about copyright laws and also about the cooperation between different enforcement authorities. Normally, those that investigate will be different from those who judge the case. Different enforcement authorities to a copyright infringement case. Should coordinate better within themselves to resolve the case.

7. Regarding the enforcement agencies, what are the pros and cons of these? What are they doing good and what could be better?

In April a case was brought to the Inspectorate of the Ministry of Information and Communication (they are responsible for taking action against copyright infringement) by the Motion Pictures of America. They wanted to fight certain websites offering free stream-lining and downloading. So they lodged a complain to the inspectorate. It took *one year* for the Inspectorate to resolve the case.

It is a significant step though because before this case it is very rare to succeed with such a claim. Not because they cannot prove the infringement but because the enforcement agency is not familiar with dealing with new

technology such as the Internet. Eventually, the website was ordered to remove all the infringing content. But it did take them quite a long time to resolve the case – even though the infringement was quite clear.

8. Vietnam is currently negotiating a membership/enactment of the TPP. Some scholars assert that the intellectual property enforcement standards in TPP are even stricter than those in TRIPS. Will Vietnam really be able to live up to these standards?

It will be an issue. But I think that as for the TRIPS when we are committed we will improve over the years to reduce the rates of copyright piracy. When we are committed to the TPP and especially its IPR provisions I think and hope that we will still keep up.

9. How important is the factor that Vietnam is a single-party system? Do you think this has anything to do with the fact that it seems to be so difficult for the government to battle piracy?

I don't think it's the cause of the problem. I am more inclined to view the cause of piracy as coming from the low public awareness.

10. Should Vietnam really strive to reach up to the same level of enforcement as f.x. the US? Is it not better for Vietnam to go at it in its own pace so that the country does not suffer from an economic point of view?

It is important to remember to strike a balance between public interest and copyright instruments. The authorities are quite understanding of this issue. I think that we should develop at our own pace and we must remember that the legislative development in Vietnam is still quite low in comparison to other countries like the US, who are 100 years in front of us with experience – we have less than 10 years. It is a big difference.

11. Has Vietnam really been given a fair chance to develop its IP-laws? Are other countries sufficiently understanding of Vietnams history and the fact that it is a developing country?

Personally I think that the countries who used to belong to the Soviet block (Eastern Europe countries) and countries surrounding us already know us very well; our history and the characteristics of our legal system. Other countries are not very familiar with our system. It is a mix between Chinese laws and Soviet laws and French laws. So if more countries understood about our own characteristics and our legal system the better it would be. Then they would understand our own problems in dealing with copyright piracy.

12. The Vietnamese government has recently revealed that their goal is to cut the software piracy to 70% in the next five years. Do you think this is doable?

Yes, definitely. In 2008 there were campaigns and orders from the PM fighting against computer program piracy. I think that these campaigns can reach many people so it should be doable.

13. What would you say is the most pressing problem for Vietnam to deal with, as regards copyright piracy?

1. The most difficult issue is how to raise public awareness and educate them to respect others IPRs. They must understand that as long as we protect their rights those who created their rights will be encouraged to create more creative products and works for the whole society. We as a whole will benefit from that.
2. We should issue certain regulations to officialy interpret and provide guidance to implement the existing laws and regulations.
3. A lot can be improved within the court system.

The difference from other countries such as fx the US is that IPR for us is something imported, it is not a concept that has been created and allowed to grow in Vietnam – it is a defined concept that foreign countries has “forced upon us”.

Interview with Practitioner 2

1. How would you describe the development of Vietnamese copyright enforcement the last 15 years?

No development of the enforcement until now. The enforcement of the copyright sector is very limited. One example is LEGO whom have a lot of problem with copyright piracy. However, the head of the copyright office does not think that the copying of the LEGO products are confusing. According to him, copyright should protect the form of the work not the content. If the content is similar but the form is different – then no confusion according to him. This is a very troubling view and reveals that he has limited understanding of the notion of copyright.

2. What is left to be done?

Problem 1: The Copyright Office is not efficient because the office is not technologically advanced, there are not enough budgetary means, the office cannot handle all the cases.

Problem 2: Black money may be paid for the market management or the economic police to change their minds when issuing a fine.

3. What is the common procedure for you as a law firm when meeting with a client who has found out that their design is being copied and sold at various stores in Hanoi?

1. The company being infringed upon sends an inquiry to the Copyright department, saying that their goods are being infringed upon.

Then:

1. First notice
2. Second notice
3. Third notice

Must provide the address of the infringer. The officer will send letters via mail to the competitor. If don't know the address of the competitor – then cant do anything. Will perhaps make a call but that is not common. This is impossible for the company being infringed to do – often the infringer is a Chinese company. That is the problem of the system. Will tell the legislator about the procedural problem. Not an effective procedure.

That is why nobody follows IPR. Will proceed under unfair competition instead. The Copyright Office only consists of three people.

Normally the Chinese producer will not disclose his address. Second, the client must pay a lot of money for legal fees and must wait for the Copyright Office to send multiple notices to the infringer – takes time.

Even when can provide the address of the infringer, the Copyright Office sends three letters to tell the company to stop.

Will usually use the administrative action. The court system is not efficient. Really expensive. Normally the client chooses AA. I have never experienced a court case.

Will sometime send a cease and desist letter – threatening the infringer. “Unless you stop this we will sue you.” Normally, it is not efficient. As a conclusion, enforcement is not really efficient in Vietnam as regards IP.

4. Where does the counterfeit goods come from?

Counterfeit goods mostly come from China – but it depends on what kind of infringement has taken place. Some goods are made within Vietnam, for example counterfeit CD’s and copied software.

5. Regarding the enforcement agencies, what are the pros and cons of these? What could be improved?

1. All enforcement agencies should have the same policy. Today, only a few of the agencies have regulations permitting the infringed companies to assist the agency in an infringement case. In this way, the infringed company can pay for the agencies travel expenses etcetera. This way it is more efficient – the agency can act immediately and will not have to worry about whether they can afford to perform the investigation. Otherwise there is a risk that the agency will tell the infringed company that it is not worth it.

Consequently, a larger budget is a must!

2. State officials should cooperate more. Seaport/airport – if the copyright office had a good relationship with customs when customs found any infringing products they may immediately inform the copyright office who can then handle it before the goods even enter Vietnam.

If can stop the infringing goods at the borders will not have to handle it again after it enters into Vietnam.

But now the customs works independently – they don’t cooperate with any other agency.

There are some opinions arguing that all administrative action should be ministered solely by the Ministry Of Science and Technology. A lot of arguments between different departments and ministries - all want to keep their part of the administrative action. A lot of prestige is involved. Now the client must think of what agency to go to – takes time.

6. The Vietnamese government has recently revealed that their goal is to cut the software piracy to 70% in the next five years. Do you think this is doable?

In my opinion this is impossible. Until now, the state office have not been able to control the software that is imported into Vietnam.

Now people download it on the Internet and then make the CD's inside of Vietnam instead. Cheaper. Takes five minute to buy a CD.

7. What would you say is the most pressing problem for Vietnam to deal with, as regards copyright piracy?

So many infringements! Not enough people, not enough financial means to deal with it. It is difficult to buy real products but easy to buy counterfeit goods. A growing problem is that there is a lot of counterfeit medicine.

No way to stop the counterfeit goods. Still today it is difficult to buy real CD's. The government will not issue strict policies to prevent it because in some ways they must protect the domestic companies. Even in Vietnam there are a lot of people who survives by providing counterfeit products. In the Old Quarter of Hanoi – all the shops sell counterfeit goods. If strict prohibition – would be easy – but the government doesn't want to enforce a strict prohibition.

The government says on the TV that they will provide strict enforcement but this is not true. Issue some decisions and some fines and show it on TV for people to see. But normally these are very limited action. Consequently, the main problem is the government who wants to protect the domestic manufacturers.

The government have a policy to protect domestic medical companies. As Vietnam is a developing country without sufficiently efficient technology to create our own medicine, the government secretly supports the domestic companies and allow them to infringe on well-known companies in a larger extent than would have been allowed if the company was not from Vietnam. Consequently, copying is officially prohibited but in reality it is allowed for certain domestic companies.

It is very difficult to advise the client. Must provide a cost estimation. What will the fine be of the infringer? The client will pay a lot of fees for the lawyer – but the infringement fine will be low.

Before, no difference between infringers whether it is personal or a company. Now, if you are a person you will just pay half the fine compared to the company. Could find information about the company earlier. Now as it is a difference – will not register. No record of individuals – how to find them?

8. What is the normal Vietnamese peoples perception of the existing IP laws?

They know of it but are not afraid of consuming or buying counterfeit goods. It is a habit. As counterfeit goods are very common in Vietnam, the people who buy the goods does not always see the connection between consuming fake goods and contributing to an illegal industry. Counterfeit goods are normal in the country.

Also, important to recognize our history. The 2008 graduates at the law school in Hanoi was the first class ever to be taught IP for more than 90 minutes. Earlier, IP used to be a subordinate subject in law school, not considered important.

9. Are there any progress as regards the courts?

Earlier the courts did not have any knowledge about IP. Consequently, they normally listened to what other people had to say, such as for example the National Office of Intellectual Property. Before, the courts often issued decisiond based on NOIP:s opinion.

That is why we do not recommend the client to go to court. But this is changing! The courts are becoming more independent and as a result, the clients are starting to believe in the court. But this will take time and effort to change completely, a lot of education is needed.

Interview with Practitioner 3

1. How would you describe the development of Vietnamese copyright enforcement the last 15 years?

Many people always question what is the progress? Yes there has been much progress, visual progress. However, I think that because I am a practitioner I know that you cannot change everything in one night. It is a step-by-step progress.

