

# COPYRIGHT LAW IN VIETNAM

NGUYEN THI HONG NHUNG\*

## I. CONCEPT OF COPYRIGHT

Under Vietnamese law, intellectual rights to literary and artistic works are an important part of the intellectual property law, in addition to industrial property rights and the rights to plant varieties. Intellectual rights to literary and artistic works include personal and property rights which allow the right holder to exclusively exploit or authorize the exploitation of his or her rights.

Copyright is known as the basis of intellectual rights to literary and artistic works, aside from other related rights. The protected subject matter of copyright includes literary, artistic, and scientific works. On the other hand, the subject matter covered by other related rights are the performances, phonograms, video recordings, broadcast programs, and encrypted satellite signals carrying programs.<sup>1</sup> Thus, it can be concluded that copyright law is built to protect the original intellectual creations which is the basis for the formation of related rights. According to Vietnamese law, copyright is recognized and protected from the creation of the work (Article 6.1 - Law on Intellectual Property).

For the concept of copyright, Article 4.2 of the Law on Intellectual Property provides one disposition, as follows: “Copyright is the right of organizations and individuals for works created or possessed.” However, this concept needs to be reviewed soon because it is obvious that when one possesses an artistic work, it does not mean that one gets the copyright on this work—one only gets the materials. At the very least, the transfer of copyright can make a non-author a copyright-holder, thereby allowing him to exercise the right of an author.

In addition, Article 18 of the Law on Intellectual Property offers a list of constituents of copyright which includes personal and property rights. Because of its significance, copyright has gradually been recognized as one of the most important

---

\* Associate Professor of Law, University of Economics and Law, VNU-HCM.

<sup>1</sup> LAW ON INTELLECTUAL PROPERTY, art. 3.1.

and fundamental rights in the economic, cultural, social and legal life of Vietnam today.

## II. HISTORY OF VIETNAM'S COPYRIGHT LAW

Unlike many Western countries, regulations on copyright in Vietnam have only appeared recently. This is because for quite a long time, Vietnam has had to face many wars which instead led to the division of Vietnam's efforts to attain freedom and the reconstruction of the country post-war. After the successful August Revolution of 1945, the basis for copyright appeared for the first time in the Vietnam Constitution of 1946. Article 10 of this Constitution recognizes the right to free speech and right to free publishing for Vietnamese citizens, though the term "copyright" was not yet used at that time. During this time, the war was still going on in the South of Vietnam.

With the reunification of the South and North of Vietnam, the economy and society of Vietnam have started to recover and develop gradually. It began in the 1980s, or more precisely, during the Sixth Congress of the Communist Party, when Vietnam initiated its economic and social "Doi moi" policy.<sup>2</sup> For the first time in 1986, the term "copyright" was mentioned in Decree 142/HDBT of the Council of Ministers ("Decree 142/HDBT"). This was a very simple legal document that regulated the protection of copyright in Vietnam, which included only eight articles that dealt with the fundamental concepts of copyright such as the concept of the author and his basic rights, as well as protected works.

As a result, Decree 142/HDBT exposed the limitations of copyright both in form and content. Particularly, in terms of content, the Decree lacked important provisions on the protection of computer programs and related rights. Moreover, there were some provisions in the Decree that did not conform to international conventions on copyright, such as the term of copyright protection which lasts only 30 years after the author's death, while under the Berne Convention, it is 50 years after the author's death. Formally, this Decree was only a sub-law<sup>3</sup> document, and the scope of the document did not meet the requirements of Vietnam during its economic, social, and legal reform. From an international perspective, this Decree had not been properly

---

<sup>2</sup> "Doi moi" was the new policy of the Vietnamese Communist Party during the 1980s. With this policy, Vietnam began to renovate the economy by transitioning from a subsidized economy to a market economy. Copyright legislation was therefore necessary in order to help develop Vietnam's culture and economy.

<sup>3</sup> In Vietnam, "laws" in their restricted meaning are only regulations elaborated by the National Assembly. Therefore, other acts made by other authorities—for example the Government and the Ministry—are not "laws", but subordinate to "laws".

assessed in order to allow Vietnam to participate in international relations with other countries in the field of copyright protection.

