



ICC BASCAP
PROMOTING AND
PROTECTING INTELLECTUAL
PROPERTY IN VIETNAM



TABLE OF CONTENTS

List of Abbreviations.....	2
Executive Summary.....	3
1. Intellectual property is important to Vietnam’s economic growth and development.....	6
IP benefits the economy.....	6
IP attracts FDI.....	6
IP promotes innovation.....	7
IP promotes R&D and technology transfer.....	7
IP helps firms monetize their inventions and grow.....	8
IP protection helps small and medium enterprises.....	8
IP benefits consumers and society.....	9
2. There are substantial risks associated with counterfeiting and piracy in Vietnam.....	10
IPR and Economic Growth.....	10
Challenges in Vietnam.....	12
Vulnerable sectors.....	13
3. The time is right for Vietnam to further improve its IP regime.....	18
4. Recommendations for a path forward.....	20
Overview.....	20
Legislative Recommendations.....	20
Policy Recommendations.....	26
5. Conclusion.....	31

List of Abbreviations

AEC	ASEAN Economic Community
BASCAP	Business Action to Stop Counterfeiting and Piracy
BSA	Business Software Alliance
EU	European Union
EVFTA	European Union – Vietnam Free Trade Agreement
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
ICC	International Chamber of Commerce
IIPA	International Intellectual Property Alliance
IP	Intellectual Property
ISP	Internet Service Provider
IPR	Intellectual Property Rights
MCST	Ministry of Culture, Ministry of Culture, Sports and Tourism
MIC	Ministry of Information and Communications
MOST	Ministry of Science and Technology
MPS	Ministry of Public Security
MSA	Market Surveillance Agency
NOIP	The National Office of Intellectual Property of Vietnam
OECD	Organisation for Economic Co-operation and Development
R&D	Research and Development
SMEs	Small and Medium Sized Enterprises
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNODC	United Nations Office on Drugs and Crime
USTR	US Trade Representative
WCO	World Customs Organization
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

Executive Summary

Economic growth is closely related to how well the economy encourages, stimulates and fosters creativity and innovation. A critical factor in maximizing the value of this creativity and innovation is a clear legal and regulatory system that recognizes the importance of the underlying intellectual property (IP) and establishes and protects the property rights of the creators, inventors and innovators.

Developing countries such as Vietnam can benefit from a robust IP enforcement regime in the same way as more industrialized countries. However, to do so, government leaders must establish an appropriate legal and institutional framework; create awareness on the importance of intellectual property rights (IPR); and protect industries reliant on trademarks and patents to produce products that can improve the quality of life in Vietnam, including textile, pharmaceuticals, business methods and software.

Several challenges hamper the development of strong IP regimes in Vietnam and throughout Southeast Asia. One is that the cross-cutting nature of IP is not sufficiently acknowledged. Another is that, in general, IP is not accorded a prominent place in national and political economic agendas. Moreover, financial and material resources available for IP institutions are inadequate.

Vietnam is making progress in increasing awareness and development of the IP system including its commitment to strengthen its IP regime in its international agreements and drafting and amending a number of IP related legislation and circulars encouraging innovative and inventive skills, and commercializing indigenous research and development. The Vietnam economy can further benefit by focusing on its areas of economic advantage, protecting appellations of origin and geographic indications, and using strategies to distinguish local products from the region.

At the same time, Vietnam has increasingly become both a target destination and significant transit route for counterfeit and pirated products. Cheap, sub-standard fakes are flooding the market through foreign and local traders while manufacturers are illegally replicating well-known brand names and designs on their packages and labels.

Several factors have contributed to the wide-scale proliferation of counterfeit and pirated products throughout Southeast Asia. Such factors include the disproportionate size of its informal economy; corruption, particularly at entry points; out-dated legislation; and weak enforcement mechanisms, including a lack of national policy on combating counterfeiting and piracy. Moreover, Vietnamese consumers are unaware of the risks involved in purchasing and consuming counterfeits.

Much work remains to be done in Vietnam to both strengthen the value and protection of IP rights and to guard against counterfeiting and piracy. The purpose of this BASCAP report is to introduce an initial set of policy and legislative recommendations that work toward reducing counterfeiting and increasing the economic benefits associated with a strong system of IP rights—including the positive link between strengthening IPRs and economic development, increased rates of innovation, attracting foreign direct investment (FDI) and promoting Research and Development (R&D) and technology transfer.

Combating counterfeiting and piracy must become a public policy priority in Vietnam. This effort must start with the government's clear message to the criminal networks and others involved in counterfeiting and piracy that these activities will no longer be tolerated. These actions will help convince legitimate business owners and consumers that the government is serious about protecting IP rights, which in turn will rally public support for these efforts.

The Value of IP

Chapter 1 explains the value of IP and why a robust IP enforcement regime is important for Vietnam's integration into the global market.

- IP protection benefits the Vietnamese economy in terms of Gross Domestic Product (GDP), employment, tax revenue, development and competitiveness.
- The strength of a country's IPR regime strongly influences FDI. Although Vietnam has been successful in attracting FDI in the last decades due to its economy opening up, robust IPR legislation and strong enforcement are essential for Vietnam to realize its full FDI potential.
- IP protection promotes innovation, increases funding for R&D and helps firms realize more value from innovations. For a developing country such as Vietnam, real economic growth will depend on its ability to create an environment that stimulates innovation. A strong IPR regime will support innovative business and increase demand for innovation throughout the economy.
- Small and Medium Sized Enterprises (SMEs) that use IP report faster growth and higher income than those that do not. SMEs currently account for over 90% of the Vietnam's businesses, but most still lack strategies to develop their brands. Helping SMEs establish and protect their IP rights are important elements of support that the Vietnamese government can provide to its SMEs sector. Creating strong and recognizable national brands is urgent and important if SMEs are to remain competitive in an increasingly global market, especially as Vietnam integrates more deeply in the global economy through several free trade agreements.
- IP protection benefits consumers and society, providing innovative products and services in virtually every area of life—from clean energy to health care—and helping protect consumers from inferior and dangerous counterfeits. While counterfeiters have traditionally focused on well-known international brands, there is a burgeoning trend of producing fake goods bearing famous Vietnamese brands.

What is at risk?

Chapter 2 explores the problem of counterfeiting and piracy in Vietnam, focusing on key sectors of vulnerability.

The report shows that several factors contribute to the wide-scale proliferation of counterfeit and pirated products in Vietnam, including the disproportionate size of its informal economy; corruption; out-dated legislation; weak enforcement mechanisms; and unawareness among consumers of the risks involved. The widespread counterfeiting and piracy divert potential tax revenues to actors of the “underground economy”, while putting both the economy and the health and safety of consumers at risk.

A broad range of counterfeit goods continue to be sold in the Vietnamese market, including accessories (e.g., sunglasses, handbags, etc.), food products, wines and spirits, cosmetics, pharmaceutical products, fake and low-quality pesticides, computer software, vehicle spare parts, tobacco products, engine lubricants, electro-mechanical products and consumer electronics. Vietnam also continues to have one of the highest rates of online piracy in the world, with illegal reproduction of CDs and DVDs continuing to be a flourishing industry throughout Vietnam.

Among the more vulnerable sectors is the garment and textile sector, which is an important contributor to Vietnam's GDP and employs some 2 million people.¹ Protecting and enforcing intellectual property rights, including trademarks and designs, will be critical to protect and grow this sector as Vietnam's economy further integrates into the global economy.

The time is right for action

Chapter 3 highlights why the time is right for Vietnam to continue strengthening its IPR systems in cooperation with established international channels and trading partners who stand ready to assist Vietnam in proceeding with necessary policy and legal reforms.

Most recently, the National Steering Board on the Prevention and Control of Smuggling, Trade Fraud and Fake Commodities—or “Steering Committee 389”—has become a catalyst for significant progress in combating counterfeiting and piracy. Vietnam has also assumed additional responsibilities through its accession to the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). Consequently, Vietnam is required to comply with all of the obligations under the WTO Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement), including compliance with the rules governing the enforcement of IP rights, civil, criminal and administrative procedures and remedies, provisional measures and customs measures.

The Vietnam government’s current efforts are creating the momentum to take further actions toward improving its IP regime. Vietnam’s ability to reap the full benefits of new international economic opportunities will however require further improvements in the effectiveness of its IP protection and enforcement.

Recommendations for a path forward

Chapter 4 provides a comprehensive set of policy and legislative recommendations that can assist Vietnam in establishing a robust IP protection and enforcement regime capable of generating the significant economic and social benefits that lie ahead.

Efforts to stabilize the economy and stimulate economic growth must include IPR protection in order to drive innovation, development and jobs. This set of recommendations includes policies and actions ranging from legal reforms to technical assistance and capacity-building measures, channels for international cooperation and tools for strengthening enforcement practices—all of which are indispensable requirements for meeting Vietnam’s full economic potential.

Notably, Vietnam is facing challenges in the process of strengthening its IP system and addressing deficient enforcement of the existing legislation. Key areas for improvement include the establishment of an appropriate legal and institutional framework, enforcement of IPR and creating awareness on its importance.

Summary of suggested recommendations

Legislative recommendations

1. Improve and expedite civil judicial enforcement procedures
2. Improve administrative enforcement procedures
3. Improve action against Internet infringements
4. Improve customs enforcement procedures
5. Address deficiencies in criminal IP law and procedures

Policy Recommendations

1. Establish an inter-agency approach and enhance collaboration between the Vietnamese regulatory agencies administering and enforcing IPR
2. Establish effective dialogue and cooperation between Vietnamese authorities, IPR holders and other stakeholders
3. Expand IP related administrative, judiciary and technical capacity building
4. Increase public and political awareness of counterfeiting and piracy and the associated economic and social harms

1 INTELLECTUAL PROPERTY IS IMPORTANT TO VIETNAM'S ECONOMIC GROWTH AND DEVELOPMENT

Creativity and innovation are proven drivers for economic growth and competitiveness. Research has shown that economic growth is closely related to how well the economy encourages, stimulates and fosters creativity and innovation. A critical factor in maximizing the value of this creativity and innovation is a clear legal and regulatory system that recognizes the importance of the underlying IP and establishes and protects the property rights of the creators, inventors and innovators.

