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## **Trademark Protection from Legal Perspective: Case Study on Vietnamese Enterprises**

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### **Abstract:**

*In the current context of Vietnam when Vietnam's economy is in a period of being extensively integrated into the global economy with a series of Free-trade agreements (FTAs) was signed such as the EU - Vietnam Free-trade Agreement (EVFTA), the Vietnam - Korea Free-trade Agreement (VKFTA), the Vietnam - Eurasian Economic Union Free-trade Agreement (VN-EAEU FTA), and most recently on February 4<sup>th</sup>, 2016, Vietnam signed the Trans-Pacific Partnership (TPP). Hence, trademark protection becomes more and more urgent to governance activities of Vietnamese enterprises. Vietnamese enterprises have shown their concern in registering trademarks; however, it has not been strong enough yet. It is because the awareness of the importance of trademark as well as the benefits of trademark protection is still limited. The paper focuses on the problems of the trademark in general; for detail, it analyses the case study on trademark protection in Vietnamese enterprises, also analyses the benefits of the trademarks' owners when the trademarks are protected. The paper makes recommendations based on the analysis to improve trademark protection efficiency in Vietnam.*

**Keywords:** Trademark, trademark protection, legal perspective, Vietnamese enterprise

### **1. Overview of Trademark**

The industrialization has boosted manufacturing process of the enterprises which are competing with each other to bring goods to market with greater quantity, wider coverage, and more types of products and services to create more choice for consumers. According to the "Consumer Bill of Rights" established by President John F. Kennedy in 1962, one of consumers rights is the right to be informed sufficient information about product characteristics to help them make the right and appropriate decision when choosing goods. The fact is now most of customers are the victims of low quality and unclear origin products and services. This seriously affects the quality of costumers' life and causes their trust issues in the enterprises as well as relevant authorities.

With the issues above, we can see that the consumers have the right of being provided information about products and services to help them distinguish the goods of a manufacturer from others. Therefore, the goods must be named, otherwise the goods must have a trademark. From legal perspective, the concept of the "trademark" in Intellectual Property Law in 2009 is *"a sign used to distinguish products and services of different organizations and individuals."* (T. S. President, 2009)

*"A trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors"* - WIPO Intellectual Property Handbook, 1(1)(a) (WIPO, 2008).

Based on the above concepts, the functions of the trademark can be listed as following:

- *First*, trademark help consumers identify a product or service of a particular company and distinguish that product from the same or similar products provided by other companies. Once consumers are satisfied with that product, there are chances that they will purchase or consume it in the future.

- *Second*, trademark indicates the origin of goods as it helps consumers distinguish the goods of a company from others. Thus, when the elements of the trademark can help consumers distinguish a product sold under that trademark with others' sold on the market, then this trademark has completed the second function.
- *Third*, protecting the rights of trademark owners will bring motivation to the owners to invest in researching. Its purpose is to maintain and improve the quality of goods and services, thereby, to enhance the prestige of trademark.

### 1.1. Signs used as Trademarks and Identification Signs of a Registered Trademark

Based on the trademark's functions mentioned above, a trademark can be any sign which is able to distinguish a good from other goods. To meet this requirement, a trademark must be presented to the objective world, hence, consumers can recognize it. The following signs may be considered as trademarks (International Trademark Association, 2012):

- *Words*: This category includes the company name, first names, last names, geographical names (except for geographical indications), any words or word chains, whether these words are created by the trademark owners themselves or slogans.
- *Letters and numbers*: For example, one or more letters, one or more numbers, or any combination of letters and numbers.
- *Graphics*: This category includes non-realistic images, illustrations and symbols
- *Trademark colors*: The combination of words, graphics and colors, or colors themselves.
- *3D signs*: The shape of goods or their packaging.
- *Auditory signs* (trademark sound): The sounds recorded by notes or other sounds.
- *Olfactory signs* (trademark smell): The particular smell of goods which are familiar to customers. Customers can recognize a good by its scent.
- *Other signs* (not visible to the naked eye): The signs which can be identified by touch.