Faced with the abovementioned shortcomings and the recognition of the importance of imposing policies on intellectual property as a tool to attract foreign investment into Vietnam, Vietnam has issued many legal documents regulating copyright. Beginning in the early 1990s, copyright was mentioned in the highest legal document of Vietnam, the Constitution of 1992. This was an important legal document that defined the most basic rights of citizens, wherein Article 60 provided that “[c]itizens have the right to conduct scientific and technological research, inventions, innovations, technical innovations, production rationalization, literary and artistic production and criticism, and participation in other literary activities. State provides the protection of copyright, industrial property rights.” With this recognition of copyright in the Constitution, it could be said that copyright in Vietnam has grown to new heights.

Next, with the help of experts from the World Intellectual Property Organization (WIPO) and references to the provisions of foreign laws, the Ordinance on the Protection of Copyright (“Ordinance”) was adopted by the Standing Committee of the National Assembly on December 12, 1994. This Ordinance, which was more complete than Decree 142/HDBT, consisted of 47 articles which were divided into seven chapters, stipulating the fundamental issues of copyright, such as authors, co-authors, protected works, works by foreign authors, computer program protection, copyright limitations, copyright exploitation contracts, copyright protection duration (until 50 years after the author’s death), and related rights.

However, this Ordinance also quickly expired due to the birth of the Civil Code of 1995 (“Code”). The Civil Code of 1995 provided some of the provisions on intellectual property rights, which included copyright in Part VI. Along with inheriting the provisions of the Ordinance of 1994, the Code also added new regulations on owners of works, rights and obligations of performers, producers of phonograms and recordings, and broadcasting organizations. But it must be noted that the Civil Code of 1995 only mentioned copyright from the perspective of civil law. Other issues related to state management, as well as the resolution of copyright disputes, were still stipulated in other legal documents promulgated by the Government, specifically, the Ministry of Culture and Information.

Along with the rapid development of Vietnam’s economy and society and with the goal of joining the World Trade Organization (“WTO”), many legal documents such as the Civil Code and Intellectual Property Law have since been amended, supplemented, or newly promulgated with provisions consistent with Vietnam’s

commitments upon accession to international conventions. Again, copyright was mentioned as a civil right that had to be respected and protected in the Civil Code of 2005. Furthermore, in order to put in one book all laws relating to intellectual property which were found scattered in different legal documents and caused difficulties in application and implementation, the National Assembly of Vietnam issued the Law on Intellectual Property of 2005, which entered into force on July 1, 2006. This law contained 222 articles in which copyright and related rights were mentioned.

Some years later, according to the Report<sup>4</sup> of the Ministry of Culture, Sports, and Tourism on the enforcement of the Law on Intellectual Property of 2005, the Law had caused certain limitations that were inconsistent with Vietnam's commitments in bilateral and multilateral international treaties, such as the "3-step Test" principle defined in the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), and the principle of "Most Favored Nation Treatment" within the WTO. To face these issues, on February 4, 2009, the Vietnamese Government submitted a Standing Committee Report on the Draft Law to the National Assembly, amending and supplementing the Law on Intellectual Property of 2005. This amendment was then submitted to the National Assembly for approval. The Report mentioned objective and subjective causes leading to limitations in the present Law and provided explanations for the amendment. After many discussions, on June 19, 2009, the National Assembly of Vietnam issued the Law amending and supplementing a number of articles of the Intellectual Property Law, including 30 terms which came into effect on January 1, 2010. Ten years later, in 2019, the Law on Intellectual Property was revised to adapt with the demands of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which Vietnam has joined officially in January 14, 2019. This Law is in effect until now.

Moreover, internationally, in order to have a stable legal system that satisfies the requirements of copyright protection, Vietnam has also participated in many bilateral and multilateral international copyright conventions, such as the Vietnam-United States Agreement on the Establishment of Copyright Relations, the Vietnam-Switzerland Agreement on the Protection of Intellectual Property Rights, trade agreements between Vietnam and the United States, the Berne Convention of 1886, the Geneva Convention for the Protection of Producers of Phonograms, the Brussels Convention on the Distribution of Programs by Satellite, the Rome Convention of 26 October 1961 on International Protection of Performers, and the TRIPS Agreement of April 15, 1994 within the framework of the WTO.

---

<sup>4</sup> Report No. 202/BC-BVHTTDL, Dec. 10, 2008.

Thanks to the many legal reforms mentioned above, copyright in Vietnam has, little by little, developed. In addition, it can be seen that copyright plays a very important and indispensable role in Vietnam's international economic and social integration.