A lot of pressure from the big companies – the giant companies pressure us. The copyright authorities cannot refuse to enforce but they want to take it slowly. In an easy case there are a lot of infringements here but we choose the big ones to go after. For example big companies that use software in the business – they must pay. We go after the big ones first, the smaller ones we can take later.

But we can expect more!

2. What is left to be done?

Many things. In Vietnam, most infringements of copyright happens online. Internet is everywhere. But our system does not meet the requirements to deal with this. Must easier for the copyright authority²⁶⁹ to take action against something in our physical world – on the Internet it is new – the person in charge of the CA they don't have enough knowledge about IP technology and they think it is complicated. Also the question about who is responsible of the copyright infringement. ISP or the physical person?

We have the law about related person or individual or the one in charge of the website. More clarification is needed. They can enforce the right easier in other countries. Here it is difficult. Internet is virtualized. We don't have a system who can act on virtual life. Must find someone in the physical world to stop it. If cannot find the person in charge of the infringement.

Don't have the system like in Sweden which allows check on the identification of the infringer.

3. What is the perception of foreign companies? Are the high rates of copyright piracy something that deters them from settling in Vietnam?

Yes, they are worried. We have many clients in the software business. The first thing; they make many progress and they cooperate with the enforcement agencies – for example the Business Software Alliance (BSA). BSA is doing a good job in Vietnam. Know that they cannot stop the infringement immediately but they can reduce it step by step. Cooperate closely with the enforcement agencies.

They know the future is not wonderful but they try to prevent it step by step. In Vietnam no immediate action – must happen gradually. Must find an

²⁶⁹ Hereinafter: the CA

intelligent way. With the small companies, first they cooperate with the enforcement agencies to send a warning notice.

For example in Hanoi a company that sell many fake CD's of software. We as a law firm and the rights owner cannot stop the very small shops or person who is cheating in this area. The first thing we do is to send a cease and desist letter. Explain to them that their CD's are infringing.

Secondly, one month later they go there and check. Cannot spend a lot of money to take action because of the cost! It is complicated and take a lot of time. Is not really worth it.

In Vietnam there are three ways to take enforcement in copyright:

1. Administrative
2. Civil case – go to court = complicated.
3. Criminal case = not popular in Vietnam.

a) Are there any common strategies in battling piracy amongst the companies?

Civil cases before the courts in Vietnam is not so common.

Reasons:

- 1: The administrative measure is more efficient.
- 2: Taking the case before the court is more complicated. Most of the cases the ultimate aim of the client is to stop the infringement as soon as possible. So we advise the client to choose administrative enforcement.

We are one of the very rare law firms handling cases regarding copyright infringement in court. In complicated cases and in cases where the client claims damages. The only way to claim damages is to take a civil action before the court.

Criminal action – very difficult. Article 170 and Article 171 in Penal Code – only one or two cases that takes up criminal case. Because the law is not clear. Commercial scale – no clarification on what that means.

On lower level: guidance is needed. People are scared to try a case without the guideline.

2: In our criminal proceeding court, there is one article that says that the criminal article about IP right – the police and the procuracy can take only once they receive the request of the victim. But who is the victim? The victim in our law means the physical person – not the company. Almost all IPR-holders are companies. Article 105 of the Course of Criminal Proceeding. “Upon the request of the victim” → but a victim cant be a company.

4. What is the common procedure for you as a lawfirm when meeting with a client who has found out that his design is being copied and sold at various stores in Hanoi?

Depends on the infringer: if small then don't file a complaint to the enforcement agency (handles it themselves).

Time-factor.

Client-factor.

With big infringers, we go directly to the administrative action. For the smaller ones, we challenge them ourselves (scare them).

5. Where does the counterfeit goods come from?

Most of the fake products comes from China. But now in Vietnam the fake products produced here is increasing. Border with Cambodia, Laos and China. We now have an efficient border-control system. We represent many clients – submit the IP right to the customs and give them information.

6. Regarding the enforcement agencies, what are the pros and cons of these? What are they doing good and what could be better?

In criminal action: police

In administrative action: police, the inspectorate of copyright. The market control department, the customs.

In civil action: civil court.

The cooperation among them is not a high level cooperation. There is a lack of cooperation between them which leads to inefficiency. The second issue in enforcement is that the enforcement agencies does not have much knowledge and not much experience in handling copyright infringement.

When took the raisins case to court: The judge did not know anything about IP and nothing a copyright. The lack of their knowledge is due to the fact that most of the IPR-owners don't want to bring the action to court. They are more inclined to take administrative action.

The administrative enforcement agencies are more experienced. More experience does still not mean that they are very experienced.

An IP-court would be a good idea or at least a bench at the court who could specialize in IP. Many agencies and NGO:s have been advocating for a set up of an IP-court but the Vietnamese authorities does not pay much attention.

The Vietnamese government does not really think that IP is important. Lay down the IP regulation just for passing and meeting some requirements before joining the WTO. Many inconsistencies. During the past few years I don't think that the Vietnamese Government honestly are trying to improve the situation. But things could change.

7. How important is the factor that Vietnam is a single-party system? Do you think this has anything to do with the fact that it seems to be so difficult for the government to battle piracy?

I do not think that the single party system is to blame for our high rates of copyright piracy. Rather, it is because of our history of not having any regulations relating to IP.

8. Has Vietnam really been given a fair chance to develop its IP-laws? Are other countries sufficiently understanding of Vietnams history and the fact that it is a developing country?

I think other countries realize this. Many agencies and NGOs try to advocate for better IP-aspects in Vietnam.

9. The Vietnamese government has recently revealed that their goal is to cut the software piracy to 70% in the next five years. Do you think this is doable?

Possible, perhaps, but too optimistic. In my opinion, piracy is very popular in Vietnam. My friends still use pirated software.

10. What would you say is the most pressing problem for Vietnam to deal with, as regards copyright piracy?

The knowledge degree of IP on copyright enforcement bodies.
Awareness of the public.

11. Public awareness

Most of the ones committing an IP infringement are ignoring the law. Don't know they are infringing and damaging the benefits of the RO. That is why we should have campaigns and a new approach to raise awareness in the public. The awareness of copyright or other issues in Vietnam is higher in the intellectual circle but most of the Vietnamese population are farmers living in remote areas, they don't really care. 70% of Vietnamese people are farmers, a very large proportion are farmers with low degree knowledge of IP.

12. Time frame of infringement action

10 days to investigate whether the complaint is sufficient. Will otherwise request us to show more evidence.

The first month within receiving the complain they will consider or case and then they can maybe carry out a raid or an inspection upon the infringer to collect evidence of infringement. After collecting evidence of infringement. If it is concluded that it is an infringement.

Normally the time frame in practice lasts 1-3 months.

It is reasonable – in comparison to the court action.

1: timeline for each instance is 4-12 months. If after the first instance the judgement is appealed the appellate court the whole case will take 8-24 months.

Injunctions: in court action and in AA – in CA can request preliminary injunction – can be requested at anytime during the court action – at the time you file the complaint or anytime during the period of preparation for the trial or even right at the hearing. If file a preliminary injunction before the hearing the judge who is assigned to the case will consider the injunction as a request. If file the PR during the trial – the judge in panel will consider it. Must pay bail.

No preliminary injunction is issued in Vietnam as regards Ip-cases. Vietnamese judges are very reluctant to issue preliminary injunctions. When they do this they must take responsibility of the decision.

No preliminary injunction in Administrative Action. There are several remedies that are not applicable in AA. The most important one is stop the infringement right away. The RO cant have the right to claim damages. Can claim a public apology and performance of civil obligation. But in the civil action the RO can request for preliminary injunction and damages and public apology and ratification and performance of civil obligations.

13. The possibility to “cooperate” with the enforcement agencies

We have a right to cooperate with them. We don't have to pay any *official* fees. The CA is experienced but not super experienced. That is why we need to support them and assist them in the action. No official fees but in fact we must support them in storing the sealed goods. The authority after the raid can seize the goods but must store the goods in a good condition and must hire a warehouse.

14. The lack of public judgements

The judgements are not public. No case law system. If the judgements became public it would be easier. Would facilitate the enforcement action. Why don't they publish the decisions? Most reason for this is that the court – has some transparency issue. In the decision maybe some inconsistencies, not perfect. Must rely on a personal relation with certain judges to get the judgements. Vietnam should establish an online database of decisions on all the courts. All information and all the enforcement cases – at least in IP.

Lastly: Tradition! Culture! To change will take time! But we will try to keep up.

Interview with Practitioner 4

1. How would you describe the development of Vietnamese copyright enforcement the last 15 years?

Vietnam now fully meets the WTO requirements. The legal system of Vietnam has developed more and more. In recent years, Vietnam has changed its laws to meet the WTO requirements.

2. What is left to be done?

In my opinion we should improve the enforcement system. Our enforcement system is a little weak.

Also we have a full legal recommendation system but the system cannot enforce sufficiently efficient. Infringements of IP happens regularly.

3. What is the perception of foreign companies? Are the high rates of copyright piracy something that deters them from settling in Vietnam?

Piracy and infringements of copyrights happens commonly in Vietnam so the foreign companies should protect their assets by technical measures. Legal matters are very weak. For example, they should protect their license. License system for all software, which should be changed all the time.

The foreign companies should confer with local law firms, they will have contacts with the right authorities who can settle and bring the case to court.

4. What is the common procedure for you as a law firm when meeting with a client who has found out that his design is being copied and sold at various stores in Hanoi?

When we receive our client request we make a survey on the market to have market knowledge and information about the infringement. Secondly, we send a warning letter to the infringer. In Vietnam some ppl infringe IP-rights as a company but the company doesn't know that they are infringing. The best solution is to send a warning letter.

If they don't comply, there is two ways:

1. Make a report of the case to the competent authority, f.x. inspectorate of the Ministry of Science and Technology or the Copyright Office. We will work with them to charge and evict the infringer. If the competent authority finds out that an infringement has taken place and gets evidence the authority will give them a fine and seize the infringed goods.