However, not all the signs mentioned above are used as trademarks. There are some cannot be registered as trademarks. For example:

- *Generic names cannot be registered as trademarks*. For example, a company cannot register 'RUOU GAO' as its trademark to the rice wine product which is traditionally distilled, because this is the generic name for the entire category of this product.
- *Descriptive names*: The descriptive words used in trading. For example, 'SWEET' cannot be registered as the trademark for candy because it is a descriptive word.
- *Signs that are contrary to morality and public order*: The words and illustrations which are contrary to morality and public order widely accepted in society, cannot be used as trademarks.
- *National flag, national emblem, national symbols* and symbols of international organizations which have been informed to The International Bureau of WIPO, cannot be registered as trademarks.

To help consumers, competitors and other manufacturers recognize whether a trademark is protected or not requires certain signs. Currently, many companies use signs such as Registered ® (Trademark officially registered in State agencies), Copyrighted © (Exclusive protection), Trademark – TM, Service mark – SM, or equivalent symbols next to the trademark. This is to inform consumers and competitors that the word, sign, logo, symbol... are the trademark. However, using the symbols mentioned above is not compulsory. These symbols do not make the trademark protected by State stronger than the other trademarks which do not use them, it is just the way to give notice to public about the trademark and to warn competitors not to counterfeit or clone the trademark of the potential enterprises.

## 2. Trademark Protection Activities in Vietnam

### 2.1. The Legal Basis of Trademark Protection in Vietnam

The intellectual property issue, including exclusive trademark, has been one of the most concerned issues in our country. Only when intellectual property rights (IPR) are successfully protected, could we encourage individuals as well as organizations to be more creative, thus help to boost economic growth. To create a legal framework for intellectual property, Vietnam Intellectual Property Law (IP Law) has been already publicized by the State. Currently, the domestic legal documents in intellectual property includes: The Constitution 1992 (amended and supplemented in 2013) (Assembly, 2013); The Civil Code 2005 (Part Six – Intellectual property rights and technology transfer); The IP Law 2009 (amended and supplemented in 2011) (T. G. President, 2010); Decrees and circulars detailing and guiding the implementation of IP Law.

In addition, Vietnam has participated in the international treaties relating to intellectual property, such as:

- Paris Convention for the Protection of Industrial Property (Schuyler, 1982)
- Vietnam - U.S. Trade Agreement (Chapter II - Intellectual Property Rights) (Fink & Reichenmiller, 2006)
- The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS –WTO – 1994) (As a member of the WTO, Vietnam has been a member of this agreement since 2006) (Correa, 1994)
- Madrid Agreement and Madrid Protocol – International Trademark Registration (Walters, 1993)
- Patent Cooperation Treaty (PCT) (1993)
- Berne Convention for the Protection of Literary and Artistic Works (WIPO, 2004)
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Ulmer, 1962)
- Brussels Convention on the Distribution of Programme Carrying Signals Transmitted by Satellite (1974) (Christol, 1978)

Vietnam's participation in the international treaties as well as the ongoing efforts to improve legal documents on IPR have shown the initiative to embrace opportunities, and the willing to face challenges in the condition of economic globalization.

The domestic legal documents on IPR mentioned above and especially the participation of Vietnam in Madrid Agreement and Madrid Protocol have helped registered trademark in Vietnam able to be protected internationally.

## 2.2. Registered Trademark in Vietnamese Enterprises

According to the annual report of The National Office of Intellectual Property of Vietnam (NOIP), Ministry of Science and Technology, the number of enterprises and other organizations registered trademark protection and intellectual property (IP) has increased significantly since 1982s. This is thanks to the efforts of the Government in stabilizing macro economy and directly promoting IP activities. In 2013, we had 79.926 registration forms, then in 2014 the number of forms increased nearly 10%, which is equal to 83.426, and this number has continued increasing in 2015 and 2016 (Ministry of Science and Technology, 2015). With a huge number of enterprises, competition is inevitable and essential for sustainable development. However, there are many companies only run for short-term purposes and interests that they ignore legal documents such as prohibition of unfair competition, and keep on counterfeiting, imitating good quality products which are preferred by consumers. These actions lead to the complaints from prestigious enterprises, change the consumption habit and cause consumers' trust issue.