### III. LITERARY AND ARTISTIC WORKS PROTECTED

Article 2.1 of the Berne Conventions provides an unlimited list of works that are protected by copyright. In accordance with this Convention, Article 14.1 of the Law on Intellectual Property of Vietnam also provides a list of works protected by copyright. Accordingly, there will be cases that are not protected by copyright. Thus, in order to be eligible for copyright protection, works must satisfy two basic conditions: first, being creative; and second, existing in a certain form.

#### A. Original Creation

How can there be original creation? It can be understood that original creation is the mark of the author.<sup>5</sup> In other words, the work is the author's own intellectual creation.<sup>6</sup> However, this concept is still difficult to define. There are works that are not original in themselves but are still considered to be creations of the author's own mind, and thus still have the nature of an original creation. The typical examples of this are collections, such as encyclopedias or data banks, which are subject to copyright protection even though these only serve to collect the work of others. The reason for the recognition of copyright for these works is that there is actually a rearrangement of works expressed in a certain order that brings about the author's own stamp on those collections. For the same reason, translations and adaptations are also protected by copyright as an original work because they reflect the creativity of the author. Article 14 of the Law on Intellectual Property of Vietnam also states that the protected work "must be created directly by the author by his intellectual work without copying from the work of others."

Should an original creation be a new thing? It can be confirmed that a work is an original creation even if it is not new. French theorists also claim that creative origin is the basis of copyright, which is different from the novelty of industrial property.<sup>7</sup> They also say that "original creation is subjective: it is the author's personal stamp that

---

<sup>5</sup> Nguyen Thi Hong Nhung, *Copyright in cyberspace*, Publishing House of National University of Ho Chi Minh City, 2015, p. 10.

<sup>6</sup> Berne Convention, arts. 2.2 & 2.3.

<sup>7</sup> Desbois H., *Le droit d'auteur en France*, Paris, Dalloz, 3<sup>rd</sup> edition, 1978, p. 5.

results from the creative endeavor of the author, while novelty is judged objectively because it is determined by comparison with previous analogues[.]”<sup>8</sup>

Similar to novelty, the quality of a work is not considered to be a factor in deciding whether or not a work is protected. As Stephen M. Stewart wrote in his book,<sup>9</sup> “the quality of a work is just a matter of taste and emotion, and therefore it is not a factor to judge whether it is a work that can be protected.”

Similar to these opinions, Article 6.1 of the Law on Intellectual Property of Vietnam declares that copyright is born from the time of creation of the work, whether or not it is new or published.

## **B. Certain Form**

Simple ideas will not be protected. This means that if the idea only exists in the mind of each person and is not expressed in some certain form, then it is not subject to the protection of copyright. And so, the author needs to mark the creations of his thinking in a certain form, possibly “some form or manifestation” as referred to in Article 2.1 of the Berne Convention. Accordingly, the thinking, methodology, or even the mode of operation is not protected by copyright.

Ideas in a certain form, in order to be protected by copyright, need not be a complete form that can be publicly disclosed. Certain forms may be a manuscript, or a summary expressing the creative intent of the author. However, it can be said that the boundaries between the idea (the unprotected) and the format in a certain form (the protected) are often lacking in clarity. So, to be protected, the idea should be edited or developed with a certain structure.

Should the form be material or non-material? The question is whether the “certain form” mentioned above is required to be in material form. From the point of view of French scholars and countries with the same legal system of copyright, formatting in certain forms does not require expression in a material form.<sup>10</sup> That is why speeches or works of a similar nature are subject to copyright protection (in accordance with Article 2.1 of the Berne Convention). However, Article 2.2 of the Berne Convention provides an alternative interpretation and application: States

---

<sup>8</sup> Colombet C., *Grands principes du droit d'auteur et des droits voisins dans le monde*, Paris, Litec, 1990, p. 2.

<sup>9</sup> Stewart S.M., *International copyright and neighbouring rights*, London, Butterworths, 1989, 2<sup>nd</sup> edition, p. 50.

<sup>10</sup> Lucas A. and Lucas H.J., *Traité de la propriété littéraire et artistiques*, Paris, Litec, 3<sup>rd</sup> edition, 2006, p. 62.