The effectiveness of a country's IPR regime is a critical element for unlocking a nation's full innovative capacity. An effective IPR regime releases the potential of inventors and creators, and empowers them to transform ideas into high-quality products and services that create jobs and stimulate economic growth. The protection of these intellectual assets is increasingly important in enabling countries to reach their economic development goals.

IP benefits the economy

Strengthening IPR is increasingly being recognized as a significant contributor to a country's economic development, technology transfer, and increased rates of innovation. IPR attracts FDI and promotes R&D and technology transfer in developing countries. IPR is also an important component of many industries, ensuring growth in value-added jobs and foreign trade.²

Developing countries such as Vietnam may benefit from the new developments arising from a robust IP protection regime in the same way as more developed countries. Among the challenges facing the country in building a strong IP protection regime are the establishment of an appropriate legal and institutional framework and the creation of awareness on the importance of IPR.

IP attracts FDI

FDI is important because it supports economic development through the transfer of technology and managerial skills and through the creation of employment opportunities. A country attracts more FDI when investors know that there is a return on investment for them which may be achieved mostly with the protection of IPR and effective enforcement.

The strength of a country's IPR regime is among the factors that influence firms to transfer technology or invest in a country. For example, the OECD has found that the strength of a country's patent rights is positively correlated to inward FDI. Economists found that a 1% increase in a country's patent protection correlates to a 2.8% increase in FDI, and that a 1% improvement in trademark and copyright protection increases FDI by 3.8% and 6.8%, respectively.³

The attraction of FDI has been a major incentive in the development of IPR in Vietnam. The country has successfully attracted FDI in the last decades due to its economy opening up and its close distance to neighbouring countries such as Taiwan and Japan. According to a WIPO-UNU Joint Research Project, FDI companies cumulatively accounted for around 27% of Vietnam's non-oil exports and 35% of its total industrial output, thus almost 13% of the country's GDP. Notably, from 2000-2014, FDI companies' contribution to GDP increased from 13 to 18%.⁴

While Vietnam has been successful in sustaining a high level of FDI of around \$18.5 billion per year over the last five years,⁵ there is still significant potential for further growth. While the manufacturing sector is a major source for the GDP growth in Vietnam, most companies depend on imported technology, thus, a successful protection of IP can help to drive more local innovation and even transfer of know-how. Moreover, FDI companies are often more aware and careful when it comes to the protection of their IP and Vietnam could attract even more FDI if companies were reassured that their intellectual assets are protected.

IP promotes innovation

Innovation is a key ingredient of sustained economic growth, development, and better jobs. Studies have estimated that innovation accounts for as much as 80% of economy-wide growth in productivity in high-income countries.⁶ Although less is known about innovation and its economic impact in low—and middle—income economies, available evidence suggests that innovating firms in those economies are also more productive than their non-innovating peers.⁷

Governments recognize that IP is a critical element in a modern strategy for the promotion of innovation, inventiveness, and technology transfer. For example, the critical role of IP in fostering innovation has been recognised by Vietnamese Ministry of Science and Technology (MOST). Speaking at the International Innovation Business Forum held in HCM City, Deputy Minister Tran Viet Thanh emphasized that protection and trading of IP rights would further innovation and economic growth in Vietnam, bringing great benefits not only to businesses but to the entire economy.⁸

Innovation, however, must not be limited to technological enterprises—although they still remain crucial for international competitiveness. Sustainable economic growth will require innovation in all areas, such as knowledge-based services, organization of business, marketing, and many others. A feature of a well-functioning market is the constant collaboration and interaction among large, medium sized and small companies. Furthermore, firms also collaborate more and more with universities, research institutes, and other external producers of knowledge. These types of public-private partnerships help foster technological development.⁹

IP promotes R&D and technology transfer

IPR promotes cultural expression and diversity, promotes the dissemination of new technologies, and promotes development. For example, the OECD has found that a 1% increase in the strength of patent protection, a basic and key form of IPR protection, in developing countries correlates to nearly a 1% increase in domestic R&D. A similar increase of trademark and copyright protection, two other critical parts of an effective IPR regime, correlates to a 1.4% and a 3.3% increase in domestic R&D, respectively.¹⁰

Appropriate IPR protection is often a precondition for international investors to disclose technology to licensees in developing countries—especially in areas involving easily imitable technologies such as software and pharmaceuticals—and hence can affect chances of attracting equity investments or non-equity modes of involvement (e.g. licensing).

IPR can also be a means of encouraging independent research activities by local companies, since businesses are more likely to invest in resources in R&D and technological upgrading if their innovations are protected. In addition, effective IP protection also attracts venture-capital investment for R&D and for the commercialization of innovative products and services.¹¹

Firms can earn substantially more from innovations that are protected by IPR. On average, the ‘patent premium’ for patented versus unpatented inventions is between 180% and 240% depending on the industry. In other words, patents on average double the value of an invention. The more valuable a patent, the more R&D takes place. A 10% increase in the patent premium leads to a 6% increase in business and R&D expenditure.¹² IP ownership has therefore become more central to the strategies of innovating firms. Demand for patents has risen from 800,000 applications worldwide in the early 1980s to 2.7 million in 2015.¹³

Vietnam has seen an extraordinary growth in demand for patents, with applications for invention patents and utility solution patents increasing from 96 in 1989 to 5,483 in 2015 to 5,816 in 2019.¹⁴

IP helps firms monetize their inventions and grow

Firms use IPR to help develop, create value, conduct trade and benefit from their works and inventions. A firm’s ownership of IP rights helps reassure investors that they should inject money into the company. The use of IP in fostering investment is not only important for established firms that are already reliant on patents, trademarks and copyrights for protecting their value, innovation, and reputation, but even more so for new firms seeking to establish a secure stream of investment and innovation. Firms also use their IP to penetrate new and profitable markets, to develop products, services, and processes and to collaborate through licensing or establishing strategic alliances.¹⁵

Firms that rely on IP generally succeed better than those that do not. Trademarks and other intangible IP assets can enhance a firm’s market value substantially. An innovative firm’s value in the market or in an acquisition does not just lie in its physical assets—cash, securities, plant, property, equipment, raw materials or finished goods—but also in the firms ‘intangible assets’ such as the value of the firm’s IP, including its brands. These intangible assets can represent a much bigger part of an innovative firm’s market value than its current and physical assets.

All Vietnamese firms will benefit considerably if there are effective IPR regulations in place. A stable and effective IPR regime will boost economic development, enhance consumer welfare by improving and ensuring product quality, and make firms more competitive. It will help firms develop their business and provide good opportunities for diversification and specialisation.

IP protection helps small and medium enterprises

SMEs have been recognized by governments and development experts as the main engine of economic growth and a major factor in promoting private sector development and partnership. SMEs help improve living standards, facilitate local capital formation, and achieve a high level of productivity and capability. They are also acknowledged as the main means of achieving equitable and sustainable industrial diversification and dispersal.

SMEs are important contributors to innovation and creativity. Traditional economic theory and empirical studies have demonstrated how large companies are a major source of innovation, given that they may have greater funding than small firms to devote to R&D, greater ability to take the risks associated with innovative activity, better economies of scale, and thereby a lower marginal cost of innovation.¹⁶ However, a large body of evidence also shows that SMEs, especially young firms, contribute greatly and increasingly to the innovation system by introducing new products and adapting existing products to the needs of customers.¹⁷

Notably, SMEs often use IPR more extensively than large companies. SMEs that use IPR report faster growth, and higher income and employment than those that do not.¹⁸ For example, SMEs in the information and communications technology (ICT) sector in the EU that rely on IPR reported 10% more growth in turnover, market share, and employment, respectively, than those that had not used IPR.¹⁹

SMEs account for over half of the total share of employment sales and value added SMEs are an effective vehicle for self-sustaining industrial development, as they possess the capability to grow an indigenous enterprise culture. SMEs represent the sub-sector of special focus in any meaningful economic restructuring program that targets employment generation, poverty alleviation, food security, rapid industrialization and reversing urban migration.

SMEs currently account for over 90% of the Vietnam's businesses, but most still lack strategies to develop their brands.²⁰ Creating strong and recognizable national brands is urgent and important if SMEs are to remain competitive in an increasingly global market, especially as Vietnam integrates more deeply in the global economy through several free trade agreements.

IP benefits consumers and society

IPR supports the development of a continuous stream of innovative, competitive products and services that benefit consumers. IPR promotes consumer trust and more effective protection against counterfeit and pirated goods. IPR is helping to address many of society's most important needs, from clean energy to health care to a truly 'digital economy.'

Copyrights provide the basis for the continuous stream of new music and films, ever-improving business, games, software, books, magazines, newspapers, and other published material, photography, and many other related activities. However, high piracy rates, inadequate legal provisions for addressing Internet piracy, poor enforcement procedures and ineffective management of IP rights inhibit creative industries from realizing their full potential and lead to underinvestment in production of professional Vietnamese creative content.

Patents boost many products and services that society relies on for health, energy, communication, transportation and many other human and commercial needs. Trademarks support the development of products and services that consumers want and depend on, from clothing and computers to foods and footwear, educational and entertainment products, services, scientific products and even sporting activities.

Consumers benefit from IP not only through the stream of innovative products and inventions and creativity that would otherwise not be created by firms, but also through the rights that protect the identity of well-known goods and services. Trademarks act as signposts of quality and prevent other firms from passing off one brand of good as being the same as another.²¹ Establishing and promoting an adequate IPR system can also have a significant impact on consumer health and safety, and on consumer protection. Counterfeit goods, including medicines, auto and airplane parts, electrical components, toys, food and beverages and many others, can be dangerous and potentially harm or kill unsuspecting consumers. These products may contain ineffective or dangerous and untested ingredients, and provide no assurance of safety or efficacy.