2. Will take the case to the courts. But the court in Vietnam is not good so this is not a feasible option.

The most common option is 1. Sometimes our lawyers will give the competent authority some advice of how to do because the competent authority does not always know how to deal with it.

Officially we don't have to pay anything. Unofficially we have to pay. For car and envelope – must make the survey, must invite them to have an inspection on the market – perhaps even in other countries. If far from Hanoi then we must pay them to go there.

Criminal case: in 10 ys of practice there has been one case only. Once the police caught the infringer they were imprisoned for one year and 50 million VND in fines. Very very rare.

For each case we must decide what law area should be considered. Sometimes we deal with TM-infringement, sometimes copyright and sometimes unfair competition.

5. Where does the counterfeit goods come from?

Almost always from China. Not enough border control. The customs is very weak. The Chinese border control support domestic companies and allow the counterfeit goods to leave China.

6. Who is responsible and who can actually provide a higher enforcement of the enacted laws?

Both enforcement agencies and the government and the law firms. Most important that the government should do is that the G must have full information about the situation and take action to change the situation.

7. What is your opinion of the enforcement agencies? Are there anything they could improve?

Not efficient enough. Some agencies behaves very well f.x. the inspectorate of MOST. Copyright department is not efficient. Once u make the fines u have to have a capability to check how the infringement took place. To find evidence – the copyright department have not enough knowledge and skills and experience to find evidence to conclude.

No protection of domestic companies by the inspectorate. IP-right owners have to show their evidence.

Court system:

Not efficient enough. No efficiency. The court system, the judge should be more trained and re-educated. The economic market is newly developed so almost all of the judges don't know about IP. Very difficult to shut down infringement in court because of this. Some judges don't know what IP-right is. They don't know how to deal with a case and how to give out a fine. They should be trained more.

International organizations should fund and have products on training and education on IP rights for Vietnamese judges.

8. As regards the current law on intellectual property and other laws regulating IP. Are the laws clear enough or do they need to be improved as well?

In the legal system, two branches.

1. The actual laws - is good
2. Enforcement of the regulations – this is not good.

10. How important is the factor that Vietnam is a single-party system? Do you think this has anything to do with the fact that it seems to be so difficult for the government to battle piracy?

I do not think that this is a determining factor.

11. Should Vietnam really strive to reach up to the same level of enforcement as f.x. the US? Is it not better for Vietnam to go at it in its own pace so that the country does not suffer from an economic point of view?

Vietnam cannot have the same standards as other countries. Especially US and Japan – because Vietnam is a developing country so the people – which should we protect? The imported goods are more expensive in Vietnam than normal goods.

Vietnamese have not enough money to buy Microsoft software. They should reduce the price of software. If the competent authority strictly deals with copyright matters in the same way as in the US the Vietnamese people would not have any Microsoft products – we simply cannot afford them.

12. Has Vietnam really been given a fair chance to develop its IP-laws? Are other countries sufficiently understanding of Vietnam's history and the fact that it is a developing country?

They understand and they know very clearly our situation.

13. The Vietnamese government has recently revealed that their goal is to cut the software piracy to 70% in the next five years. Do you think this is doable?

The standard should be lower than other developing countries. Vietnam's government should focus on goods and products. Should separate between goods that should be strictly protected and other products who can have lower protection. For example common life goods such as computer software

14. What would you say is the most pressing problem for Vietnam to deal with, as regards copyright piracy?

Awareness of normal people – they don't know IP exist.

15. The perception of regular people, as regards IP laws

IP law is new area in Vietnam so many Vietnamese don't know about IP-law. Do not know that it is illegal to buy counterfeit goods. They do not think that they are committing a crime.

Interview with Practitioner 5

I do not feel that the Vietnamese Government has a genuine intention to battle piracy. Maybe they are pressured and they know that it will not go away, but there are pressures from many ways, that does not make the Vietnamese Government care that much.

I believe that most of the counterfeit goods come from China, but perhaps also from other Southeast-Asian countries. We must also be aware that some of the counterfeit goods are in fact created within Vietnam.

As regards the enforcement, since its private rights, the government will not put that much effort into trying to protect them; they think it is up to the right-owner to do this. Consequently, it is kind of the egg and the hen dilemma, the rights-owner wait for the government to act and the government wait for the rights-owner to act.

Must remember Vietnam's history – twenty years ago we had the government taking care of everything – employed artists and composers to create music and works. Consequently, the creations made by these employers belonged to “everyone” and we did not have to pay for them. The system shift has caused some confusion; are we now supposed to pay for what was earlier for free?

Also, today, whereas there is a rising awareness of the existence of copyright, most people do not understand that downloading a song or a movie on the Internet is illegal. Consequently, today, people are more ignorant as regards illegal activities taking place online than in the “real world”.

The Business Software Alliance is doing everything right. Has managed to bring Bill Gates, are dragging the Vietnamese Government with them in the cases where the Vietnamese Government is hesitant to act. They have put the limelight on software piracy and forced the Vietnamese Government to act.

Interview with Teacher 1

1. How would you describe the development of Vietnamese copyright enforcement the last 15 years?

Yes, the situation has improved. The law firms deal with a lot of copyright piracy. For example, at a firm where my friend works they are assisting Microsoft and their enforcement in Vietnam. They take actions against the shops selling laptops and computers who have installed unauthorized software. They also take actions against a lot of companies. It is normally Chinese companies and Taiwanese companies who use software that are not legal.

2. What is left to be done?

The most important factor is to raise awareness of customers. If they do not request the shop to install the real software then they will not do that.

3. What is the perception of foreign companies? Are the high rates of copyright piracy something that deters them from settling in Vietnam?

The software companies should improve their PR so that the owners or the directors of companies can understand the benefits of using authorized copyright software. Then they will not use the infringed software.

4. What is the common perception of “normal” Vietnamese people? Do they understand the conception of intellectual property rights?

The consumers are aware that it is infringed but because the price is so low they will purchase it anyways.

5. What is the procedure when suspecting that a possible infringement is taking place?

Conduct an investigation to collect the evidence of infringement. As far as the necessary information need to provide to the competing authority.

After this we have the quantity of infringed laptops we will file a request to the competent authority. In Vietnam the competent authority to take action against infringement can be Inspectorate of Culture, Tourism and Sports.

The Inspectorate will take action, inspect the company that is infringing and put a sanction on the infringer. Monetary fines. Confiscating of the goods. In Vietnam when the I come to the shop and take action against the company they normally are in corporation with the economic police. They are well trained to collect the evidence.

They don't pay bribes! The Inspectorate have financial assistance from the government.

Civil action

Mainly to claim the damage from the infringer. You can do both! When file the request to the inspectorate want to stop the infringement immediately – fx when Microsoft want to claim for damage they will also file a petition in

court to stop the infringement. Microsoft usually have a negotiation with the infringer to request them to legalize them to use the authorized software.

Deal with the infringer instead of turning them in to the Inspectorate. Some owners have a campaign to send warning letter to the infringer and then they have a meeting with the infringer and persuade them to legalize.

First they try to solve the problem themselves.

Criminal case

Very rare. Since an act of infringement can be criminalized if he infringes copyright with intention and in commercial scale. ← Commercial scale is not defined.

No official letters have been issued. In criminal court we have one case to criminalize or to bring criminal charge against a infringer. This was a trademark case.

In Vietnam counterfeit products can be criminalized in accordance with the crime of manufacturing or trading in counterfeit product with respect to the quality.

Difficulty: It is on case by case basis. When infringer cooperate then the case will be settled quickly and the infringer will implement the sanction. Difficult to implement the decision of the court if the infringer does not apply.

Administrative action + criminal action = monetary fines will be submitted to the state party.

Damages = company.

6. Where does the counterfeit goods come from?

DVD's and CD's come from China. But the reproduction make take place in Vietnam.

Provision to stop the copyright piracy from the customs but Vietnam has a long border and a lot of smuggling exists. Difficult for the customs to control the situation. The same situation is prevalent for the counterfeit product.

7. Regarding the enforcement agencies, what are the pros and cons of these? What are they doing good and what could be better?

In a few years the officials of the Inspectorate has raised awareness of copyright issues. A large number of the public is not aware of the public. Usually think that copyright piracy in Vietnam will never stop.

They need a bigger budget and to be better trained and updated on technological issues. If you want to take action against the infringer one

must spend a large number of money to investigate as far as to collect the necessary evidence.

Law firm assist the inspectorate in collecting evidence. The state budget is limited. Assistance from law firms and IPR holders are welcome in Vietnam. It can be permitted. Give them advice. Every year the IPR holders will train the law firms to deal with infringers. Fx screen prints. Will then take that to the Inspectorate. The corporations may have 500-1000 computers and separated in different rooms – need a large number of officers to assist the Inspectorate.

8. As to the Intellectual Property Law. What could be improved in it?

Since joined the WTO and Berne Convention our provisions of IP laws especially copyright has been improved. But quite a lot of the provisions are not meeting the requirements of the WTO.

9. Vietnam is currently negotiating a membership/enactment of the TPP. Some scholars assert that the intellectual property enforcement standards in TPP are even stricter than those in TRIPS. Will Vietnam really be able to live up to these standards?

The situation of copyright infringement in Vietnam has developed but compared with the developed countries for example the US it is difficult for us to meet the demands and the higher standards.

10. Should Vietnam really strive to reach up to the same level of enforcement as f.x. the US? Is it not better for Vietnam to go at it in its own pace so that the country does not suffer from an economic point of view?

Will strive to a higher level. But it takes a lot of time.

11. Has Vietnam really been given a fair chance to develop its IP-laws? Are other countries sufficiently understanding of Vietnams history and the fact that it is a developing country?