Nowadays, Vietnamese enterprises have already concerned about trademark registration for their products. According to The National Office of Intellectual Property of Vietnam (NOIP, 2017), Ho Chi Minh City had 12.890 trademark registration forms in 2015; and 13.870 forms in 2016, which made this city top in trademark registration forms from 2013 to 2016. Come in the second place is Hanoi with 8.969 forms in 2015 and 10.567 forms in 2016. These 2 cities have the number of registration forms beyond the remaining provinces/cities (e.g. Binh Duong came in the third place but it had only 922 forms in 2015, and 857 forms in 2016). Among the remaining provinces/cities, there are the ones which the number of trademark registration forms in 2016 was extremely low such as Lai Chau (5 forms); Cao Bang (8 forms); Bac Kan (10 forms); Dien Bien (15 forms).

*Unit: Trademark registration forms*

No.	Province /City	Year 2013	Year 2014	Year 2015	Year 2016
1	An Giang	114	204	208	218
2	Binh Duong	545	857	922	857
3	Ba Ria Vung Tau	119	135	126	209
4	Bac Lieu	12	17	22	50
5	Bac Giang	93	97	115	194
6	Bac Kan	3	5	11	10
7	Bac Ninh	105	371	339	399
8	Ben Tre	100	137	174	145
9	Binh Phuoc	22	54	46	62
10	Binh Thuan	65	83	74	100
11	Binh Dinh	50	86	76	110
12	Cao Bang	6	8	12	8
13	Ca Mau	51	98	59	68
14	Can Tho	200	283	435	586
15	Gia Lai	25	39	62	81
16	Hoa Binh	16	22	27	36
17	Hung Yen	113	197	373	432
18	Ha Giang	15	35	50	35
19	Ha Nam	26	47	82	92
20	Hanoi	5.189	7.668	8.969	10.567
21	Ha Tinh	5	19	45	335
22	Hai Duong	22	257	340	293
23	Hai Phong	225	326	305	379
24	Hau Giang	268	3	9	21
25	Khanh Hoa	8	147	146	205
26	Kien Giang	102	82	112	138
27	Kon Tum	84	11	4	21
28	Lai Chau	4	2	4	5
29	Long An	305	424	557	787
30	Lam Dong	75	176	225	245
31	Lao Cai	12	24	48	74
32	Lang Son	21	65	60	77
33	Nam Dinh	85	108	170	158
34	Nghe An	69	132	191	265
35	Ninh Binh	42	62	96	114
36	Ninh Thuan	22	25	31	35

No.	Province /City	Year 2013	Year 2014	Year 2015	Year 2016
37	Phu Tho	23	65	82	100
38	Phu Yen	42	75	87	53
39	Quang Binh	12	20	28	35
40	Quang Nam	45	78	110	116
41	Quang Ngai	33	100	46	82
42	Quang Ninh	98	159	157	204
43	Quang Tri	16	36	20	53
44	Son La	9	25	29	32
45	Soc Trang	35	32	66	73
46	Thanh Hoa	69	112	173	267
47	Thai Binh	41	105	135	170
48	Thai Nguyen	39	88	110	94
49	Thua Thien Hue	50	69	85	148
50	Tien Giang	85	91	103	181
51	Ho Chi Minh City	5.688	11.577	12.890	13.870
52	Tra Vinh	43	59	54	69
53	Tuyen Quang	10	38	32	28
54	Tay Ninh	75	109	140	110
55	Vinh Long	52	77	63	87
56	Vinh Phuc	92	91	123	203
57	Yen Bai	9	11	18	22
58	Dien Bien	8	9	9	15
59	Da Nang	243	454	461	526
60	Dak Nong	10	14	9	28
61	Dak Lak	45	132	135	172
62	Dong Nai	281	486	568	623
63	Dong Thap	114	184	157	166
Total		15.485	26.602	30.415	34.938