Effective IPR rules and strong enforcement of laws and regulations are therefore crucial to protect the health of customers while ensuring that the products are genuine and comply with the required safety standards.

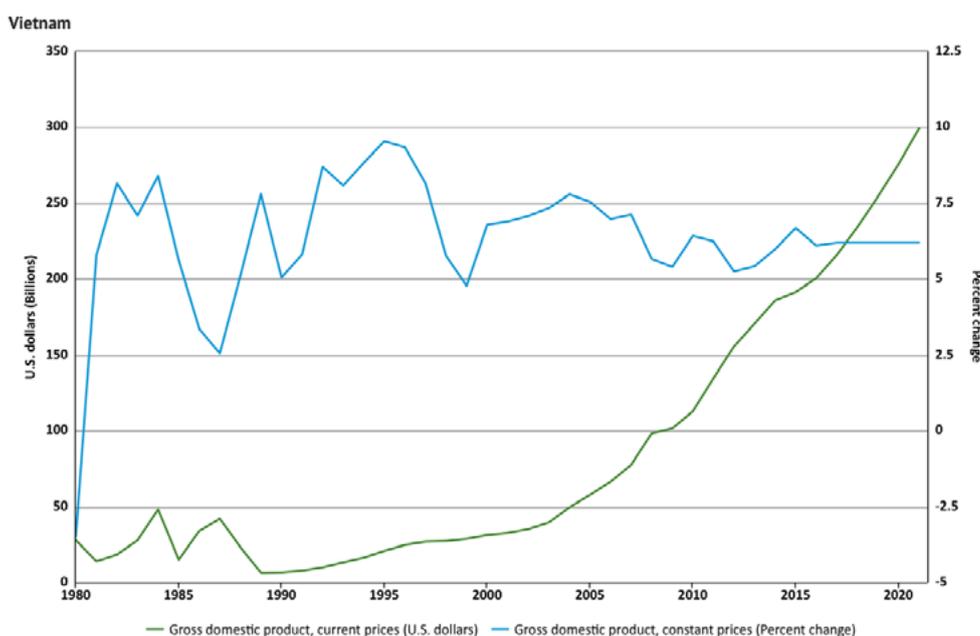
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THERE ARE SUBSTANTIAL RISKS ASSOCIATED WITH COUNTERFEITING AND PIRACY IN VIETNAM

IPR and Economic Growth

Vietnam's economy has experienced a huge transition since 1986, when it started to move away from its centrally planned economy model to a market economy. The efforts, including reforms and economic policies, have successfully transformed the Vietnamese economy from one of the poorest countries to a lower middle-income country with a GDP at much higher levels than before the transition in the mid-1980s. This can be illustrated with the GDP in percentage that rose from 3,36% in 1986 to constantly remaining above 5% since the end of the 1980s; also the GDP in current prices has constantly risen since the end of the 1980s:

Figure 1. Vietnam's GDP growth 1980 - 2021



Source: International Monetary Fund. (2016).²²

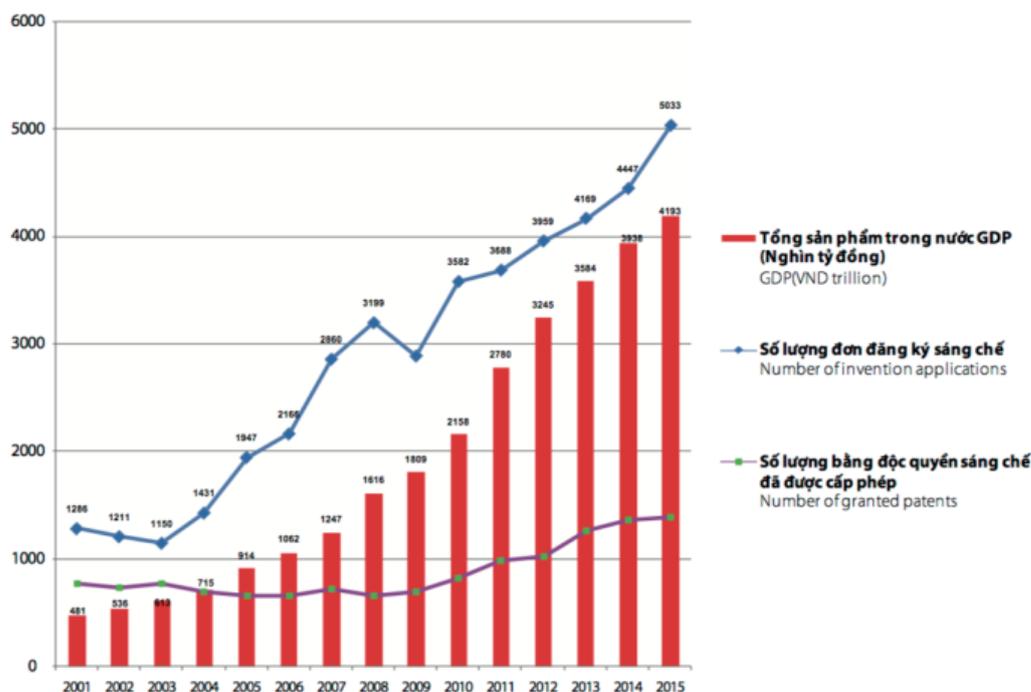
Vietnam has great potential for further economic growth because it is geographically close to global supply chains and has remained politically stable, making it an attractive place for investors to re-locate or diversify their Asian manufacturing base away from China (next to political considerations, Vietnam offers an abundant work force that is less expensive than that of China).²³ The economic growth has also translated into a shift in the sectors of the Vietnamese economy with a focus on services and manufacturing, while the agricultural sector has decreased steadily.

Vietnam's impressive economic growth has gone hand-in-hand with an increasing investment in IP, both by domestic and foreign industries. The National Office of Intellectual Property of Viet Nam (NOIP) 2015 Annual Report shows a continuous increase in applications for registration of industrial property rights. In 2015, the NOIP received 50,975 applications for establishment of industrial property rights, including 37,283

applications for trademark registration. This is an increase of 10% compared to 2014 and the largest number of applications ever received by NOIP.²⁴

The increase in applications for IPR has grown in tandem with the growth of the economy. Figure 2 shows the correlation between Vietnam's GDP and the number of applications for invention patents and utility solution patents. The critical role of IP will only increase as Vietnam integrates more deeply in the global economy.

Figure 2. The correlation between GDP and invention applications/patents during 2001 - 2015



Source: Ministry of Science and Technology National Office of Intellectual Property of Viet Nam. (2015).²⁵

Foreign investors are increasingly recognizing the value of Vietnamese companies' intangible assets. For example, in 2015 the Vinamilk brand—the largest dairy company in Vietnam—was valued at US\$1.1 billion,²⁶ accounting for 22% of the company's wealth.²⁷ Yet, the combined value of Vietnam's 50 leading brands, estimated at \$5.5 billion, remains modest compared to neighbouring countries. The Singaporean DBS bank brand alone is valued at \$4.4 billion and Malaysia's Petronas dwarfs the entire Vietnam market with a brand value of \$9.4 billion.²⁸

Compared to the seven ASEAN countries listed by Brand Finance, Vietnam as a nation brand ranks sixth — after Singapore, Thailand, Indonesia, Malaysia and the Philippines; and ahead of only Cambodia.²⁹ To improve the competitiveness and the integration of Vietnamese businesses into the world market, Vietnam must develop measures that help the development of trademarks, while at the same time ensuring the protection and enforcement of IP.

Challenges in Vietnam

Unlike many other countries, IPR enforcement in Vietnam is primarily practised through the imposition of administrative penalties for infringements whereas civil and criminal remedies are rarely used or used ineffectively. Consequently, the number of infringements has increased significantly while the capability of IPR enforcement authorities remains limited at both the central and the local level.³⁰

The alarming levels of counterfeit and pirated goods in Vietnam are putting both the economy and the health and safety of consumers at risk. Widespread counterfeiting and piracy divert potential tax revenues to actors of the “underground economy”, while the sold counterfeit goods pose health risks for its consumers.

Moreover, the problem and scale of counterfeiting destroys the comparative advantage of products and Vietnam's ability to attract foreign investment. Foreign investors compete on innovation, invention and high-quality design and production. Piracy strips that comparative advantage away, creating disincentives for business to invest in Vietnam. This is particularly true for IP-sensitive sectors, such as technology-intensive industries characterized by high levels of R&D, worker productivity, and innovation, where companies are reluctant to do research in Vietnam or bring in advanced designs for fear of theft.

A broad range of counterfeit products continue to be sold in the Vietnamese market, including garments, accessories (e.g., sunglasses, handbags, etc.), food products, wines and spirits, cosmetics, pharmaceutical products, computer software, vehicle spare parts, engine lubricants, electro-mechanical products and consumer electronics.³¹ Moreover, domestic manufacturing is now emerging to be a concern.³²

Counterfeiters in Vietnam are becoming more sophisticated in their methods and practices, as well as in their use of counterfeiting technology to produce counterfeit products that are easier to pass off as genuine products to Vietnamese consumers. While counterfeiters have traditionally focused on well-known international brands, there is burgeoning trend of producing fake goods bearing famous Vietnamese brands.³³

Vietnam's geography presents additional challenges, with a long coastline and border adjacent to several ASEAN members and China – the world's main producer of counterfeit goods. The complicated border topography, coupled with poor living conditions of people living in rural border areas, helps facilitate the smuggling of illicit goods across the borders.