The government and inspectorate are aware of the IP especially copyright but a lot of problems should be solved to improve the situation.

12. The Vietnamese government has recently revealed that their goal is to cut the software piracy to 70% in the next five years. Do you think this is doable?

In respect of software piracy the situation can be improved but in some other areas or other fields such as CD or DVD's or books the situation can probably not be solved. Along with the development of technology such as internet the infringement has spread out – no longer only physical copies of CD's but also digital copies. We have issues regarding the provisions of paying fee for listening to music online. Difficult to collect the fee. Although very cheap. 1000 VND for one downloading.

Microsoft has spent a lot of money to deal with the problems and the situation has improved. The percentage of IP infringement in Microsoft has been decreased remarkably.

13. What would you say is the most pressing problem for Vietnam to deal with, as regards copyright piracy?

I think that the problem is that the competent authority has to deal with that the infringement take place on the internet. A new fear in Vietnam – less knowledge and experience. Lack of knowledge to deal with this problem.

The provisions to deal with the infringement on the internet is not enough. The sanction provisions are not enough.

Raids

Each company is divided into a lot of rooms if not enough people to perform the raid the companies can clear all the info. Very fast. Experience of situations when the competent authority arrives the foreign companies cuts the electricity. must then wait and take a re-investigation.

Expensive to carry out raids! Expensive for the companies that are being infringed on. In addition, we think that the company usually only concentrate on industrial parks. The infringed company need to pay for the travelling costs – must hire a car to assist the competent authority. Because the number of infringing computers are so high it takes a long time to perform the raids. The actual expense of the raid is quite high.

The different ministries can cooperate. But as the information of the raid must be kept secret – not common to cooperate.

When the competent authority want to check all the matters of the company they need a decision form the higher level to issue the decision to check all matters. The procedure is a difficult one.

This is a complicated procedure.

Time: It depends on the result of the investigation. When we file the request they need time to consider it. Takes quite a long time.

Interview with Teacher 2

Perhaps it is because of our history and our Confucian roots, it is important to understand that in Vietnam, people do not like to resort to court. This is one of the reasons to why there are so few court cases. Moreover, the government does not really know what to do about the vast percentage of copyright piracy.

Consequently, the private companies do what they can to protect themselves. Today, it is quite common for private companies to strike deals with local governments regarding the enforcement of intellectual property rights. The local government then becomes more willing to protect the copyright of the paying company.

The increased use of Internet and 3G has caused an explosion of copyright piracy online. This is a new challenge to the enforcement agencies; so far they are struggling to keep up. A common attitude amongst the enforcement agencies is “this is just the way it is” – they find it quite difficult to imagine a Vietnamese society without piracy.

“This is just the way it is” is also common among the Vietnamese people themselves. Very few Vietnamese people have an understanding of what IP is – they do not understand that they sell or buy something that is illegal because they do not look at it the same way as Westerners does.

I believe that most of the counterfeit goods comes from China and North Korea. A key to decrease the flow of counterfeit goods is to improve border control. But this is very difficult, as Vietnam has a very long land border and also a large sea border. The customs cannot be everywhere.

The question of copyright piracy is a political question. I am convinced that if the politicians wanted to stop copyright piracy they could do so within 5-10 years. However, as of today, they are not really doing that much to improve the situation.

Finally, I believe that Vietnam needs time. Right now, our economy is growing fast. One day we will reach the stage where intellectual property rights becomes important to protect, perhaps then our government will improve their efforts.

Interview with Vietnamese Official 1

Talk about the Trans-Pacific Partnership (TPP)

In principal the standards of TPP are higher. With respect to copyright it has some very strict provisions on copyright protection, especially in the digital environment. For Vietnam, it is difficult often violate copyright issues and piracy is very popular. But due to IP-chapter in tPP Vietnam must reform its copyright enforcement system.

The US and developing countries want to raise standards as regards criminal measures. “On a commercial scale” would like to criminalize any infringement of copyright and the criminal measures is not commercial scale – but now it must just be proved that persons that infringe has some kind of private gain and some kind of benefits.

Negotiation is a package. You give something, you take something. It is a deal and you must participate in the game. How to use the flexibilities in the agreement in order to protect the social welfare and consumers welfare? To protect Vietnamese interests? When agree with that kind of high standards you must comply with it. Otherwise you will be prosecuted by other countries.

TRIPS; it is also a package. Allows developing countries to access the markets of developed countries. If criticize from a developing countries perspective can criticize TRIPS and TRIPS + but if a developing country cannot give develop countries IP issues then it cannot access to the markets – especially relating to agricultural.

The flexibilities in TPP – should reasonably used those in order to protect Vietnam’s national interests.

Enforcement problems in Vietnam

Enforcement is a big problem for Vietnam in particular and developing countries in general. But it is getting better. Used to be difficult to criminalize IP. Now we have regulating laws and framework. In practice it is not easy to enforce IP. Must be done by IP holders. They must enforce IP in order to protect their rights and the state agencies will help IP holders to enforce IP to protect IP-holders rights. Don’t blame the government or the government agencies for not enforcing IP! Each IP-holder should protect his or hers right first. Then he can have a lot of measures his or her IP-right.

Criminal cases: very difficult of course, but according to the Penal Code 170a.

Article 170a: can make a claim to the economic police and ask them to investigate. Police must consider and investigate the case. If that infringement satisfy all the requirements of the criminal law.

Protection of IP is firstly the duty of the IP owner.

Administrative measures:

Not only criminal but also administrative measures should be transparent and effective in order to deter the persons infringing on copyrights.

The low public awareness:

Can go to a street shop and buy Windows 7 etc. The price is less than a cup of coffee. From a governmental perspective: must protect IP. From peoples' perspective: this is their monthly income. It is very low. They don't care about IP.

Under international pressure, the Vietnamese Government must improve its IP-system and its IP enforcement system in order to comply with TRIPS and later TPP-standards. However it is not easy for the Government to punish people who infringe IP. Since that issue can not be the .. if the economic standard the living standards is not improved. It is easy for developed country to enforce IP-rights because most people are rich in these countries and can afford it. If would force Vietnamese to pay 100€ for Windows 7 – there would be no purchases. It is a paradox!

The current IP-laws

Since there is a paradox it is difficult to provide laws. The VG provide guidelines and almost everyone can be punished in administrative measures. From enforcement perspective there is not enough resources. This is very difficult. However, of course Vietnam has committed to live up to TRIPS and TPP. We must enact and enforce the law.

The lack of guidance of the words “commercial scale”

It is better to have no guidelines on commercial scale. If you have a guideline – then other countries can bring a case against us. It is a strategy not to explain “commercial scale”. Must follow the rules on the game but must use all given flexibilities in order to balance the rights of the copyright holder and the right of the people who would like to have access to copyright and information.

Administrative measures, enforcement agencies:

Now in Vietnam there are many administrative agencies responsible for IP-infringement. Customs (imported goods), goods circulated on the market (market management agency), inspectorate of the ministry. Criminal police only involved in criminal cases. If police upptäcker a case the economic police will transfer the documents back to the inspectorate or to market management agency.

Cooperation between agencies in Vietnam is not good. Normally, due to many issues one of those issues that normally don't care about what the other agencies do, just focus on their own capacity and competence. That is why having good coordination and cooperation among agencies takes time for Vietnam to create that kind of system. But it is ok.

It took EU at least 60-70 years from 1958 to have an IP-court for the EU. It is easy to propose it. But it takes time. Of course, according to our new constitution, maybe enacted in the near future, right now it is being amended, we open the way for special courts, such as fx the IP-court.

Will Vietnam ever go from being an imitator to an innovator?

It is an ambition. Should use knowledge. IP plays an important role in order to create a knowledge-based economy. It depends. IP law cannot help a country to develop from an imitator to an innovator country.

The problems of imposing higher IP-standards in Vietnam

1. Vietnam must apply higher standards and the people will be faced with more serious punishments – not only monetary punishments. That will hinder people to infringe
2. The government must according to the new standards enact new standards. It will impede the infringements
3. As the Vietnamese people get increasingly richer – they will prefer to buy genuine books rather than fake books.

One must remember that there has been a gradual decrease of the copyright rates in Vietnam!

Interview with Vietnamese Official 2

In my view, the question of enforcement is very complicated. It is a very different from country to country and region to region. In the Nordic countries there are other mechanisms and in the field of copyright there is a strong system for collective management system. In some senses that reduces the conflicts and disputes. In the US for example the enforcement authorities are very strict and they have a lot of lawyers and cases. Very excellent judges. In the UK also different.

But in general the enforcement of IPR and copyright in particular in developing countries we must admit that it is more difficult. Not so effective. Maybe ineffective. There are reasons to this.

In a country like Vietnam we are a developing country so we suffer the same difficulties as other developing countries. We have some more difficulties due to being a country that is transferring from the centrally planned economy to a market economy. In the past the question of private property is not well dealt with, mostly only the ownership of the right is recognized. Private property is very rare. Including the private property in creations. For example in the past we had not recognized patent protection but called it an inventor's certificate – the property rights remained to the state and to the organization authority for which the inventor worked. The inventor had only the moral rights to be mentioned etc. Some economic rights / interest like when the invention was used one should pay the inventor some money like an incentive.

In the field of copyright almost the same, when composers create a musical work then the property rights belonged to the state. Then it changed around 1990s or late 1980s.

IPRs are now recognized as private rights in the civil law field. In 1995 we got the Civil Code. Lack of knowledge and ignorance of property rights. The Government Authorities are not ready to deal with the issues in the way that is done in other countries.

Other countries: they show considerations. Not the question of knowing or not. Cannot be justified the lack of enforcement. The weak protection. We must take up measures to agree with TRIPS. Cannot benefit from others understanding. Maybe in some cases we can differ the enforcement in some respect but not in others.