*Table 1: The number of trademark registration forms in Provinces /Cities  
Source: The National Office of Intellectual Property of Vietnam (NOIP, 2017)*

The registration forms include both Vietnamese and foreign enterprises which are operating in Vietnam. According to Mr. Le Ngoc Lam, Deputy Director of The National Office of Intellectual Property of Vietnam (NOIP, 2015), in 2014 the number of trademark forms registered by foreign enterprises led by the U.S enterprises with 1.713 forms; followed by Japan with 1.295 forms; China with 904 forms; South Korea with 785 forms; and Thailand with 519 forms.

Thus, Vietnamese enterprises now seriously concern about trademark registration for their products and services, which is reflected in the increasing number of registration forms year by year. Trademark registration not only represents the growth and confidence of enterprises in the competitive market; but also the commitment to customers on products and services quality, and responsibility of enterprises to their consumers. However, we need to admit that the number of registration forms includes all enterprises operating in Vietnam: enterprises established by Vietnamese individuals or organizations, enterprises which have investment from foreign individuals or organizations (Foreign Direct Investment enterprises, FDI). The number of increasing registration forms is due to the expansion of FDI enterprises in Vietnam. On the contrary, the real level of concern to trademark of Vietnamese enterprises is still low. Besides, the number of registration forms could partly explain the reasons why provinces/cities such as Hanoi, Ho Chi Minh City, Da Nang and Binh Duong have large number of trademark registration. It is because these provinces/cities have many FDI enterprise operating.

Foreign investors in Vietnam always actively protect themselves and show their responsibility to clients by the registration for trademark protection. When Vietnam is extensively integrated into the global economy and TPP comes into effect in 2018, the number of foreign enterprises operating in Vietnam will significantly increase. With extensive experience and good legal knowledge, they (foreign investors) are interested in trademark registration in the countries where they are about to open and run their business. TPP has high requirements for intellectual property, especially for industrial property which is included trademark. Handling issues related to trademark infringement does not only handle administrative violations, but also apply the criminal sanctions. Civil penalties are applied too, such as compensation for damages, corrections, and public apology. Therefore, all enterprises must pay attention to their trademark, because only one single violation whether unintentionally or not, will be strictly handled in order to avoid violating commitments and requirements of TPP.

The lessons from the trademark disputes in foreign markets such as Trung Nguyen Coffee in the U.S, Buon Ma Thuot Coffee in China, Petro Vietnam and VINATABA tobacco in Europe, Sa Giang shrimp chips in France and Europe, Phu Quoc fish sauce in Thailand or Ben Tre coconut candy in China have shown that if Vietnamese enterprises still do not care about the trademark

registration, then we will have to face with the risk that our traditional products could eventually fall into the hands of foreign companies. Vietnamese enterprises will lose in their homeland.

### 3. Benefits of Registering Trademarks in Vietnam

In general, the function of trade marks is to legally prevent other parties from benefiting from the reputation built by the firm by creating confusion on the origin of the product. However, in Vietnam trademark registration not only satisfies the benefits of trademark owners but also benefits other parties such as: customers, government and others. The benefits of trademark registration for these parties will be analyzed as follows:

**For the trademark owners**, being licensed the trademark registration certificates brings them many benefits. In this case, the owners have the exclusive rights to use and dispose of the registered trademarks. The word “exclusive” can be interpreted in two ways: (1) the owners have the rights to use or allow other people to use through a license agreement; (2) in case of violation (using without permission), the owners have the rights to request (or through the relevant authorities) the offenders to stop the violation. The rights and responsibilities of the trademark owners are emphasized as follows:

- **The owner’s trademark use rights:** The trademark owner has the exclusive rights to use the trademark on the registered products and services. The rights include labeling the products and services; keeping, circulating and advertising the registered products. The protecting scope of the trademark use rights not only applies to the products having the same trademarks as the ones described in the certificate but also those having trademark which is so similar that it can cause mistake. For example: Hào Hào instant noodle and Hào Hạng instant noodle (‘hào hảo’ and ‘hào hạng’ both mean perfect in Vietnamese), Trần Phú electric cable and Thiên Phú electric cable (similar spelling).
- **Rights of disposal:** Besides the use rights, the owners have the rights to dispose of the registered trademark, by selling it through license agreement, or can bequeath the trademark. In fact, there are many trademark trading contracts. Most recently, on July 2<sup>nd</sup> 2016, TCC Holding Group reached the agreement to buy 59% shares of Thailand BigC at 3.5 billion USD. Another example is AEON successfully bought 30% shares of Fivimart and 49% shares of Citimart in 2015. The trademarks mentioned above have become famous and popular with customers all over the world, which created a major advantage for the owners when transferring the trademarks. Even the buyer would “inherit” a great number of customers and the reputation of the trademarks, which would also bring advantages for the buyers. Building strong trademarks with proven reputation will create a solid foundation for famous trademark ownership.
- **The owner’s obligations:** After the owner has been licensed the trademark registration certificate, using the trademark is not only his/her rights but also obligations. If the owner does not use the trademark directly, he/she can transfer this rights to other people. In case the owner does not use the trademark continuously in a regulated length of time (five years), the certificate can be suspended or cancelled. For example, the trademark Ông Thọ milk (Longevity) was owned by a Holland company before 1975. After 1975, this factory was taken over by VINAMILK and continued to produce Ông Thọ milk. In 1997, the Holland company claimed the industrial property right over Ông Thọ milk. In this case, VINAMILK could refuse to return the trademark because the Holland company had not used it for more than five years. In addition, when the trademark has been registered, it is the obligation of the owner to ensure the quality of the products with that trademark is as registered in the certificate and to constantly improve products quality.

**For the customers**, trademark helps them to distinguish the products and services of different manufacturers. Protecting trademark against counterfeiting also protects customers’ rights and helps them choose high quality products and services, hence, create customers’ trust. Besides, registered trademark is the enterprises’ guarantee for the product quality. Using the goods with registered trademarks is a way customer protect their own rights.

**For the government**, the trademark has registered to protect the enterprises against counterfeiting, in turn boost the economic growth. By protecting trademarks, the government can avoid tax loss through smuggling and counterfeiting, build a healthy business environment and create incentive for economic growth. Trademark protection also means building national trademark, establishing the nation’s position in the international trade, hence, helping the domestic enterprises go further in globalization process.

The meaning of a trademark, as mentioned above, is to help customers recognize the product. When the product has a certain market share in the market, its trademark becomes the symbol of the product’s prestige to customers. The more well-known a trademark is; the more chance it is counterfeited. Therefore, it is necessary to register a trademark. It not only guarantees the economic benefit of the owners, but also protects the consumers. Using trademark for marketing purpose is not only important in the domestic industry, but also in the international trade. The story of Vietnamese Rice is a good example of why it is important to register a trademark. Vietnam is one of the largest rice exporters in the world. However, we still have no trademark for our rice on the international market because we have not yet successfully registered a trademark for Vietnamese Rice.

Furthermore, if Vietnamese enterprises still do not pay attention to trademarks, there is a risk that our traditional products could fall into the hands of foreign companies. We already have had lessons on this issue. Cafe Buon Me Thuot has been registered in China as the trademark of a Chinese enterprise. Although Buon Me Thuot is a place of Vietnam which is famous for its coffee, if we export this coffee to China as Buon Me Thuot’s coffee, we will be sued for trademark violation. Or Phu Quoc fish sauce has been registered in France and the U.S as the trademark of a Thailand enterprise. Therefore, if we export Phu Quoc fish sauce to these countries, we will be sued for trademark violation.