Legal framework

Prior to becoming a member of the WTO in 2007, Vietnam issued a series of new laws and regulations to strengthen the protection and enforcement of IPR to meet the TRIPS Agreement. As a result, Vietnam's Intellectual Property Law (“IP Law”), Civil Code, Commercial Law, Law on Competition and related implementing legislation together provide a reasonably good legal framework for protection in accordance with international standards.³⁴ However, legal rights are only as good as the ability of the IP owner to enforce them. In this regard, several international observers note that Vietnam still falls short in a number of respects:

- Vietnam ranks 43rd out of 45 countries in the annual IP index released by the US Chamber of Commerce, which highlights very high physical counterfeiting rates, significant weaknesses in the availability and enforcement of IP rights, and insufficient penalties as key areas of weakness.³⁵
- The fifth edition of the Global Intellectual Property Index (GIPI) ranks Vietnam's IP regime as 35th out of 43 jurisdictions. Vietnam scores poorly for exploitation and enforcement, with criticism for a lack of judicial guidance for assessing damages and its complex court

procedures. Moreover, the GIPI notes that “sales of counterfeit goods, both online and in physical markets, remains a serious concern.”³⁶

- Vietnam’s IP score increased by 0.146 to 5.075 in the 2018 International Property Rights Index (IPRI). As a result, Vietnam’s IP protection ranks 76 (of 125) in the world.³⁷
- Vietnam remains on the US Trade Representative (USTR) Special 301 Report Watch List in 2019. The report lists the prevalence of online piracy and sales of counterfeit goods over the Internet as a key problem. Counterfeit goods—“including counterfeits of high quality—also remain widely available in physical markets, and, while still limited, domestic manufacturing of counterfeit goods is emerging as a concern”. The USTR report also notes that enforcement continues to be a challenge, with capacity constraints and the heavy reliance on administrative enforcement actions, “which have failed to deter widespread counterfeiting and piracy.”³⁸
- The 2017 USTR Special 301 Out-of-Cycle Review of Notorious Markets highlights prominent online and physical marketplaces in Vietnam that reportedly engage in and facilitate substantial copyright piracy and trademark counterfeiting.³⁹
- The Economist Intelligence Unit (EIU) 2018 Illicit Trade Environment Index ranks 21 countries across Asia and the Pacific on the extent to which they enable illicit trade. Vietnam ranks 15th of 21, below neighbours Singapore, Malaysia, Thailand and the Philippines. Vietnam scores 47.5 (out of 100) in the Index.⁴⁰

Vulnerable sectors

Software Piracy

The Vietnamese Government has recognised that piracy continues to remain a challenge in the country and is increasingly sophisticated, yet actions to combat all forms of piracy have been insufficient.⁴¹

According to statistics from the Business Software Alliance (BSA), 78% of software installed on personal computers in Vietnam in 2015 were not licensed. This is a drop from 81% in 2013 and part of an overall positive trend. The decline is in part accredited to the government’s efforts to enforce anti-piracy laws and increase public awareness, however, Vietnam still has one of the highest rates of online piracy in the world. Compared to other countries in Southeast Asia, Vietnam has the second highest software piracy rate, after Indonesia with 84%, while the rates in neighbouring Malaysia and Singapore are significantly lower at 53% and 30%, respectively. The commercial value of the pirated software units in Vietnam is estimated at US\$598 million, removing vital revenue that would have come through controlled channels in the form of taxes, duties and levies.⁴²

Digital/Internet Piracy

With approximately 66% of the population using the Internet and 84 % of mobile users using smartphones.⁴³

Vietnam offers enormous opportunities, as well as challenges, for legitimate services for creative content. While a growing number of providers are distributing legal content, Vietnam faces a significant challenge with online and mobile network piracy, including via streaming and download sites, peer-to-peer (P2P) networks, linking sites, video streaming sites, cyberlockers, online market places and social networks.⁴⁴ In addition, set-top box (STB)/media box piracy is also growing in Vietnam as it is elsewhere in the region.⁴⁵

Pirate websites receive 29 times more visitors than legitimate websites hosted by film distributors in the country.⁴⁶ Despite the Ministry of Information and Communication's Administration of Broadcasting and Electronic information listing 80 websites as pirates, most of these websites continue to remain active.⁴⁷

Recently, the Office of the USTR 2017 Out-of-Cycle Review of Notorious Markets identified several websites that facilitate piracy in Vietnam including: The notorious piracy website Pirate Bay allegedly uses a hosting provider in Vietnam to evade enforcement actions; Gostream which streams popular movies and television content reportedly contains "content including pages that send visitors to harmful websites" and is also operated from Vietnam.⁴⁸

The harm caused from online piracy is significant and makes it difficult to impossible for legitimate online platforms to compete with pirated sites. For example, online piracy in Vietnam is directly impacting the international and local film industry, because new movies are frequently available online while they are still in their theatrical run. A vast number of movies are stolen right off the screen by professional camcorders, and then distributed to pirate "dealers" throughout the world and over the Internet.

Illegal reproduction of CDs and DVDs remains a flourishing industry with bootleg discs widely available for sale throughout Vietnam. A recent police raid in Ho Chi Minh City revealed an underground factory capable of pirating around 15,000 music and movie discs per day, making it the largest illegal disc production operation discovered in the city.⁴⁹

Rights holders note that Vietnam has taken some important steps in its enforcement against online piracy over the past few years, demonstrating a willingness to cooperate with right holders in enforcement actions and training and capacity building.⁵⁰ The music industry, for example, reports an improved takedown rate from 82% in 2014 to 85% in 2015 and the level of cooperation with internet service providers (ISPs) has improved incrementally.⁵¹ To date, however, limited enforcement action has been taken to punish or prevent digital and internet piracy, and rights holders continue to seek additional enforcement actions against websites containing infringing digital content.

Illicit tobacco trade

Illicit tobacco trade is a major challenge in Vietnam. According to the Asia Illicit Tobacco Indicator 2015, published by International Tax and Investment Center and Oxford Economics,⁵² 23.2% (equivalent to 22.2 billion sticks) of cigarettes consumed in Vietnam in 2015 were illicit. The report ranked Vietnam third in volume for consumption of illicit cigarettes across 17 selected markets, after Pakistan and Indonesia.⁵³ The report further estimated that in 2015, the Vietnam government estimated tax loss of around US\$ 200 million to illicit tobacco. Moreover, the Vietnam Tobacco Association reports that illicit brands "Jet" and "Hero" accounted for over 90% of the illicit cigarette market in Vietnam. These two brands contain excessive levels of toxic chemicals and their nicotine content also exceeded permissible level under Vietnam's tobacco regulations.⁵⁴

The illicit trade and the smuggling of cigarettes creates unfair competition on the market place by offering cheaper and untaxed products. There are also concerns that organized crime is using Vietnam as a manufacturing place and a key transit point for illegal cigarettes in the domestic market and in the entire APAC region. Further, technical cooperation within law enforcement across the region and increased industry customer's due diligence is required to address concerns that Vietnam is potentially used by illicit traders as a manufacturing place.

The Vietnamese Government has recognized the issue and is taking steps to address the problem. For example, the amended Criminal Code 12/2017/QH14 passed on June 20, 2017 by the National Assembly effective from January 1, 2018 stipulates the act of trading in contraband including counterfeit cigarettes as prohibited. Thereof, the act

of trading in contraband cigarettes faces monetary penalties or imprisonment based on the quantities as follows:⁵⁵

For Individuals

Quantity of contraband cigarettes packs	Monetary penalty VND	Imprisonment Year
From 1,500 to < 3,000	From 100 mio to 1 bio	From 01 to 5
From 3,000 to < 4,000	From 1 bio to 3 bio	From 05 to 10
From 4,500	Not prescribed	From 08 to 15

For commercial entities

Quantity of contraband cigarettes packs	Monetary penalty VND	Imprisonment Year
From 1,500 to < 3,000	From 1 bio to 3 bio	Not prescribed
From 3,000 to < 4,000	From 3 bio to 6 bio	Not prescribed
From 4,500	From 6 bio to 9 bio	Operation suspended for 6-36 months

OLAF has reported that 10.4 million counterfeit American Legend cigarettes were seized in European shores that were originating from Europe in November 2016, and in December 23 million cigarettes (9.95 million Royal Blue and 12.99 million De Santis branded cigarettes) were also shipped from Vietnam. These brands are sold illegal in the EU without any legal distribution network and do not pay taxes.⁵⁶

Book and Journal Piracy

Book and journal piracy continues to be a serious problem in Vietnam. Bookshops, roadside vendors and copy shops routinely sell unauthorized copies of bestselling trade books, travel books, and academic textbooks, including English language teaching (ELT) materials. Moreover, efforts by universities and the Government to address the endemic piracy at university campuses have not been nearly commensurate with the magnitude of the problem.⁵⁷ Universities should implement appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty, and students in order to discourage infringing behaviour.

Pharmaceuticals

The trade and availability of counterfeit medicines is widespread in Vietnam and poses a serious risk to public health. In March 2016, nine people were charged in a private drug company based in Ho Chi Minh City, for allegedly smuggling in fake cancer drugs worth over US\$251,000. Documents and certificates on the imported drug had been faked and tests by Vietnamese agencies later confirmed that the drug's main agent, capecitabine, used for inhibiting tumour growth, was of poor quality and could not be used on humans.⁵⁸ Fake and substandard anti-malarials also continue to be a major impediment to malaria control in Vietnam and helps to create dangerous drug resistance.

Consumer Goods

Alarming levels of counterfeit consumer goods in Vietnam are putting both the economy and the health and safety of consumers at risk. A recent newsworthy example in Vietnam includes the seizure of 5 tons of fake cosmetics in Ho Chi Minh City. These products were

registered to be produced or imported from countries such as France, South Korea and Japan, but they were in fact made in China and smuggled into Vietnam illegally.⁵⁹

A 2014 report by the United Nations Population Fund (UNFPA) has warned that nearly half (47%) of the commercially-available condoms in Vietnam are of poor quality. Moreover, many of the low-quality condoms are sold under the names of trusted brands such as Durex, tricking consumers into believing that they're buying a genuine and effective product.⁶⁰ Health officials have cautioned that the flood of poor-quality condoms entering the market could erode consumer trust in condom safety, undercutting years of safer sex programs that have helped reduce cases of HIV and adolescent fertility rates.⁶¹

Counterfeit pesticides

The presence of fake and low-quality pesticides in Vietnam can have a serious effect on the growth of the agricultural sector as well as farmers' income. Farmers are cheated when they buy illegal pesticide products that do not contain active ingredients as claimed, leading to poor efficacy, financial loss, and food safety problems. In severe cases, they could present a hazard to the farmer who is handling the product. In addition, while the farmers lose their crops and are left with potentially destroyed fields, the criminals continue to sell their products.