Other countries to be inspired of: Vietnam has its own problem they must deal with by paying attention to its interests and integration in the world market. Must acknowledge the technological infrastructure and legal tradition. Cannot take the model of any other country to be imposed here. Singapore, China, huge country, big economy, lot of bureaucracy. Thailand – democratic country for long time. Still they have a lot of problem.

Vietnam is unique. Very hard to get rid of, not suitable, very bad – but in practice, people have been accustomed to it, very difficult to stop.

The people of Vietnam are aware of the protection of IP in general, in particular trademark, design, copyright. In the field of patent they are not so aware of it. Very strange for people with patents. Only the enterprises care that deals with licensing and disputes. To infringe in a patent is very difficult, does not occur very frequently in V. Lack of infrastructure to be able to imitate. ← Even that! Regarding copyright: propaganda has led to higher awareness of its existence. Media etc. Infringement of films, books etc. The publication industry in Vietnam, many Vietnamese publishers and not so many foreign publishers. The infringement directly affects Vietnamese publishers.

Deterrent factor = not a way to prevent people from copying. A lot of lawyers and governmental officials and scholars say that the public awareness. I don't agree! The enforcement must begin with clear provisions, substantive provisions. What are the rights? Who own the rights? In which cases are there an infringement? What is the consequence? Secondly: clear and quick procedures. Who has a responsibility to receive the complaint, where is it received, how long must it be addressed. And then the question of the capability of the governmental officials and judge officials.

The public is not to blame! But people often take that as the number one issue. Don't want to be accused of lacking of knowledge and responsibility.

Improvements of the law: in my view the knowledge of copyright is very low in the country. Very few experts. Very badly written law. The process of drafting is very bad. People in charge of drafting are not skilled and knowledgeable. It is difficult to draft a law when lacking expertise. Must rely on the comments and opinions of people who doesn't know anything about the law. Read the draft and must make comments: often biased to say its very good and carefully written, thoughtful. It should be rewritten in the future.

The right to performance should belong to the organisation, which organises the performances, that is responsible for the arrangement and not the performer unless the contract says so.

Article 201 intended to provide for the expert witness. Very bad system to establish and conflicts with other laws. Now they have already implemented this provision by two circulars; for copyrights and related rights. Don't think that the government of Vietnam and the Ministry of Science and Technology can select people and train people to be witness and experts. Because copyright in practice is a very varied subject. A lot of problems and a lot of specific areas. Very different; singing, performing a drama, writing a book, creating a film. Cannot train people to become experts; so many varied subjects even within one field for example music; classic, pop, hard rock.

Enforcement agencies: should be stipulated and clearly formulated in the law. Now very little cooperation. The economic police, the market control / market management authority, the inspectorate, the customs, the peoples committees provinces and districts, the water guards – a lot of different organizations. A lot of organizations involved. In practice, in the same product – sometime cannot separate the infringements of different infringements. Separation of industrial property and copyright – in view of enforcement this is something not good. In view of administration = good, in view of enforcement.

Too many agencies dealing w enforcement? Depends on how we classify the infringement. We should separate the administrative way from the judicial way. Then the administrative way/measures and procedures, in application of administrative measures we have to distinguish and make it easy and uniform in the enforcement. Not to say that “you are inspectorate then you do this you cannot do this” “you are economic police you can do x but not y”. I think that we have to deal with the problem, what is the problem? All the administrative agencies should have the same power!

If at a sports arena see someone selling fake t-shirt. I am the police. They don't deal with it especially – say to talk with the inspectorate or the market management.

The aspect of the problem should not be in focus – the problem itself should be in focus! IF it is an infringement – it must be solved. Must be addressed by deliberations by workshops. Then to clarify and provide it in the law.

When infringing on computer program – must collaborate several agencies – this is not efficient! Risks of leaks! If approach one EA – they must do it! Or should be blamed! But this is not something that will solve itself in the near future. The VG on a very high level must do something. Question of prestige. Promulgated the law in 2005. In 2009 – revised 10 provisions.

A new revision will not lead to good result if follow the same way of thinking as earlier. Must ask experts, people to say what the problem is. As practice in Vietnam the Ministry of Culture Sports and Tourism is responsible for the copyright, the Ministry of Science and Technology for industrial property. The National Office of Intellectual Property Rights is also involved.

Copyright Office is not very knowledgeable. When amend something but don't understand clearly what considerations should be made. This is very bad.

Court-system:

Even worse than the administrative route. Lack of knowledge and skills of the judges. They are not specialized in IP. We don't have specialized courts

and don't have specialized or permanent chamber of IP. Even the documentation is insufficient.

A specialized IP-court? Don't think this is the solution. It can be examined. But for the time being we can not afford it. Instead we should have some committees and chambers in Hanoi, CHM etc to be more specialized to deal with IP cases. To enable them to follow up all the time, to consult in the dictionary, in the literature, in the precedents of other countries. Allow them to study IP law in depth. Must be the status that the judges like to be good IP-judges. otherwise it is very difficult.

Border-control:

Sure, this is a problem. Long land-border. Bring in a lot of products, a lot of counterfeit goods pass through the border. Difficult for customs to prevent counterfeit goods. Lack of knowledge and skills of border officials, and competency is not so good. Corruption!

First we need a clear substantive law

Then we need a clear procedural law

Then we can think of training of the government officials, agents and judges.

Will Vietnam ever become a destination for High Technology Value-Added manufacturing?

No. I am not so optimistic. Not because of the protection and enforcement of IPR but because of other reasons as well. Why bring big money and factories to Vietnam? Difficult question.

What would you say is the most pressing problem for Vietnam to deal with, as regards copyright piracy?

In the long term: Repeat – must have a good law that is understood in the same way by different people. You cannot explain to the judge if you are a lawyer, the other people will say a different thing. Then one must bypass to the international treaties. Again, difficult to persuade a judge to apply a provision of an international treaty instead of the Vietnamese law.

Interview with Foreign Official 1

1. Is copyright piracy something that foreign companies talk and worry about?

No it is not really something we talk about. It is an issue but not something we have specifically discussed and worried about. Obviously the companies suffer from piracy. One example is LEGO – can find original LEGO-stores but 5 m to the right there are Chinese copies. Can buy the copies for a fraction of the price. IKEA – without being established they source a lot of production from Vietnam. No IKEA store – transport it down from Guanghzo over the border and pay customs (perhaps). Can buy a lot of stuff this way.

More small shops claiming to sell IKEA when they really don't. IKEA doesn't consider it a large challenge.

None of our members consider it as a critical issue, not really affected by it. No members that produce anything that is so easily copied.

2. What is the perception of the foreign companies? Are the high rates of copyright piracy something that deters them from settling in Vietnam?

a) Are there any common strategies in battling piracy amongst the companies?

Every company is on their own. Within our chamber there is a coordinated working group where one can raise questions regarding this. The embassies also help. The companies whom are having an issue would raise the question with their embassy. If it is not a small issue the embassy and the ambassador would bring it up to the right level. But then again - what kind of action would really be taken? That is another question. The amount of control is quite limited. Difficult for such a small amount

It is a partially corrupted system – bribes are quite normal to get out of every issue – Vietnam is a big country with a lot of people. Not structured as Sweden – harder to detect and find the people behind the unauthorized selling. The Vietnamese are good at copying. Can split a Mac and assemble a fake one very quickly.

3. How would you describe the development of Vietnamese copyright enforcement since becoming a member of the WTO?

The government takes it more seriously. More publicity regarding this in both newspapers and events – chambers, Ministry of Science and Technology arranges workshops etcetera. Increasing level of awareness regarding this. Both as a challenge to foreign companies coming to Vietnam but also the Vietnamese companies themselves are being copied. Especially from the governments point of view it is seen as a threat to future foreign direct investment. More intention definitely!

The enforcement – sure more enforcement but still, a fraction of what most companies would expect them to do. Seems as if it is difficult for the government to implement – have a framework that is not fully implemented. Good intention but that's about it.

Vietnam has the right intentions they say the right thing they put it into the laws but in Vietnam the law is only implemented – it's the circulars and decrees that says how to actually interpret the law and that takes time.

4. Where does the counterfeit goods come from?

China! It is a border control problem. Also the **corruption** that exists within the customs is massive.

5. Are Vietnamese people aware of the fact that a lot of things they buy are counterfeit goods? What is the normal perception of copyright law in Vietnam?

I think so. Maybe not aware of the laws but from a practical point of view. The difference in quality – increased awareness. Health. If being analysed would show that the paint used is not good for the kids. The V people are more aware of the health effect of the fake products. Fake food

6. Who is responsible and who can actually provide a higher enforcement of the enacted laws?

The key is the government and the enforcement. At the same time an increased awareness amongst the population is a necessity. That kind happen both from the companies and the governments side, trade organisations the chambers.

Has been a few scandals involving Chinese toys, milk, fruit. A debate has raised regarding these issues. Much higher awareness than 10 years ago!! today people realise that it might be dangerous.

7. How important is the factor that Vietnam is a single-party system? Does the political system has anything to do with the fact that it seems to be so difficult for the government to battle piracy?

Yes. Doesn't have the same kind of efficiency in the government as you would have back home where there would be pressure from the opposition to enforce. Basically the only side that pressures the government is the businesses.

Enormous amount of bureaucracy – huge public sector where everything has to go one step at a time all the way up and down. That is no secret – everything takes time and is complicated.

Unless you are Samsung or Toyota it will take time to fulfill your rights. Hard for the government to take any quick action. In case of LEGO the problem is in Vietnam but hardly related to Vietnam. All the copies comes from China – and are being smuggled over the border. Hard to control.

8. What would you say is the most pressing problem for Vietnam to deal with, as regards copyright piracy?

If can team up w software producers – the software producers are putting measures in that makes it harder to use pirated software – they can actually make it difficult for pirates. At least professional companies wants to use it for business purposes.