Parties are entitled to recognize protection for works only in the material form. And in accordance with Article 2.2 of the Berne Convention, the Law on Intellectual Property of Vietnam provides in Article 6.1 that “[c]opyright came into being from the time the work was created and expressed in a form of a certain substance.”

Thus, it can be summarized that under Vietnamese law—in addition to the original creative element—in order for a work to be protected, the work must also be expressed in a material form. Other factors such as novelty, length, and quality of the work are not used to evaluate the protection of works.

### **C. Author’s Rights**

It is possible to view the author’s exclusive rights to the work as privileges granted by law to persons engaged in creative work. Vietnamese law recognizes the authors of two fundamental rights groups—moral rights and property rights. This recognition meets two basic objectives: if moral rights allow the author to mark his or her personal stamp on the work, the property rights allow the author to obtain the profit derived from the exploitation of products.

#### **1. Moral Rights**

Moral rights belong to a family of non-property rights that allow the author to protect his personal identity as embodied in the work the author created. Thus, this right arises from the link between the work and the human being of the author, the expression of the author’s personality in the work. Logically, moral rights prevail over property rights because at the time of publication, the author has made one of the first manifestations of moral rights: publication rights. In the Law on Intellectual Property of Vietnam, moral rights (Article 19) are placed before property rights (Article 20).

Vietnamese law raises a list of moral rights that express the relationship between the author and his or her work.<sup>11</sup> Accordingly, the moral rights of authors protected by Vietnamese law include the right to name the work, the right to display the real name or pseudonym on the work, the right to use a real or pen name when the work is published or used, the right to publish the work or authorize others to publish the work, and the right to protect the integrity of the work—to prevent others from repairing, mutilating, or distorting the work in any form that is detrimental to the honor and reputation of the author.

---

<sup>11</sup> LAW ON INTELLECTUAL PROPERTY, art. 19.

a. *Right to Name the Work and Right to Display the Real Name or Pseudonym on the Work*

The right to name the work and the right to display the real name or pseudonym of authors on the work are the rights to be placed before other moral rights of authors in Vietnamese law. Paragraphs 1 and 2 of Article 19 of the Law on Intellectual Property stipulate that the author has the right to “name his work” and “to have his or her real name or pseudonym on the work” when products are published or used. These rights are also mentioned in Article 6 of the Berne Convention. This also means that the respect of these rights is mandatory. The naming of the work is significant to authors, similar to how a father wants to name his son. As to the right to display his name on the work, this right is also important because it serves as evidence before the court that the person with the name displayed on the work is the author.

The right to display the real name or pseudonym of authors on the work can be understood in two ways: the right to include his or her name in the work, and the right to object. For the first right, the author has the right to authorize his or her name and address to appear on all published copies, as well as any materials relating to the work, if desired. However, naming the author is accepted as a right and not an obligation—for example, a particular author may not like fame, so they can choose anonymity by using a pseudonym. However, anonymous authors or those using pseudonyms can reveal their real names at any time. As for the right to protest, it is the right of the author of a work to protest against another person’s name being displayed on his work. This is a prohibition on any third person who claims to be the author of the work of others.

b. *Right to publish the work*

Publishing a work is the introduction of a work to the public. The author evaluates the perfection or completeness of the work and has right to bring it to the public. This also means that he has the right not to publish or publish his work and no one can prevent this. In other words, the right to publish a work entails the obligation of others not to freely introduce the work without the author’s permission. This is not strange because under Article 19.3 of the Law on Intellectual Property of Vietnam, the author has the right “to publish or allow others to publish the work.” The phrase “allow others to publish their work” clearly explains why the right to publish a work can be transferred, under the provisions of Article 45.2 and Article 47.2 of the Law. However, it can be added that the right to publish a work is not universally recognized, which explains why the right to publish a work is not uniformly defined in the different countries of the world. The Berne Convention does not even recognize this right.



Furthermore, according to Vietnamese law, the right to publish a work only covers the distribution to the public of certain copies of the work.<sup>12</sup> This right does not cover the performance or broadcast of a work, even if it is made for the first time. According to this provision, it can be understood that when the author publishes his work by means of paper, this is protected by the right to publish the work; however, when his work soon appears in electronic form on the Internet without his prior permission, this act cannot be regarded as an infringement of the right to publish the work (but obviously, an infringement of another right).