#### 4. Conclusions and Recommendations from Legal Perspective

Registering a trademark is an act of the trademark owners to legally establish their rights and obligations to the products. Currently, the way to implement these rights and obligations totally depends on the owners. In essence, intellectual property rights, industrial property rights which include the proprietary rights of trademarks are judicial authorities. The owners themselves must protect their rights. State agencies will intervene only when there is a request from the owners. Therefore, if other enterprises violate a trademark (by counterfeiting, imitating), or use this trademark without permission from its owners, trademark owners have the rights to request the offenders to stop the violation or request the intervention of the appropriate authorities. Currently, in Vietnam, market surveillance agency has discovered many cases of large-scale counterfeiting and imitation of high-quality goods. Those high-quality goods are trusted by consumers and have been already registered trademarks. Counterfeiting and imitation occur almost openly, and the owners themselves cannot control every case. This suggests that the benefits of customers and enterprises can be guaranteed for real only when the Vietnamese government has found a solution to protect the right of the trademark owner. It is necessary for the Vietnamese government to support trademark owners to implement their rights. Some recommendations would be mention below:

- *Firstly*, it is necessary to build the evaluation criteria for the group of international trademarks, in order to help Vietnamese products accepted and consumed on international markets. Therefore, it is a must for the Government to release a detailed document to guide the law application uniformly and legally.

- *Secondly*, to intensify the checking, inspecting and strictly coordinating activities among functional authorities and the trademark owners, in order to comply with the legal regulations when detecting and punishing counterfeiting, cloning. Violation on industrial property, including trademark property in Vietnam will be subject to administrative punishment. More strictly, it can be prosecuted for criminal liability. According to the Decree No. 97 (ND 97/2010/ND-CP dated 21/9/2010), regulating the administrative punishment to the violation of trademark property rights, the punishment for violation of trademark property rights, geographical indication, tradename and industrial design ranges from VND 3 million to VND 5 million. The highest level of punishment does not exceed VND 5 million for the action of manufacturing, labeling and importing the products having signs that offend the trademark property rights. However, we have already known that the money from only one (fake) bag with famous trademark such as Dior, Louis Vuitton and Hermes sold is enough to pay the fine if detected. As for the criminal liability, the action of manufacturing and trading counterfeit products is regarded as crime (Article 156, The Penal Code of Vietnam 2009), with the highest level of punishment is 15-year imprisonment, however this is only applied for counterfeiting activities which have huge illicit profits or cause very serious consequences. Besides, the action of imitation has not been criminalized, so it is subject to only administrative punishment.

According to the article 171 of The Penal Code of Vietnam, the punishment applied for violation of industrial property is a fine of from VND 20 million to VND 200 million; or the longest imprisonment of 3 years. This punishment is too light for violation of property, especially industrial property because the use of property in this field can bring huge benefits.

- *Thirdly*, the functional authorities should intensify their support in enforcing the intellectual property rights, including trademark protection. Those authorities such as market administrators and economic police must support the trademark owners when they detect the violation of their rights. Besides, these authorities should be active in the process of inspecting the business activities of enterprises located in the area that they are in charge of. The violation of trademark property, especially counterfeiting and importing counterfeit products must be detected and punished timely so that Vietnam will not become the “paradise” for poor-quality goods.

- *Fourthly*, to educate and encourage customers to use high-quality products, especially those which have been quality verified and trademark registered. When a trademark is registered, it is always accompanied with the product quality standard, which is the commitment of the manufacturers and their responsibility for their products. Therefore, the trademark owners should show clearly the signs to distinguish between their products and the counterfeit ones, in turn encourage the customers to discover and boycott them. The customers play an important role in protecting the trademark property rights.

- *Finally*, from the perspective of the government, international cooperation should be strengthened to detect and punish intellectual property infringements, especially the protection of well-known trademarks. To effectively protect the product trademark, it is necessary for all the above parties to co-ordinate strictly, especially the active role of the functional authorities in implement strictly the legal regulations which relate to intellectual property, industrial property, in order to boost the awareness of people in complying with the law.

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