The trade of counterfeit pesticides is becoming more and more complicated, as criminals use sophisticated tricks to evade authorities globally. This situation is made even more difficult because the counterfeit products bring large profits to criminals, and farmers want to buy low-priced items to save costs.

The use of counterfeit pesticides has even caused some agricultural products to be banned in other countries, and put consumers and the environment at risk. Vietnam is a major exporter of rice and coffee and is looking to boost fruit and vegetable exports—which according to official figures were up by 36% year-on-year in 2014 to \$1.46 billion.⁶² The presence of illegal pesticides—or even false rumours—can, however, have the potential to impact the country's strong reputation in global export markets, with the risk that buyers of Vietnam's crops place embargoes on export produce from Vietnam.

Co-operation between pesticide and customs regulators is critical, particularly in limiting cross-border trade. It is essential that the industry and Government works closely to provide co-ordination and awareness around the problem of illegal pesticides.

Ball Bearings

Bearings are an essential component in virtually any machine with moving parts. Machines used in manufacturing as well as the end products (e.g. motorcycles, cars, and buses) themselves rely on the benefits of ball bearings. Fake bearings, however, may pose dangers to operations, to finances and to human lives. Low quality or substandard designs and worn-out bearings can degrade and fail quickly. At best, this will only lead to equipment downtime and repair, at worst it can endanger lives.

The supply of counterfeit bearings are often accompanied with forged documentation; Certificates of Origin and authorization of supply, so the purchaser is unaware of the level of fraud. Counterfeit bearings are a global problem and all markets, segments, types and sizes are affected. Industry estimates put the value of the Vietnamese import/sale of counterfeit ball bearing market at US\$15-20 million, with an estimated lost production and productivity impact of 2-3 times that value. Moreover, the very low declared/imported value of fakes versus sales value generates large profits for the seller and low import taxes for the government.

Alcohol

The Vietnam Association for Anti-Counterfeiting and Trademark Protection estimates that 60% of imported wine into Vietnam has fake stamps.⁶³ In another incident, review of brandy sold at shops in Lao Bao Border Checkpoint in Quang Tri Province revealed that 98% of the goods were fake.⁶⁴

Expressing concerns over the increasing trade in fake alcohol, an official from the Viet Nam Anti-Counterfeiting Fund commented that there are many tricks used by criminals to make counterfeit wines look like those from famous brands. Violators substitute poor-quality alcohol into used bottles of wine to trick consumers, or fake the bottle, cork, labelling and even certification stamps to sell the products.⁶⁵

Hanoi city police, in co-operation with police in Hai Phong City and Thanh Hoa and Nghe An provinces seized approximately 5,000 bottles of fake alcohol, which contained a mixture of imported and domestic wine and labelled with false certification stamps. The bottles resembled well-known brands from Germany, Australia, Scotland and the US.⁶⁶

Garment and textile sector

The garment and textile sector is an important contributor to Vietnam's GDP, ensuring social security, generating an export turnover of \$27.5 billion in 2015 and generating jobs for about 3 million people. As Vietnam's economy further integrates into the global economy, this sector will only increase in importance. In anticipation of further integration into the world economy, domestic garment and textile companies have also changed from processing to self-production and the development of products that have their own brand. However, international economic integration also brings with it challenges. The Vietnam Garment and Textile Group has cautioned that the domestic market faces many challenges, including illegally imported, counterfeit products and goods of low quality. Protecting and enforcing IPRs, including trademarks and designs, will therefore be critical to protect and grow the garment and textile sector.

Cosmetics

Low-quality and fake cosmetics are widespread in Vietnam, with up to 50% of cosmetics in the Vietnam market place reported to be counterfeits of well-known brands.⁶⁷ The ubiquity of fake cosmetics is reflected in the frequency of seizures.

In March 2015, authorities arrested a Chinese man in Quang Ninh Province, near the border with China, on suspicion of making and selling fake cosmetics. Police found more than 31,000 fake cosmetic products and about 200 kilograms of materials at a warehouse rented by the suspect. In addition, the suspect reportedly faked Vietnamese police's anti-counterfeit stamps, which he stuck on to the fraudulent products.⁶⁸

In April 2015, authorities seized about 100,000 cosmetics and related products from five stores of the Xuan Thuy Cosmetics Ltd. in Ha Noi. More than 160,000 cosmetics products of uncertain origin were found in Ha Noi in 2014.⁶⁹

It is not uncommon that Vietnamese enterprises register brands identical to existing protected trademarks to deceive consumers into buying their fake dietary supplements, pharmaceuticals, and cosmetics. The products, labels and packaging are often outsourced packages from Chinese manufacturing facilities, that are then smuggled into Vietnam for repackaging and reselling, sometimes with "Made in Vietnam" labels attached on the surface.⁷⁰ The trend of importing products in the form of spare parts, labels and packaging rather than finished products is increasing, as it makes it much more difficult for Customs and police to identify the fake goods.

3 THE TIME IS RIGHT FOR VIETNAM TO FURTHER IMPROVE ITS IP REGIME

In order to realize the economic and social value of its IP, Vietnam has in recent years undertaken improvements in its IPR protection and enforcement regime through a variety of actions.

Accession to international treaties and conventions

Accession to the WTO in 2007, and its compliance with the TRIPS Agreement, signified an improvement to IP protection in the country. Vietnam is also a member of the following international instruments regulating IP matters:

- Paris Convention for the Protection of Industrial Property;
- Madrid Agreement concerning the International Registration of Marks and the related Protocol;
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- Patent Cooperation Treaty International Convention for the Protection of New Varieties of Plants; and
- Berne Convention for the Protection of Literary and Artistic Works.
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership

As a result, Vietnam's IP legislation is now relatively comprehensive, covering most aspects of protection of IP in accordance with international standards. However, enforcement mechanisms are still relatively underdeveloped and much work remains to be done to strengthen deterrent measures and raise awareness amongst Vietnamese consumers.

Efforts to strengthen enforcement and inter-agency cooperation

In March 2014, Prime Minister Nguyen Tan Dung signed Decision 389 to establish the National Steering Board on the Prevention and Control of Smuggling, Trade Fraud and Fake Commodities or "Steering Committee 389". This was done in an effort to enhance and strengthen national anti-illicit and counterfeit efforts, that had to date been coordinated by the National Steering Board on the Prevention and Control of Smuggling, Trade Fraud and Fake Commodities or "Steering Committee 127" from 2001.

Steering Committee 389 is chaired by the designated Deputy Prime Minister, and aims at uniting and coordinating the national law enforcement forces under various agencies including the Ministry of Industry and Trade (including the Market Surveillance Agency), the Ministry of Finance (including the General Department of Customs), the Ministry of Defence (including the Border Guards) and the Ministry of Public Security (including the General Department of Police).

The goal of the Committee 389 is to proactively combat the increasing levels of product counterfeiting and illicit trade in Vietnam. It is tasked with raising public awareness of the harmful effects caused by smuggling, trade fraud and counterfeit goods and closely coordinating its work with the press, socio-political organisations and associations.

Concerted efforts made by various agencies in the past few years have proved successful. In 2018, functional forces discovered and handled more than 234,000 violations (up 4% year-on-year), collecting over VND 19 trillion (USD 818.4 million) to the State budget (up 7.7%), prosecuting 1,446 cases and 1,656 offenders (up 6%) (compared to 2017).⁷¹

In total, 1,561 cases involving 1,863 perpetrators and violators were prosecuted. A significant amount of this data relates to counterfeit products.

However, VND 500 million (USD 21,750) is currently the highest fine the market watch can levy per violation⁷² and most cases related to the manufacturing, sale, transportation and possession of counterfeit goods are subject only to administrative fines.⁷³

In the past year, the Government has also made efforts to improve public-private cooperation to conduct trainings for enforcement agencies to intercept suspect counterfeit material and to promote interagency cooperation to closely monitor goods that are prone to being counterfeited.⁷⁴

Acknowledging the further need to strengthen mechanisms to fight counterfeits the Prime Minister of Vietnam in June 2018 issued Directive No. 17/CT-TTg. The Directive recognises that although great progress has been made in curbing counterfeit trade, there is room for more improvement as infringers continue to use more complex methods. The Directive calls for special attention on the pharmaceuticals, functional foods and cosmetics sectors urging relevant ministries to undertake urgent tasks to ameliorate the situation in Vietnam.⁷⁵

Efforts to combat online piracy

In the recent years, the Government has taken several important steps to strengthen its enforcement against online piracy including willingness to cooperate with stakeholders in enforcement actions and capacity building. The Government issued a circular in 2017, that enabled the Ministry of Information and Communication (MIC) to take actions against online infringement and strengthen its capacity to fight these crimes.⁷⁶ In addition, the MIC has also initiated a project, which will be implemented from 2017 – 2020, in coordination with other relevant authorities to amend regulations to further improve enforcement and carry institutional reforms to fully address online infringement.⁷⁷ However, despite such efforts online piracy continues to remain a challenge with procedural impediments and inability for right holders to take speedy and effective action without government intervention.⁷⁸

EU-Vietnam Free Trade Agreement

Vietnam has recently concluded a Free Trade Agreement with the European Union (EVFTA). Vietnam stands to benefit greatly from the agreement when it enters into force, not least in its access to the 500 million consumers within the EU bloc—which accounts for around 20% of global exports and imports.