Moreover, in Vietnam, we do not find any regulations related to the exhaustion of the right to publish the work. However, Article 22 of Decree No. 100/2006/ND-CP, details and guides the implementation of a number of articles of the Civil Code and the Intellectual Property Law regarding copyright and related rights. This Article stipulates that the right to publish a work is recognized for certain copies of a work. Therefore, it is possible to understand that another author's consent is required to publish other copies in the same mode of publication.

*c. Right to Respect the Integrity of the Work*

The right to respect the integrity of the work is provided for in Article 19.4 of the Law on Intellectual Property of Vietnam, in accordance with Article 6bis of the Berne Convention. Accordingly, this right allows the author to protect the integrity of his work against any modification or misrepresentation of the work which infringes the author's reputation. In other words, this right allows the author to request that his work must be communicated to the public exactly as the author intended. This ensures that the author's wishes, ideas, as well as his personality, are reflected well in the unchanged work. Therefore, everyone is obliged to respect the work, including the right holder of the work.

In addition, it should be noted that under the provisions of the Vietnamese law, the author can only sue for infringement of the right to respect the integrity of the work, provided that the infringement of the integrity of the work is detrimental to his honor and prestige. It can be seen that this provision is in line with the content of Article 6bis of the Berne Convention to which Vietnam is a party. Accordingly, in such an understanding, all acts of infringement of the right to respect the integrity of a work shall not be subject to automatic penalties, but only those which are harmful to the honor and prestige of the author. What are the damages to the honor and dignity of the author? There is no precise guide to this issue in the Law on Intellectual Property

---

<sup>12</sup> Decree No. 100/2206/ND-CP of Sept. 21, 2006, art. 22.2, detailing and guiding the implementation of a number of articles of the Civil Code and the Law on Intellectual Property regarding copyright and related rights.

or the Berne Convention. However, the right to protect the honor and prestige of an individual can be found in Article 34 of the Vietnamese Civil Code.

In summary, the above provision of the law aims to prevent the abuse of the author's rights. However, if viewed from a different angle, this provision makes it difficult for the author to exercise his or her statutory rights since the existence of damage to his or her honor and reputation is not easy to prove, even though infringements of the right to respect the integrity of the work are clear and increasingly popular. Some examples are the insertion of commercial advertisements during a film without the consent of the author, coloring a black and white film, or modifying the lyrics of a song.

#### *d. Term of Protection of Moral Rights*

Article 6bis of the Berne Convention provides that after the author's death, the author's moral rights shall be maintained, at least until the expiration of the term of protection of property rights. Pursuant to this Convention, the laws of Vietnam recognize that the author is given a longer time to exercise his moral rights. Specifically, in accordance with the law of Vietnam, the right to name the work and the right to respect the integrity of all types of work is, in principle, protected indefinitely. This is defined in Article 27.1 of the Law on Intellectual Property. This protection is given in order to fit the personal attributes of the privileges, because it is the author's personal mark and will last forever, even if the author dies.

It should be added that, contrary to those rights just mentioned above, the right to publish a work, in accordance with the provisions of the Law on Intellectual Property, has the same term of protection as property rights (Article 27.2 – Law on Intellectual Property). This makes the right to publish a work half a moral right and a half a property right.

## 2. Property Rights

In material terms, the author is given the property rights associated with the exploitation of his or her work. These are economic privileges that allow the author or owner of the copyright to determine the conditions of exploitation, and to obtain material benefits from the exploitation of the work. In other words, by virtue of these rights, the author may be remunerated for the exploitation of his work. The work is a product of the author's thinking and can be exploited in various forms such as books, video discs, cable television, and satellite TV, especially now that the Internet has created a new method for exploiting their work. In fact, with digital technology, the Internet has allowed the maximum exploitation of their work, while the pay to the author is still limited. So, how can the author protect his financial interests and have

a legitimate and effective incentive to continue to innovate? In Vietnam, the legal provisions relating to the protection of rights mentioned above are recognized in Article 20 of the Law on Intellectual Property.

Article 20 of the Law on Intellectual Property provides a list of the property rights of authors. Accordingly, the property rights of the author are recognized and protected by Vietnamese law, including the right to make derivative works, the right to perform their work before the public, the right of reproduction, the right to distribute or import the original or a copy of the work, the right to communicate the work to the public by wire, wireless, electronic information network or any other technical means, and the right to rent the originals or copies of cinematographic works and computer programs.