Needs to reduce the corruption – this is not unrealistic!

It is also a mindset – even if explain it for a Vietnamese – why buy it for 500€ when can buy it for 2€ it is exactly the same? Vietnamese companies already have a competitive issue – not the most competitive in the world. If had to take pay for their licenses they would be even less competitive. Vietnamese Government has an interest in making sure that not more companies within the IT sector get bankrupt. Wants to become the new India – there is an implementation process.

Vietnam also needs time!

Interview with Foreign Official 2

1. What is the perception of the foreign companies? Are the high rates of copyright piracy something that deters them from settling in Vietnam?

It is a key concern among our member companies. However, it is not something that prevents them from completely settling in Vietnam but it is in fact something that does affect how much they invest.

However, obviously one cannot know for sure. Does only know about the calls you get from people wanting help to establish a Vietnamese-branch, the people whom actually are deterred probably does not contact us – so might be a lot of hidden cases.

It is something that we prioritise. Have just initiated a IP Attaché. We have a lot of campaigns together with the companies to raise awareness of IPR.

However, as to the strategies this is on company-level, no common strategy for all the companies. If there are common strategies this has more to do with the fact that the companies are in the same industries.

The companies also spend a lot of money on being able to protect themselves first, second hand they go to the authorities.

How would you describe the development of Vietnamese copyright enforcement since becoming a member of the WTO?

There has definitely been an improvement. There is a genuine will at the governmental level however, this will is not necessarily transmitted all down through the chain.

What is left to be done?

Implementation
Enforcement

However there are bigger fishes to fry, one must be aware of the cost to solve this problem – they have other troubling areas such as banking and finance to deal with, this is of a bigger importance than IP.

Where does the counterfeit goods come from?

Small scale: from within Vietnam
Bigger scale: outside of Vietnam

Are Vietnamese people aware of the fact that a lot of things they buy are counterfeit goods? What is the normal perception of copyright law in Vietnam?

They do know what IP is however they don't feel that its worth it. Not a deterrent factor. Punishments need to be stricter, bigger fines.

7. Who is responsible and who can actually provide a higher enforcement of the enacted laws?

There need to be more cooperation between the different agencies and ministries. Such a complicated system, very bureaucratic.

A need for different kinds of resources, Human resources, capital etc.

How important is the factor that Vietnam is a single-party system? Does the political system has anything to do with the fact that it seems to be so difficult for the government to battle piracy?

No this is not a concluding factor. There are several democracies in the world were copyright piracy is an issue.

Vietnam is currently negotiating a membership/enactment of the TPP. Some scholars assert that the intellectual property enforcement standards in TPP are even stricter than those in TRIPS. Will Vietnam really be able to live up to these standards?

It will be a challenge. Went to a workshop last week regarding TPP were both Vietnamese officials as well as Vietnamese companies expressed concern about this. However, that is what implementation periods are for. It is good to set the bar high.

Has Vietnam really been given a fair chance to develop its IP-laws? Are other countries sufficiently understanding of Vietnams history and the fact that it is a developing country?

Other countries are understanding. Although it is a new topic, so is the fast growing economy. It has been 26 years since Doi Moi. To enter into the WTO and other treaties you receive great benefits but there are also certain requirements you must live up to. I think that developed countries understand Vietnams situation although that does not mean we should cut them a slack – in other ways than with implementation periods as with TRIPS f.x.

What would you say is the most pressing problem for Vietnam to deal with, as regards copyright piracy?

Implementation.

Enforcement.

Interview with Foreign Official 3

1. How would you describe the development of Vietnamese copyright enforcement since becoming a member of the WTO?

This is just my probable guess: yes there has been a difference.

2. What is left to be done?

There are many areas of concern. Counterfeit goods are still so common, they can be found at every market in the entire country. It is almost impossible to buy a original DVD in Vietnam today. Also, the software piracy rates are still really high, one of the highest rates in the world.

Some of the domestic companies keep copying international companies goods, it is as if they prefer to imitate rather than to innovate.

As the situation looks like today, IPR infringement threatens the country's long-term economic competitiveness and discourages foreign companies from transferring their best technology and proprietary know-how, or engaging in research and development activities in Vietnam.

3. Where does the counterfeit goods come from?

They come from all over the continent; India, Malaysia, China etc. Some of the goods are also domestically produced.

There are no control at the borders at the moment. It is just money changing hands. Fairly inexpensive to get the fake goods into Vietnam. Thus, cases of corruption and bribes must be taken seriously! The customs have access to accurate and updated records of protected trademarks, patent, copyrights etc, so it should not be impossible for them to prevent counterfeit goods from entering the country.

4. What do you believe is the normal Vietnamese persons perception of copyright law?

I do not think that the Vietnamese population in general have been made sufficiently aware of the harm that counterfeiting and IPR infringements causes to the Vietnamese society and the economy. Many retailers openly admit that the goods they are selling is fake. Also, Vietnamese consumers continue to purchase the low quality goods due to the pricy.

But in the cities, the middle class, then people are aware of it. Most people who buy the counterfeit goods they know what they are doing. They balance the risk of getting caught with the value of having something that looks expensive. Right now, the balance is not equal.

The government has not done enough and they should increase their efforts in educating their people so that everyone understands that he or she has a direct stake in the protection of IPRs in Vietnam.

Generally: lack of respect of all kinds of things regarding IP

5. What is the perception of foreign companies? Is the high rates of copyright piracy something that deters them from settling in Vietnam?

Sure! depends on the individual company and how they feel they can protect themselves. Developing a culture in the economy and allowing the place to go – impossible if not improve the IPR protection. The companies want to do more, but got a long way to go. People don't trust this place enough to put down real investments!

6. The Vietnamese government has recently revealed that their goal is to cut the software piracy to 70% in the next five years. Do you think this is doable?

It is definitely possible, it is just a question of whether the government are genuinely committed to it. If they are – it will happen.

7. Who is responsible and who can actually provide a higher enforcement of the enacted laws?

Ultimately it rests on the governments shoulders. educating the population. The laws can be enforced very well if they feel like it! In this country, if you wear a t-shirt saying democracy = you are in trouble. But if you sell fake goods, then no one cares.

Right now we are working with a group of companies on a contest for university students – best film for anti piracy. There is education today. And it must be stressed that piracy has been reduced but is still terrible. 87% today – was 96%

8. Vietnam is currently negotiating a membership/enactment of the TPP. Some scholars assert that the intellectual property enforcement standards in TPP are even stricter than those in TRIPS. Will Vietnam really be able to live up to these standards?

11 vs 1 – world v US.

A country that doesn't even comply with TRIPS – how can they expect to live up to higher standards?

it is gonna be a challenge.

9. How important is the factor that Vietnam is a single-party system? Do you think this has anything to do with the fact that it seems to be so difficult for the government to battle piracy?

No. Corruption has nothing to do with the fact that it is a single party system the culture of corruption in Vietnam leads to laws that are not evenly enforced.

The political system no much rule of law – no independent judiciary. that is not about how many parties there are. Without this – u end up with vast parts of the population that don't respect the law = leads to stuff like this.

10. What would you say is the most pressing problem for Vietnam to deal with, as regards copyright piracy?

1. Not much of a deterrent. for someone to engage in IPR theft – no big deal. Maximum fine is 5000 USD – who cares? People can make a lot of money!

Without a deterrent factor it is just a business cost – piracy is very profitable. Not a reason not to do it. Combined with the fact that if you do get caught you can buy your way out of it.

The problem starts at the top. We cannot only blame the kid on the street that buys the fake cd, must start higher up in the hierarchy.

“uuh were a poor developing country” = this kind of talk is nonsense. There are plenty of resources. 1 of 6 works for security police apparatus. 91 million people. It is not a priority. For things that are a priority – the resources are there.

Talks about the lack of enforcement

Vietnam has been a member of TRIPS for quite a lot of years now and they have not done enough progress. Their enforcement system needs a lot of improvement in order to stop deter and punish infringements effectively.

The process regarding administrative enforcement should be more transparent. Records should be kept of all the administrative fines, of the products confiscated and destructed. Moreover, the infringer should be required to provide details of the origin of the goods, the specific amount of goods and contact details to distributors or manufacturers.

There has only been a few criminal cases, this is not good enough. Criminal prosecution is necessary in some cases to deter systematic high volume commercial scale counterfeiting and other violations of intellectual property rights. The criminal provision in the law generally accord with the country’s obligation under TRIPs but these provisions are of little use if they are not regularly applied to cases of infringements on a commercial scale.

According to TRIPs standards, IP rights owners should have effective access to judicial remedies such as injunctive relief and monetary damages. In Vietnam, IPR owners are discouraged from filing actions in Vietnam’s courts. Although provisional remedies such as injunctive relief are available under the Civil Proceedings Code, in reality it is very difficult, almost impossible to obtain such a relief. To act quickly is impossible.

As in other countries, we think that Vietnam would benefit from a specialised IP court.

Interview with Foreign Official 4

Difficult time when it comes to cashflow. Number of dissolved businesses and difficulties facing the market. However: 58 000 newly registered companies only this year. That is an 11% increase. To continue boosting the environment: challenges ahead of us and a lot of improvements needs to be done.

Key concerns:

Most of our member companies are worried; not about the laws but about the lack of implementation and enforcement of the existing laws. Especially among local authorities.

Still have some WTO issues in Vietnam. Some things granted by the WTO are still not applicable in Vietnam.

Sector & IPR Situation Overview

Various industries within our chamber. Trying to work with the Vietnamese Government to strengthen the partnership. Vietnamese customs and MOST. In general the enforcement mechanism need to be strengthen. Most companies are worried about this. Have been a strong improvement. A lot of raids, good cooperation between industry and customs. Key issue: raising awareness among all the sectors in the public and the industry = will result in better protection.