Chapter 12 of the EVFTA sets out various provisions on the protection and enforcement of IPRs. To implement the EVFTA, Vietnam will be required to improve its framework for protection and enforcement of IP rights, including providing for Customs cooperation with right holders.⁷⁹

Vietnam's ability to reap the full benefits of these new international economic opportunities will however require further improvements in the effectiveness of its IPR enforcement.

The above-mentioned steps to address counterfeiting, piracy and increased integration into the global economy indicate that the time is right for Vietnam to take further actions towards improving its IP regime, particularly its IP enforcement law. Although there is a legal regime in place to curb, or at least reduce the menace of counterfeiting and piracy, more still needs to be done to ensure that effective enforcement mechanisms are in place in order to be in tune with best international practices. Overall, further improvements of IP legislation are encouraged. In addition, greater awareness among public authorities and the public at large of the risks which counterfeit and pirated goods pose to consumer safety, public order and health should be prioritised.

4 RECOMMENDATIONS FOR A PATH FORWARD

Vietnam is facing challenges in the process of strengthening its IP system and addressing deficient enforcement of the existing legislation. Specifically, the areas of concern for Vietnam involve the establishment of an appropriate legal and institutional framework, enforcement of IPRs and awareness-raising on its importance.

In order to facilitate the required reforms, BASCAP has put forward a set of specific legislative and policy recommendations, which could serve as a roadmap for the path forward. The recommendations presented below are drawn from independent and respected sources, ranging from foreign and Vietnamese government agencies to business, international IP associations and academic institutions. Some of the key sources for the proposed recommendations include:

- Vietnam International Intellectual Property Alliance (IIPA) 2019 Report on Copyright Enforcement and Protection, which lists a range of legal reforms and enforcement priorities including undertaking actions against infringement on the Internet, strengthening the criminal enforcement regime and improving copyright protection.
- United States Trade Representative (USTR) 2018 Special 301 Report, which urges Vietnam to take additional steps to increase IPR enforcement, especially with respect to Internet piracy and domestic manufacturing of counterfeit goods.
- EU IP Enforcement Protection in Vietnam, which points out that the Vietnamese judicial system suffers from a lack of deterrent-level sentences and significant delays, and that there is an absence of a clear enforcement structure.

Overview

BASCAP views that in order to strengthen the overall copyright and trademark protection and enforcement in Vietnam, priority should be given to:

- Designing and implementing a comprehensive national IP strategy that identifies needed legal and policy reforms, delineates implementation and enforcement responsibilities and allocates sufficient resources to ensure effective enforcement.
- Adoption and implementation of significant policy and legislative reforms, such as those recommended below.
- Establishing a new high-level IP authority to coordinate and implement the IP strategy and the associated legislative and enforcement reforms.
- Building respect for the rule of law and for IPR.
- Creating of a Vietnamese Observatory on Counterfeiting and Piracy, similar to that established recently in the EU. The Observatory could serve as platform to join forces and build coalitions between relevant government agencies and representatives from business. The tasks and activities of the Observatory would include responsibility for implementing legislative and policy recommendations, such as those suggested in this report; assisting Vietnamese government agencies in their policy, legal and enforcement work; and assisting the government in developing a national awareness program and network for sharing best practices and data.

Legislative Recommendations

The following recommendations address issues requiring further legislative reforms related to IPR protection and enforcement.

1. Improve and expedite civil judicial enforcement procedures.

One of the deficiencies in this area is the duration of judicial procedures. Industry frustrations are borne out of the undue delay and the long period of time it takes to determine a case completely, coupled with the low supply of IPR-trained judges and ineffective enforcement of court orders. Even if brand owners have been successful in court, it is difficult to implement and enforce the court decision. Overall, the enforcement environment is challenging, with slow and inefficient law enforcement and judicial proceedings.

Another shortcoming relates to the lack of clarity on the destruction of seized products, as well as the materials and implements used for their production. In particular, Articles 202(5) and 214(3) of the IP Law permits seized infringing goods and the means of producing them to be distributed or used for “non-commercial purposes,” rather than being destroyed.

Likewise, Vietnam should revise Article 26 (5) of the Law on Tobacco harm prevention and control of 2012 to uphold commitments under the international treaties, such as the WHO Framework Convention on Tobacco Control, and consistently apply a mandatory practice of destroying all seized illicit cigarettes without re-exporting these seized commodities to any countries. These provisions fall short of Vietnam’s BTA (Article 12.4) and TRIPS Agreement obligations, as well as the requirements of WHO FCTC Article 15.⁸⁰

Moreover, burdensome enforcement procedures have also been reported by brand owners. Though provisional remedies are available under the law, obtaining such relief in a practical, effective and expeditious manner is very difficult, if not impossible. Under Vietnamese law, a formal court action must be instituted and “allowed” by a Vietnamese court before remedies, such as seizure of counterfeit goods and evidence of infringement, can be sought from the court. In practice, preparing and submitting a complaint in a form that will be accepted and acted upon by a Vietnamese court can be onerous due to the requirement that complaints must be supported by evidence that has been notarized and/or legalized. Meeting such onerous formal requirements can often take months, making it virtually impossible for owners of IPRs to act swiftly to protect themselves against counterfeiters who are often capable of “suspending” or “hiding” their illegal activities at the slightest hint that action is being taken against them.⁸¹

Furthermore, the Vietnamese Civil Code does not grant civil judicial authorities the power to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and their channels of distribution.⁸²

Recommendations

- A.** Speed up the trial process, ensure courts issue preliminary court injunctions in a timely and effective manner by way of providing clear guidelines for courts to issue injunctions in certain cases, and enforce the implementation of court orders.
- B.** Enhance the deterrent effect of civil administrative penalties and civil remedies.
- C.** Amend the IP Law to provide for mandatory destruction of seized counterfeit goods, materials and equipment used for their manufacture.
- D.** Reduce burdensome evidentiary requirements, provide clear guidelines for admissible evidence for online infringement and revise the Civil Procedure Code to permit right holders to expeditiously seek and obtain provisional relief on the basis of proof of ownership of IPRs. Ensure that such provisional relief should not be subject to a notarization/legalization requirement.
- E.** Introduce obligations for courts to order infringers to inform rights holders on the source of infringing goods or content (“right of information”).

2. Improve administrative enforcement procedures.

The Administrative Violations Decree (No. 131/2013) reduced the maximum administrative fine for an individual to VND 250 million (USD 10,870), and set the maximum fine for an organization at VND 500 million (USD 21,750). The following fines are also set forth:

1. VND 400 to 500 million (USD 17,400 to 21,740) against an organization that imports an unauthorized copy;
2. VND 70 to 100 million (USD 3,050 to 4,350) against an individual that engages in unauthorized broadcasting or re-broadcasting; and
3. VND 15 to 35 million (USD 650 to 1,525) against an individual that reproduces unauthorized copies of phonograms or video recordings.

The penalties for counterfeiting and piracy are too low to serve as deterrence to prospective infringers. An upward review of the fines will help the law to be effectively administered in this area. In particular, the Vietnamese government is encouraged to increase the maximum administrative fine for individuals.⁸³

Further challenges for the enforcement of IPR include complicated administrative structures that hamper successful detection or seizure of counterfeit or pirated goods. A particular challenge for rights holders is that, although the administrative processes are same for all provinces, the effectiveness for filing complaints and authentication depends on the capabilities of each local authority and the geographical characteristics. It is therefore recommended that the Market Surveillance Agency (MSA) apply the same system as the Vietnam Customs does for Customs recordal. This system allows brand owners to record their trademark at the Central MSA or Provincial MSA instead of submitting all company registration certificate, investment license, letter of authorization, trademark registration certification for every single case, which creates a heavy workload for the brand owners.

Under Article 211 of the Amended Intellectual Property Law 2009, IPR owners can request administrative sanctions if an act of infringement causes “damage to consumers, society, the author or the IPR owner”. The burden of proof is placed on the IPR holder to prove such damages prior to initiating an action. No guidance has been issued on the meaning of “causing damage”. It is unclear whether actual losses need to be proved or whether the likelihood of causing loss is sufficient. Without this guidance, it remains unclear when an IPR holder can pursue administrative action against infringements.⁸⁴

Recommendations

- A. Increase the level of administrative fines against individuals committing copyright infringements (Degree No. 131/2013 on sanctioning administrative violations of copyright and related rights) and issue deterrent administrative penalties against infringers.
- B. Establish a proper, centralized, trademark registration recordal and seizure system.
- C. Issue guidance on the meaning of “causing damage” to permit IPR owners to request administrative sanctions.

3. Improve action against Internet infringements.

Online piracy is a serious issue in Vietnam; firstly, because of the lack of adequate legislation and secondly because of weak enforcement. The digital environment has developed rapidly, leading to new forms of copyright infringement. There is a clear need for legal measures that address online enforcement in an increasingly developing digital era.

Industry notes that the process of addressing infringements is cumbersome and is done on a case-by-case basis; thus, many offending rogue sites remain in operation and are growing in popularity. For example, in 2015, the movie industry reported that the site *hayhaytv.vn* removed infringing motion picture and television content as a result of administrative sanctions issued by MIC. However, the site was not shut down and currently shows unauthorized movie trailers. Vietnamese authorities, including the MIC Inspectorate, MCST, and Ministry of Public Security (MPS), are currently being asked to take more effective measures against notorious infringing sites whose business models are based on providing access to infringing content

In general, a lack of clear prosecutorial and court procedures for Internet-related cases restricts effective enforcement, and existing procedures are too difficult to be used effectively.

Despite the recent efforts by the MIC/ MCST the process of addressing infringement is still done on a case-by-case basis and proves to be cumbersome for rights holders. Tracing owners of infringing websites is extremely difficult as Vietnam's domain registrar, Vietnam Internet Network Information Center (VNNIC), is not required under national law to provide contact and registration information of website owners in any WHOIS-style lookup database.⁸⁵

Although the response from ISPs and the level of cooperation has increased, they are unable to take direct action against pirate websites without consent from government authorities. The Government is encouraged to amend the Joint Circular issued by MIC and MSCT to ensure greater cooperation between rights holders and ISPs to facilitate smoother takedown processes.