However, in order to make it easier to compare the laws of Vietnam with other foreign laws on copyright, it is possible to summarize the property rights into four groups: the right of reproduction (including the right to make derivative works); the right to communicate the work to the public (including the right to communicate the work to the public by wire or wireless means, or any other technical means); the right of distribution; and the right to rent a work. These rights are recognized as the exclusive rights of authors for their works.<sup>13</sup> And in principle, any exploitation of a work requires the permission of the author or copyright owner.

#### *a. Right of Reproduction*

It is logical that the duplication of the work in a certain form which ensures long-term continuity is considered a material reproduction (copy), while the translation of the work or adaptation is considered a non-material reproduction and is therefore understood as “making a derivative work.”<sup>14</sup>

According to Article 4 of this Law, the term “derivative works” refers to works of translation, adaptation, transformation, compilation, annotation, and selection.<sup>15</sup> The “copy” of a work means the making of one or more copies of a work or of a phonogram or recording of a work, by any means and in any form, including the electronic form.<sup>16</sup> A similar understanding can also be found in Article 9.3 of the Berne Convention, but with a broader definition— “[a]ny sound or visual recording shall be considered as a reproduction.”

---

<sup>13</sup> LAW ON INTELLECTUAL PROPERTY, art. 19.

<sup>14</sup> LAW ON INTELLECTUAL PROPERTY, art. 20.1.

<sup>15</sup> LAW ON INTELLECTUAL PROPERTY, art. 4.8.

<sup>16</sup> LAW ON INTELLECTUAL PROPERTY, art. 4.10.

*b. Right to Communicate the Work to the Public*

The Berne Convention provides three articles regulating the right to communicate the work to the public (Articles 11, 11bis, 11ter). For the purposes of this Convention, authors of literary and artistic works enjoy the exclusive right of authorizing the presentation or transmission of works to the public by any means or process. Pursuant to the provisions of this Convention, the Vietnamese Law on Intellectual Property authorizes the author to communicate their work to the public pursuant to Article 20.

Accordingly, the communication of their work before the public is considered as a way of demonstrating and directing their work to the public by means of wire, wireless, electronic information network, or any other technical means. Nowadays, in the digital era, the digitization or storage of a work on an online web page will constitute a copy of the work and making this work available to Internet users is considered an act of conveying the work to the public because it allows for the transmission of their work which can be accessed all over the world.

*c. Right of Distribution*

Vietnamese law stipulates that the distribution of the original or copies of the work depends on the permission given by the copyright owner.<sup>17</sup> This provision aims to comply with Article 6 of the WIPO Copyright Treaty, which states: “[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sales or other transfer of ownership.”

In detail, the law of Vietnam provides that the author is exclusively entitled to perform or authorize a third party to distribute his work, in any form or by any means, including the transmission of copies through the Internet. One question is whether Vietnamese law recognizes the theory of the depletion of copyright. Although the answer is “yes” for the material world, it seems that in the Internet world, the right to distribute the work online does not appear to be exhausted after the first distribution (the first transmission) because it cannot be found in any legal text. It means that in principle, after the authorized transmission of work, the work received by the user A cannot be redistributed online by this user to other user (user B), without the permission of the copyright owner (or without payment to the copyright owner). Moreover, there are provisions on infringements of copyright, such as the “publication, distribution of works without the author’s permission”<sup>18</sup> or “exporting,

---

<sup>17</sup> LAW ON INTELLECTUAL PROPERTY, art. 20.

<sup>18</sup> LAW ON INTELLECTUAL PROPERTY, art. 28.3.

importing, distributing copies of works without the permission of the copyright owner.”<sup>19</sup>

*d. Right to Rent a Work*

For cinematographic works and computer programs, the Vietnamese law prescribes that copyright owners have the exclusive right to rent or allow others to rent originals or copies of their works.<sup>20</sup> This provision originated from the TRIPS Agreement and the WIPO Copyright Treaty.

Nowadays, transmissions of film and computer programs on the Internet actually have the same role and lead to the same result as rental of physical materials such as CDs, VCDs, or DVDs. It can be seen that there is no real difference between renting a traditional physical CD in a store and a non-physical rental on the Web because with these two methods, users can only use works for a definite period of time. Vietnamese law stipulates that the lessee is responsible for paying the copyright owner.<sup>21</sup> Despite such regulations, infringement of the author’s right to rental, such as the use of similar code for multiple computers or the prolongation of use of programs, is also common.