Online piracy and trade of counterfeit goods online.

Some of the key issues: If Vietnam can improve its IPR – is such a great potential in the high-tech area. Not only the foreign companies but also local companies – suffer from this too. Health and safety issues! Especially in the pharmaceutical area. Additionally, one thing that V could to to increase awareness – uppmana V companies to register their trademarks and copyrighted works.

If IPR can be better protected = more investment, create better jobs, higher pay for the people here. Will be an increase of FDI if IPR is improivng.

The Vietnamese Government must continue raising awareness, must work closely with the us and sponsor more education in this sector.

As regards TM-protection, in general a lot of the well-known trademarks due to the lack of guidelines its difficult to have well-known trademarks to be considered as well-known. The intl treaties V is part of should receive higher attention. Bad faith is common by the infringer. Squatting is common. Copying of trade dress. In our experience those things are not always taken into account to determine the case, which they should be.

Steady improvements during 20 ys in this area. big push for the Vietnamese Governments side to improve it. V might in the future have a specialised

court in this area. If an IPR is violated should be considered as a theft of property – should be dealt with in that way.

One emerging issue here, as becomes more high-tech oriented = Patent protection!

Why continued focus on IPR?

Every year we stress this issue. Big companies have many famous brands. High-tech. Pharmaceutical. For R&D a huge investment goes into investing new products. For that reason, companies want to protect their new products. Want to be insured that their investments will be protected. Make sure that the ones wanting to infringe are deterred. That's an international commitment under TRIPS. Must have a deterrent legislation. We must look at the improvements; there are some improvements in this area the last year. A lot of cooperation with the customs as regards training in how to discover fake products. This issue will remain in the White Book for many years to come.

Whether the Vietnamese Government is making a serious attempt to decrease piracy

I do believe that the VG is making a sincere effort in battling copyright piracy but it is a resource problem. The fact that the Ministry of Culture, Sports and Tourism handles copyright is no good, they have too much on their plate. Would be better to have all the enforcement in one single ministry and not spread it out like it is now. But this is a controversial issue, prestige loss to lose ip-responsibility.

The importance of raising awareness

The government are doing an effort to raise awareness of IPR among the local retailers and consumers. In 2009 the Market Management Department introduced a handbook on IPR to emphasise the importance of combating related infringements. But although the understanding of IPR issues among businesses and society in Vietnam has improved, it is still insufficient. A survey made by us revealed that the majority of consumers still admit to buying counterfeit goods.

Being a developing country, Vietnam is dependent on low-cost labour. Despite the countries turnover figures, which are impressive, the country still ranks low as relates to competitiveness. To become a higher-value-added manufacturing country and move up the supply chain Vietnam need to apply high technology and innovation in its emerging manufacturing. But as long as foreign companies are not sure that their IPR will be respected they will not engage in research and development and they will not transfer or license their IPR into the country. With the right education, people will understand that by respecting IPR and focusing on innovation, Vietnam can evolve to a high-tech value added manufacturing country.

Efforts to raise efforts around IP laws and benefits will also increase the skill level and salaries of the local population. Moreover, improving awareness of copyright will foster innovation in high-tech industries like

software, fashion, performing arts etc. In total, this will boost foreign direct investments and help the country's economic growth further.

The lack of enforcement of IPR laws

We believe that the Vietnamese authorities must be assertive and willing to handle more complex cases. Copyright is an area that requires stronger intervention. Today, a huge problem with illegal streaming and downloading in relation to software.

Sometimes, the low fines is the problem, as they are not deterrent. Criminal charges are possible according to the law, but does not happen in reality. For the infringer, the small fines are seen as merely a cost of doing business. Also, there is no requirement for the infringers to reveal the origin of the goods.

Greater cooperation between the various agencies would benefit the administrative enforcement system. The system today is confusing for foreign investors. Clear provisions on what agency is to deal with what type of infringement is necessary.

Cooperative Discussion on Intellectual Property Rights Enforcement

US Ambassador David Shear:

IP is a key issue for American companies and for AMCHAM. This is why this discussion is so important. Second year for this discussion.

A victimless crime. Far from the case. If ideas are not protected then businesses can not get the benefits from their inventions. Deter them from inventing. Without IPR protection some of the best ideas will never get off the ground or get to the market. Its important to highligh public health and safety aspects. National library: safe medicines → the danger of counterfeit goods.

Sustaining innovation. The VG has since improved its regulatory framework. Hopefully the enforcement can keep up with the regulatory framework.

Vice Minister of Science and Technology Tran Quoc Khan:

We all know the role played by IPR in academic life and efficient protection of IPR is important issue esp in multilateral discussion. The efficiency depends on the efficiency of IPR enforcement. Mounting issue capturing the interest of businesses nationally and internationally.

Legal framework and policies in IPR as required by treaties but also. MOST has been chosen by the VG as a sambandsminister to carry out this task. Legal normative documents regarding IPR = MOST. Relevant partners in its inspections in issuing

To improve the performance of IPR in Vietnam. Nevertheless we still face difficulties from the enforcement sde from the public awareness side. It takes time to change this and to act efficiently.

Vietnam has been a member of WTO with opportunities and challenges. One = fulfill our commitment. We are in TPP negotiations and to fully exercise those commitment to WTO and speed up TPP negotiations. We relaly need sharing of experience and training esp by the US.

American Chamber of Commerce IPR Committee Member Michael Mudd:

Increasing costs for salaries in China.

Larger companies in mid luxury range – recently moved their production from China to Vietnam.

They would not do that if did not think their IP would not be respected.

IP + investment in Vietnam = true

In the US increasing focus on unfair competition. Companies importing to US that have somehow managed to get an advantage. Rigorously pursued

area. Companies in Vietnam that respects IP laws to take advantage of this. Violators against this law are substantially not in Vietnam atm.

1. Panel Discussion: Trends in IP Enforcement – Government perspective

Moderator:

Nguyen Nhu Quynh, Deputy Chief Inspector, Ministry of Science and Technology

Panelists:

Vu Xuan Thanh, Chief Inspector, Ministry of Culture, Sports and Tourism

Tran Minh Dung, Chief Inspector, Ministry of Science and Technology

Nguyen Van Thuy, Head, Division of Control for IPR Protection, General Department of Vietnam Customs

Nguyen Van Cuong, Deputy Director, Institute of Jurisdiction Science, SPC

Recently Vietnam has been held as a country with positive changes in IPR enforcement and in fact this is attributed to effort by enforcement agencies the corporate sector and consumers as well.. However these challenges are not robust and quite limited and modest. We can see IP infringement is still ubiquitous and more complex. F.x. unfair competitive products industrial properties especially has increased an this is a concern for vietnam and also our trade partners incl US. The issue is how to find tune our IPR enf mechanism and have practical improvement of its improvement. Observants from IP enforcement agencies. Discussion on how to improve this work and the work in the future.

We are part of the administrative rout in IPR, this is a unique character in V because we have three alternatives: Civil measures, Criminal measures and border measures and Administrative procedures.

Administrative measures and their future:

AM against a civil right ppl may ask why we impose an administrative action on a civil relationship? In fact we have seen some positive impact in the protection of the right of consumers and right owners. The advantage of AM is whenever we detect a violation the RO can file a complaint + evidence and the EA must verify the complaint to make sure that it is accurate and the next advantage is time. IPR means the time of exploiting the right. The AM is time efficient and the remedies in terms of fine and additional measures such as business license revocation and business suspension and compensation order are deterrent and so the needs of RO to some extent. We also want to respect civil rights and in the drafting of administrative penal accent documents we always respect civil rights by respecting the right of both parties to negotiate and reconcile without harming customers in the street. We respect both parties right to voice their opinion and the fine we want to be as deterrent as possible. This is a good additional measure to protect RO and in the future it will be continued

simultaneously alongside other measures. Fx last year 11 000 cases has been resolved by administrative route so to some extent we cant deny its impact on IPR enforcement.

Customs:

On behalf of GDC – border control – hello! Similar to other EA we must practice the law. Vietnam has a long lane and coastal border line. This is a hot spot, very sensitive in terms of IPR infringement. The traders involving in counterfeit they have a lot of sophisticated tactics. The customs sector can see this anti-counterfeit and IPR protection is one of our priorities to make sure that we should have an efficient filter and prevention measures.

1. We have close coo with most, police and market management = very well outturn. Our wish is that the corporations with right owners are important are the best to detect counterfeit. Information sharing is so important in our job! The customs office require us to facilitate the practicing of right of right owners – free of charge! Because customs sector must take care of other areas if RO don't register their right at border to detect and seize counterfeit it would be very difficult for us when it comes to resources surely the customs office and other enforcement agencies in Vietnam will efficiently do our job in the prevention and tackling counterfeit and IPR infringement.

We all understand that customs sector plays a crucial role in terms of IPR protection.

Supreme People's Court court:

The jurisdiction of the courtsystem dealing with ipr. Criminal and civil cases are to go to tribunal 2 of the civil court. This is where we have to go. art 170, 171 criminal code dealing with IP. The PPLC in terms of statistic we don't have an exact number of cases but on average Annually the percentage of IP cases in both civil + criminal route is relatively high contributing to stabilizing the .. and minimizing the ip infringement.

MOST – 168 on IP infringement prevention and the inspectorate of MOST is having a relatively holistic view on IP enforcement in Vietnam. That is Q1 – IPR license of last year and this years enforcement. Do u think we have down to earth practical outcome in IPR performance? Coordination and cooperation amongst ourselves? Each agency is very powerful and strong but collectively does not seems as powerful as we wish. What are the challenges facing MOST in cooperation with other parties and if it has been solved? In terms of staffing?