Vietnamese authorities, including the MIC Inspectorate, MCST, and MPS, are encouraged to take effective measures against notorious infringing sites whose business models are based on providing access to infringing content.

Furthermore, the MIC can make use of the authority granted under the Joint Circular (JC 07/2012/TTLT-BTTTT-BVHTTDL) and Decree No. 17 to sanction violations more effectively. Greater progress in fighting online piracy will be achieved with increased criminal investigations by the relevant agencies with responsibility for investigating copyright and online crimes including the MCST Inspectorate, MPS IPR/High-Tech Police and related police units (such as the Hanoi local High Tech Crime Police (PC50), the High Tech Crime Police (National) (A05), and the Security Police (P83)); and increased prosecutions by the Supreme People's Procuracy.⁸⁶

The Government of Vietnam is therefore encouraged to adopt key enforcement measures to address piracy over the Internet, including by adopting legislation to provide an appropriate regime for notice and takedown. Any effective policy must address Internet piracy, include safeguards against abuse, and provide for meaningful opportunities for due process (e.g. a fair counter-notice process).

Recommendations

- A. Take more effective measures against notorious infringing sites whose business models are based on providing access to infringing content.

- B.** Introduce legal reforms to: (a) clarify that companies will face liability for operating a website that offers infringing copyright or trademark materials, and to (b) create incentives for rights holders and ISPs to cooperate with each other.
- C.** Ensure that courts have the authority and, in the appropriate cases, the obligation to issue orders to ISPs to provide information on suspected infringing website owners to law enforcement agencies and rights holders.
- D.** Amend the Law on Information Technology to provide for liability of ISPs and others for copyright infringement in certain situations, for example, when they continue to engage in the transmission or storage of copyrighted subject matter even after notice by the IPR owner.
- E.** Ensure that procedures are available for law enforcement agencies and rights holders to obtain information that allows them to identify owners of websites that are suspected of targeting pirated or counterfeit goods. Such procedures must include safeguards against abuse and a meaningful opportunity for due process (e.g. a fair opportunity to protect against perpetual investigations).
- F.** Implement appropriate notice and take down procedures for websites hosting illegal material without the need for government intervention.

4. Improve customs enforcement procedures.

Vietnamese customs laws prohibit the import of goods which infringe IP rights registered within Vietnam. To this end, customs authorities have the power to impose fines and confiscate infringing goods that have been stopped at the border. However, these powers extend only to imports, as Vietnamese civil law and IP law does not consider “export” as the use of a trademark. Therefore, activities exporting trademark counterfeit are not considered a violation of law, and as such, Customs has no authority to issue penalties or destroy infringing products being exported.

Finally, in theory, all IPRs can be registered with the Vietnamese customs authority. In practice however, only trademarks, geographical indications, and copyrights and related rights are registered.

Recommendations

- A.** Amend the Intellectual Property Law by adding “export” as a use of IPRs, and that the export of counterfeit goods infringes IPRs. The current Decree 99/2013/ND-CP dated August 29, 2013 needs to be revised, or alternatively a new Decree should be issued that provides for administrative penalties and gives Customs the power to impose penalties and destruction of trademark counterfeits for export activities, including transshipment.
- B.** Ensure Customs’ IPR Unit has the necessary authority to address high-quality counterfeits/pirate materials at the borders, including on an *ex-officio* basis for exported goods.

5. Address deficiencies in criminal IP law and procedures.

Overall, the Vietnamese criminal IP enforcement regime is not an effective deterrent, with few prosecutions initiated and verdicts rendered. Criminal procedures deficient, available in law but seldom implemented. Moreover, the criminal enforcement regime lacks deterrent criminal sentences, which are crucial to combatting IPR infringements. In addition, in criminal actions, the prosecuting officers are not adequately trained to handle such specialist areas of law.

Furthermore, Article 155 of the Criminal Procedure Code currently requires a formal complaint to be made by an IP owner as a precondition for prosecution, limiting the ability of police and prosecutors to act. Consequently, it is recommended that criminal enforcement authorities are allowed to take *ex-officio* action.

Another deficiency relates to the issue of criminal liability. Only a few criminal cases involving IPRs have been brought to trial in the last two years. Article 225 of the Penal Code provides for a criminal penalty “against the violation of the copyright or related right on a commercial scale”. Article 226 provides the same penalty for “wilful infringements of industrial property rights over trademarks or geographical indications on a commercial scale”, but it is unclear when a copyright/trademark infringement will be viewed as “on a commercial scale”. Without further clarification, the administrative authorities lack the necessary guidance on when to recommend a case for criminal action and the criminal courts, in turn, will be hesitant to impose maximum fines.⁸⁷

The lack of criminal procedures to deter unauthorized camcording in movie theatres is another shortcoming. It has been reported that a vast number of movies are stolen right off the screen by professional camcorders, or video cameras to illicitly copy a movie during its screening—usually shortly after its release in theatres or even prior to the film’s public release (e.g., at a promotional screening). These illicit copies are then distributed to pirate “dealers” throughout the world and over the Internet.

In addition, the Criminal Code only penalises acts of illegal reproduction and distribution of copyright works and does not cover other forms of unauthorized use copyrighted works, including those by streaming & cyber-locker websites.

Moreover, there have been reports by brand owners that the People Procurator and Economic Police have interpreted the IP law incorrectly. The English translation of Article 213 pt.2⁸⁸ defines trademark counterfeiting as: where goods or their packages bears a mark or sign which is identical with or indistinguishable from a mark currently protected “for those very goods”. The original wording in Vietnamese, “dùng cho chính mặt hàng đó”⁸⁹, translates more accurately to “the same product category”. However, this has been interpreted by the People Procurator and Economic Police as a requirement for brand owners to provide genuine samples (from 2 to 5 for each product model) in the “same model, design, material” as the suspected counterfeit good. As a result, rights holders have been forced to drop criminal cases because they are unable to provide identical genuine products to the counterfeit, which is often produced in a substandard material or similar, but not identical, design and packaging.

Recommendations

- A. Increase and intensify effective criminal prosecutions and convictions, and impose deterrent levels of criminal sanctions.
- B. Amend the Criminal Procedure Code to permit *ex-officio* criminal actions.
- C. Issue implementing guidance for the Criminal Code, confirming
 - 1) its application to online distributions and other violations of the IP Code;
 - and 2) that “commercial scale” includes infringements without a profit motive.

Recommendations

- D. Adopt legislation providing for criminal procedures to deter unauthorized camcording or any form of recording in movie theatres, and to capture not only acts of illegal reproduction and distribution of copyrighted works, but also other forms of unauthorized use and facilitation of other's unauthorized use of the copyrighted works, including those by streaming & cyber-locker websites.
- E. Ensure a proper interpretation of Art. 213 of the IP Code. Suspected infringements should be examined without a requirement for rights holders to provide "identical" samples of the genuine product.

Policy Recommendations

The following policy recommendations encourage broader measures, actions and initiatives to support the more specific implementation and enforcement of IP legislation as recommended above.

The policy recommendations are primarily aimed at establishing an overarching IPR strategy and empowering an authority to oversee enforcement of the strategy and associated legislation. In order to increase effectiveness, the recommendations suggest better oversight and coordination between government agencies and encourage cooperation with business and IP rights holders.

As mentioned above, a useful starting point would be the establishment of a comprehensive national IP strategy and implementing action plan covering the full range of legal and policy reforms, technical assistance and capacity building measures, channels for international cooperation and tools for strengthening enforcement practices.

In addition, the effective implementation of the IP Strategy could benefit considerably from the establishment of a new high-level inter-ministerial IP authority, or alternatively, the assignment of responsibility to an existing high-level IP body such as the Standing Office of the National Steering Committee against Smuggling Counterfeiting and Trade Fraud (National Steering Committee 389). In addition to the already existing mandate of the National Steering Committee 389 to coordinate the activities of enforcement agencies and establishes inter-branch missions to investigate and tackle serious acts of counterfeiting, the Committee could also have the mandate to oversee implementation and enforcement of the IP Strategy, develop and implement joint strategic enforcement plans and report to the Vietnamese government on specific performance indicators.

1. Establish an inter-agency approach and enhance collaboration between the different Vietnamese regulatory agencies administering and enforcing IP rights, including the policy, judiciary and Customs.

An important aspect of enforcement is the cooperation and coordination between law enforcement authorities. In Vietnam, there are several enforcement agencies involved in addressing IPR infringement issues. These include the Ministry of Science and Technology's Inspectorate,⁹⁰ the Ministry of Culture, Sports and Tourism's Inspectorate,⁹¹ the Ministry of Industry and Trade's Market Surveillance Agency, the Ministry of Public Security's Economic Police Department, the Ministry of Finance and the People's Court (Civil Court). In addition, the The National Office of Intellectual Property (NOIP) under the Ministry of Science and Technology (MOST) is regularly consulted on cases of IPR infringements and has an important role to play in the coordination and reporting on IPR enforcement.

While there is already cooperation established between these bodies, this needs to be further improved and actions better integrated. There are no clearly defined areas of responsibility among these agencies. The involved government agencies have experienced major challenges in dealing with increasing violations of IPRs due to poor detection equipment, inadequate manpower and a lack of effective co-ordination among them. Therefore, the establishment of sound cooperation and coordination structures is particularly important in the area of piracy over the Internet and IPR enforcement generally.