MOST:

To answer efficient enforcement: a comprehensive and sufficient legal framework. Thx to the effort of VG we have specialized law and law on administrative remedies these laws are in line with V:s integration with the world. After passing IP law in 2005 we have the first amendment in 2009 to satisfy Vs integration. Last year the state upgraded the ordinance on administrative remedies.

We have sufficient legal framework which is in tune with international integration. We have effort in promoting the activities by enforcement agencies so we can turn into action esp in the end of last year nearly 11 000 companies violating IPR:s has been dealt with in both civil and adm route. 26 cases led to prosecution, that was 2012:s statistic. Reflects our stronger effort to ensure a better enforcement of IPR. The ambassador has indicated that we must make sure that no paper tigers. If we compare to actual situation we need to exert more effort. It requires a roadmap and a time frame to make our enforcement agencies framework better off. As an enforcement agency since only this year – 42 cases been dealt with, 28 fine decisions has been imposed and we encourage IPRO to mediate first – a sign of respecting their civil right. Overall snapshot shows effort.

Challenges facing us – cooperation amongst us. Many enforcement agencies f instance specialized inspectorate market mechanism, market management, ppl committee, customs, police, coordination to ensure maximal enforcement in fact there is no compulsory mechanism on cooperation – everything is based on voluntary. Discretionary decisions on whether to join the cooperation or not. Need to exchange expertise some times. A level of good will from each side. That's why we have signed a program of actions from 2012. 9 ministries – MoU on corporations. First if necessary mutual assistance and sharing information and ideas esp inspection, sharing corporation and sharing information to the community. Training courses to improve capacity and I expect that these activities although they are not compulsory but voluntary we should improve our efficiency to have better enforcement of IPR.

Thirdly, remaining problems. Two key issues:

1. Our staff in terms of quantity and quality – it doesn't mean that a new recruited person can do the job right away and we have enough number of ppl doing the job is another problem –need to update their knowledge through training they must be more proactive! Cooperation amongst ourselves could fill up the gap and maximise the strength of each of us.
2. Communication to improve public awareness so they have correct attitude and support us in the fight against counterfeit. RO are aware of their rights and what right has been tampered with. Demanding process.

A lot is to be done, we should have a road map and the model of coordinating agencies is very important.

QUYNH:

Due to geographics, a lot of coastal line and land border – increasing number of counterfeit products imported into the country. Cross-border IPR enforcement is a burden on customs sector. Q: what difficulties are you facing when cooperating with RO? Last year customs dealt with a lot of big cases one regarding Gucci and Chanel and this year we have not seen any big cases like those detected last year. What is your plan to improve the enforcement efficiency in border control?

CUSTOMS:

The counterfeit producers earn a lot of profits and the counterfeit rings will try to everything possible to realize their profit. We have a vast area of coastal and land border lines and it is very difficult for us to prevent every shipping of counterfeit goods. If without cooperation with RO – this is our concern and fear if RO doesn't feed us with information and share information beforehand we know that counterfeit goods is almost identical with real product. Given the resources at border gates this is impossible. To maximise the customs clearance and have a firm grip it is a challenge facing us. If RO doesn't cooperate with us in the investigation and seizing of goods. Who to ask? Who to get the confirmation from? Is it real – is it fake? The law allows CO to seize the goods and stop the clearance for a limited time only! Really wish that corporations with rights keep an updated list of rights to us. When have this information – suspected shipments will be stopped. Then we can contact and discuss the RO.

Second part on the well-known goods cases like Gucci last year we seized a lot of shipments violating a lot of well-known marks. Goods that are detrimental to public health and security. A lot of seizing. Regarding solutions from outside one solution is international cooperation. We cooperate with other countries very close especially within the World Customs Organization. Frequent information sharing.

QUYNH:

We may agree that IP via the judicial system we have seen a limited number of cases, very few. Most of them are dealt with via administrative route. Is there any plan from SPC to accelerate the judicial solution to the problem and the legal framework to tackle IP infringement? Ppl often discuss it. Art 170 and 171 in penal code – concept of commercial scale as a threshold for criminal prosecution but no clear guidance on the definition of this word. This is a challenge facing the economic police and many other enforcement agencies regarding “commercial scale”. Please have your view on this!

SPC:

The number of cases brought to court in IP was low, minor and why is this so? First, I think that it is an awareness of the victims. We should have a complain filed to the court and if we are not aware of the role of the court and one is reluctant to come to us this is the biggest hurdle towards the judicial system.

Second, we still have troubles in the application of law, fx bureaucracy procedure and our staff have not got sufficient capacities. Must make sure that we have a fast track solution on IP cases and we are drafting an ordinance on short cuts – short hearings. When that ordinance come it will shorten the time required in settling ip cases.

Third, the SPC is informing our target plan especially targeting charges in IPR area. We have not a specialised court but on provincial level we have designated a court specializing in IP cases so we can focus our training effort on him or her. The SC is doing a research on the building of a

specialized IP court. Will be a step forward. We should have better cooperation of individuals and organizations.

Articles 170 and 171 the court is drafting a guiding circular and we are aware of the problem arising in enforcement and not all the law and regulation have to wait for guiding documents before enforcement. You shall not wait for guidance before implementing the law only if you have trouble in enforcing it. We are drafting 170A and 171 guidance!

QUYNH:

Positive changes in Vietnam but not very strong and robust manner so we must do more to promote the enforcement in Vietnam and we must continue improving our legal system. Stake holders and right owners and the capacity by the EA must improve – better cooperation with RO and international cooperation place an important role.

2. Panel Discussion: Trends in IP Enforcement – US Industry

Perspective

Moderator:

Thomas Treutler, Partner, Tilleke & Gibbins

Panelists:

Alasdair Grant

Mike Orgill, Country Lead, Public Policy and Government Affairs, Google

Frank Rittman, Senior Vice President, Motion Picture Association

Phil Wadsworth, Vice President and Legal Counsel, Qualcomm

Cooperation: the key to success in the region. We can say that there has been some important improvements in our system. Specialized training of judges, possibly an IP court.

GOOGLE:

The internet is changing. Interesting. Reducing distribution costs of content. Means that ppl find new ways to pirate content. A few points of what we are observing:

1. Important to provide legal alternatives to content. Challenge – impossible to buy content online (purchased). Important for Vietnam to develop legal alternatives to piracy.

2. The way to take down sites is to deprive them of their money. Expensive to run them. Big, require a lot of investing in servers. Advertisement-funding. Google find ways to deprive these sites of their funding. If no money to thrive = will be put down.

BSA:

Esp the last 5 years have been successful in battling software piracy. Cooperation with copyright office. Thx to combined cooperation there has been a dramatic reduction in software piracy. 8 years = 11 % reduction. Relates to other similar countries in the region. Working hard to develop

their economic development. These countries have started to address the question of piracy in a similar way. China, Thailand, India We see initiative and the same kind of cooperation between corporations and the governments. The development of specialized IP courts like they have in Thailand(!) is very effective – they understand IP better, evidence are valued better.

Reduction to 70% the next five years. This campaign is ambitious. Strong actions – implementation of criminal sanctions are of an essence!

26 criminal actions in total → NONE regarding software piracy

QUALCOMM:
Patents!

MOTION PICTURE ASSOCIATION:
Last year: 1 trillion dong.
Pay tv sector, very valuable.

A revolution on film distribution activities and digital technologies. Wide variety of consumer experiences. Anytime, anywhere era. Rob sites – track and store television programs. Many of them belong in Vietnam. Copyright infringement = low risk crime.

Potential harm, lost jobs, lost income, lost incentive to creativity. Policy perspective = VG must send a message of the importance of protecting IP. Must have correct infrastructure to deal with this issue.

Arrests, damages. Law enforcement authorities are best suited to address large commercial infringements.

From a cultural perspective: many infringer are unaware that they are doing something wrong. If take the time to explain for them that they are doing something illegal – they will stop. Are now running a commercial at the cinema telling people to stop downloading.

The message: clearly need to step up enforcement. Education; absolutely an essentiality. Soft education. In my experience, most societies follow

Small percentage of people will always download. But at the other end of the spectrum who will always pay. In the middle you have the mass of people – want to move them to the paying end of the spectrum. Still need enforcement to deal with the worst people.

TREUTLER:
IPR only been on the schedule in law school for 10 years. Need to give back to the law schools and help them in their training. Evidence to to that in Vietnam. Ford and the auto industry in Vietnam in general one issue is industrial design – very important topic in Vietnam. Are there any success

stories about Vietnamese ppl who have used YouTube etc to get a profit by using IP?

GOOGLE:

Use intl platforms and make money out of their content. It is profitable to be a pirate. The system need a change so it is no longer profitable. As long as piracy = money, then they will continue to pirate.

Take down system: clear notice of take down system. If copyrighted content on the platform – CO notify Google who review it and eventually takes it down. Visual fingerprint.

BSA:

India, China, Thailand, can be compared to Vietnam. Starting to grow their manufacturies. Increase in GDP → starting the travel from imitator to innovator. In 5-10 ys concerted issues high volume low cost. Real opportunity once the population is educated to move into creative industries. Has already happened in India – Thailand is doing the same now. Develops IT because it provides a profound platform. China is also doing it. New 5 year plan they want to move up the value chain, want to invest and get their own low cost high volume factories.

In order to have a strong industry developing IP – domestic industries can enable this. If look at the piracy rates and the Vietnamese tax revenues – quite a significant loss.

MPA:

What countries have done something unique?

Malaysia – 20 ys ago a catastrophe. Mid 1990-s started to listen. Made it a national policy to track ?? You have to do something to clean up IP. Over the 90-s they did a tremendous effort. Enforcement on street level etc. Really did the right things. As stuff migrated onto the internet the malaysian enforcement agencies do a fantastic job. Have shut down two really big sites. Huge success.

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