Recommendations

- A.** Design a comprehensive national IP Strategy that identifies needed legal and policy reforms, delineates implementation and enforcement responsibilities and allocates sufficient resources to ensure effective enforcement.⁹²
- B.** Establish a new high-level IP authority or assign responsibility to an existing inter-ministerial IP Council such as the Standing Office of the National Steering Committee 389 to coordinate the implementation of the IP strategy.
- C.** Establish a coordinated working group among the various Vietnamese agencies to develop a common understanding and coherent and uniform application of newly adopted laws.
- D.** Encourage the highest specialized courts in civil and criminal cases to issue guidelines for judges on sentencing, assist judges with developing expertise in IP cases, and training judges on these guidelines.
- E.** Foster cooperation and coordination amongst enforcement authorities through measures such as investigative training programs, seminars for judges, workshops and conferences for law enforcement officials.
- F.** Improve cross-border cooperation between Vietnamese enforcement authorities and international agencies or IP offices of foreign governments.
- G.** Encourage customs and policy authorities to participate more fully in developing and using existing technical tools to collect and share information. Share information with the competent customs authorities to better identify and target for inspection shipments suspected of containing infringing goods.
- H.** Improve customs' risk assessment tools. For example, given the great differences in prices between authentic and counterfeit products, a system should be set up to flag any imports of certain products that fall below a certain declared value.
- I.** Promote internal coordination among the competent authorities, and facilitate joint actions by those responsible for the enforcement of IPR.
- J.** Upgrade technical infrastructure and develop an online network to allow competent authorities involved in the enforcement of IPR to rapidly exchange information on enforcement issues, including real time alerts and information on suspect products, manufacturing sites, distribution routes and key sale points.
- K.** Research and make information available on technical tools and systems for prevention and investigation purposes (including tracking and tracing systems which help to distinguish genuine from counterfeit products⁹³).
- L.** Develop databases that collect, store and analyze data on the scope and impact of IPR infringements, including national case laws on such infringements and systems to enhance access to information to public authorities and private stakeholders.
- M.** Issue documents for the implementation of IP rights such as handbooks and manuals and make them available to the law enforcement authorities.

2. Establish effective dialogue and cooperation between Vietnamese authorities, IP rights holders and other stakeholders.

Effective cooperation between private and public authorities is a key element in combating counterfeiting and piracy. While industry has the primary responsibility for protecting its IP, government plays a critical role in ensuring there is an effective IPR protection regime in place and enforcing the relevant laws and regulations. Rights holders have the technical expertise to distinguish counterfeits from original products and know the supply chain involved in manufacturing, distributing and selling their products, and can assist government in investigations and enforcements actions. Partnerships between rights holders and government agencies will provide the technical expertise that enables authorities to intervene.

Recommendations

- A.** Integrate rights holders into all working groups of the relevant ministries to assist in developing policy and legislation affecting industry sectors.
- B.** Integrate rights holders into a working group of police and prosecution investigators to assist in developing investigative guidelines and methodology.
- C.** Promote the establishment and maintenance of formal or informal mechanisms such as advisory groups that would facilitate engagement between Vietnamese agencies, rights holders and other relevant stakeholders, including organizers of trade fairs, transport and logistics companies, retailers and payment service providers.
- D.** Undertake cooperative actions together with the private sector to build strategies and promote and spread successful private sector strategies.
- E.** Cooperate with private stakeholders to build an electronic information exchange and an early warning system on counterfeit and pirated goods.
- F.** Enhance pre-seizure information sharing with rights holders about samples of products and packaging to aid Customs in determining whether goods are infringing.
- G.** Consider the creation of a Vietnamese Observatory on Counterfeiting and Piracy, with membership constituted of representatives from relevant government agencies, industry and other stakeholders. Such an Observatory could serve as platform to join forces and build coalitions between representatives from national authorities and other stakeholders for mutual assistance. The tasks and activities of such an Observatory could include responsibility for helping to put effective policy recommendations in place and assisting the Vietnamese public authorities in their policy, legal and enforcement work.

3. Expand IP-related administrative, judiciary and technical capacity building.

A country's effectiveness in protecting IP rights is, in significant measure, dependent upon its capacity to enforce them. Therefore, in addition to prescriptions for better legislation and stronger enforcement, methods for improving knowledge, enhancing training, and developing technical expertise and competences, should be put in place.

The Vietnamese government's lack of institutional capacity to address IPR issues is a major barrier to enforcement. Government institutions suffer from poor training, limited resources and understaffing.

Vietnamese courts and judges often have limited experience in dealing with IPR disputes. However, the ability of IPR owners to enforce their rights is largely dependent on a knowledgeable and experienced Vietnamese judiciary. Vietnam should take steps to expedite the training of more judges in IPR matters. Training on the determination of compensation for damages together with the calculation of damages is also essential for civil judges. Further, the Vietnamese Government should consider establishing specialized tribunals to handle IP matters.⁹⁴

Recommendations

- A. Appoint special IPR investigators, prosecutors and police officers at both the district and provincial levels throughout Vietnam to address IP crimes.
- B. Increase and better resource the IP police enforcement personnel.
- C. Establish specialized courts for IP matters.
- D. Develop an IP manual for Judges, which includes references to civil, administrative and criminal remedies.
- E. Increase resources to the economic courts that have judges specialized in IP matters.
- F. Increase resources to the Vietnam Intellectual Property Research Institute under the Ministry of Science and Technology in charge of assessing claims of IPR infringement in Vietnam.
- G. Enhance the knowledge on best public and private sector practices to protect IPR.
- H. Conduct regular training of IP personnel so that they are up-to-date with international best practices.
- I. Appoint experts and professionals to key offices to implement policies.
- J. Enhance the expertise of persons involved in the enforcement of IPR by providing an online inventory of available, relevant, training programs and initiatives offered and organized at the international level.
- K. Expand cooperation with international organizations with the goal of facilitating the participation of enforcement authorities such as police, prosecutors and customs in seminars organized by specialist IP enforcement representatives from the World Customs Organization (WCO), Interpol, Europol and the United Nations Inter-Regional Crime and Justice Institute (UNICRI). These enforcement seminars will secure a more sustainable flow of knowledge and learning throughout Vietnamese enforcement agencies.

4. Increase public and political awareness of counterfeiting and piracy and the associated economic and social harm.

According to a recent Nielsen survey, a significant number of retailers in both Hanoi and Ho Chi Minh City openly admit that they are benefitting significantly from the sale of counterfeit products.⁹⁵ In fact, many say they expect the business of trading in counterfeit products to grow, and many plan to continue selling counterfeit products in the years to come. The same poll showed that Vietnamese consumers, though aware of the poor quality of counterfeit products, continue to buy them mainly because of the lower price. Sometimes, Vietnamese consumers are also unable to differentiate between counterfeit and genuine products. Overall, Vietnamese retailers and consumers seem to lack sufficient awareness of the fact that counterfeiting not only results in the delivery of low quality and potentially dangerous products to consumers, but that it has also been shown that the trade in counterfeit products often funds various criminal activities.⁹⁶

The Vietnamese public must be made more aware of the dangers of counterfeit products with regards to safety and health. It is important for consumers, rights holders and government officials to be aware of the problem, to understand the economic and social effects, and have an understanding of how they can combat counterfeiting and piracy activities.

Recommendations

- A. Build on BASCAP's globally tested awareness campaign (Fakes Cost More: I Buy Real) to create a national campaign to strengthen public awareness of the value of IP, the detrimental effects of IPR infringements, and the harms and costs of counterfeiting and piracy.
- B. Work with industry and government agencies—in Vietnam and globally—to develop a program for effectively delivering the national campaign across the country, with special attention to children and young adults.
- C. Develop an overall communication strategy on enforcement-related activities, including the use of new communication channels such as social media and the design and development of an exclusive enforcement related website.
- D. Encourage universities to implement appropriate IPR policies to ensure that students and faculty use legitimate textbooks and other course materials.

5 CONCLUSION

Counterfeiting and piracy have become an important factor frustrating business development in Vietnam. Vietnam has an enormous potential for further growth, however, the prevalence of counterfeiting and piracy limits it from achieving its maximum potential; putting both jobs and consumer health at risk.

The government must seriously address the numerous factors that undermine effective enforcement of laws in the country, including corruption, lack of coordination among the responsible agencies, lack of accountability, and lack of resources.

This effort must start with the Vietnamese government sending a clear message to the criminal networks and those involved in counterfeiting and piracy that this activity will no longer be tolerated—and that increased enforcement of stronger IP laws will result in severe punishments. These actions will help convince legitimate business owners and consumers that the government is serious about protecting IP rights, and encourage them to support these efforts. Public officials, international organizations, industry and consumers need to work together more closely to develop more creative and effective methods to fight this economic and societal problem.

The benefits of a more advanced IP regime to Vietnam's economy are undeniable. As summarized throughout this paper, there is a close correlation between the effectiveness of IPR protection and a country's economic performance. IPR systems significantly affect every country's growth, FDI, employment capacities, innovation and overall competitiveness, and enable productivity and efficiency gains. Putting in place a solid IPR protection and enforcement regime is thus critically important for Vietnam to reach its economic potential.

ICC through its BASCAP initiative stands ready to do its part to help the Government of Vietnam to achieve these important goals.

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92. The term “mặt hàng” is used in the Trademark Certification for the protected product category. For example, Class 25 includes “mặt hàng” clothing, footwear and headwear
93. Industrial property rights are administered by the National Office of Intellectual Property (NOIP), under the Ministry of Science and Technology (MOST); NOIP is responsible for the overall management of intellectual property and the direct management of industrial property.
94. Copyright and related rights are administered by the Copyright Office of Vietnam (COV), under the Ministry of Culture, Sports and Tourism; The COV has two branches, in Ho Chi Minh City and in Da Nang. Its tasks include helping the Minister of Culture, Sports and Tourism in the management of copyright and related rights protection
95. We note that NOIP has recently been assigned by the Government to develop a national IP Strategy
96. The United Kingdom has supported the Market Surveillance Agency (MSA) in developing a web portal (<http://chonghanggia.qitt.gov.vn/default.aspx?lang=en>) with a database to distinguish genuine from counterfeit products. However, the portal is not sufficiently resourced and lacks up to date information.
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