However, it should be noted that the right to rental does not apply where the computer program is necessary and mainly for the operation of machinery or other technical equipment. This provision is intended to be consistent with the international provisions of the TRIPS Agreement (Article 11) and the WIPO Copyright Treaty (Article 2 (2) (i)).

*e. Term of Protection of Property Rights*

In general, the term of protection of property rights for copyright holders is 50 years after the death of the author.<sup>22</sup>

Furthermore, Vietnamese legal provisions relating to the protection of intellectual property rights are valid in the territory of Vietnam and apply to Vietnamese organizations and individuals, as well as to foreign organizations and individuals. This is in accordance with conditions prescribed by Vietnamese law and treaties to which Vietnam is a contracting party.<sup>23</sup> Thus, Vietnamese law will apply if a violation to copyright is carried out within the territory of Vietnam or outside

---

<sup>19</sup> LAW ON INTELLECTUAL PROPERTY, art. 28.16.

<sup>20</sup> LAW ON INTELLECTUAL PROPERTY, art. 20.

<sup>21</sup> LAW ON INTELLECTUAL PROPERTY, art. 20.3.

<sup>22</sup> LAW ON INTELLECTUAL PROPERTY, art. 27.2.b.

<sup>23</sup> LAW ON INTELLECTUAL PROPERTY, art. 2.

Vietnam, by a Vietnamese or by other nationalities, against a Vietnamese copyright owner under the international treaties to which Vietnam is a party.

#### **D. Limitations of Copyright**

In fact, the author's privileges for works are not absolute, because such privileges need to respect other fundamental interests. The Vietnamese law provides for some exceptions<sup>24</sup> to permit the harmonization of the requirements of copyright protection with other requirements for the common good. Some limitations are explained by the need to protect the basic rights and interests of individuals (press freedom and freedom of speech), such as citation, analysis, and comments. Some other restrictions are explained on the basis of public interest, such as for teaching purposes, research, or propaganda activities.

It should be added that these restrictions are strictly regulated and applied. In other words, these restrictions can only be applied when it complies with the "Three-step Test" principle. This is the standard set out in Article 9-2 of the Berne Convention, Article 13 of the TRIPS Agreement, and Article 10 of the WIPO Copyright Treaty. Clause number 2 in Articles 25 and 26 of the Vietnamese Law on Intellectual Property are prescribed in accordance with those international treaties: "[o]rganizations and individuals using works defined in Clause 1 of this Article must not affect normal exploitation of works, without prejudice to the rights of authors or copyright holders; must disclose information on the name of the author and the origin of the work." Thanks to the "Three-step Test" principle, the user may use the work for legal purposes provided by law, while the author can effectively protect his or her rights.

##### **1. Cases of Usage Without Permission and Without Payment**

There are cases where people can have the right to use a work without asking permission from copyright holders or making payment<sup>25</sup>—one is as a copy for personal purposes or scientific research and teaching activities; as reasonable citation for comments, newspapers, or for teaching purposes without misleading author's opinion; as copies for archival purposes in the library; as a performance of works in cultural activities without commercial purpose; as a record or photograph of live performances for news coverage or for teaching purposes; as a transfer of the work to braille or other language for the visually impaired; and as an import of copies of works for personal use.

---

<sup>24</sup> LAW ON INTELLECTUAL PROPERTY, arts. 25 & 26.

<sup>25</sup> LAW ON INTELLECTUAL PROPERTY, art. 25.

Thus, according to this Article, the copy for personal use can only escape the “net of copyright” if only one copy is made and used for the purposes of scientific research and teaching. This means that the user does not need the permission of the copyright owner nor make payment to him or her. This is an absolute exception. It also means that it is not legal if the users make copies for their studies, because this activity can harm the property rights of the copyright holder. Theoretically, this provision is in line with the “Three-Step Test” principle set forth in Article 9-2 of the Berne Convention, and stated international treaties to which Vietnam is a party. In other words, if a personal copy is used for purposes other than for scientific research and teaching without the permission of the copyright owner, it is considered to be a copyright infringement.

Article 25 of the Law on Intellectual Property of Vietnam also applies to digital copies. This means that in order to be considered as an exception to copyright, it must be a digital copy of a personal nature for the purposes of scientific research and teaching. Thus, it is considered illegal for a computer user to download work from the Internet to his or her computer memory for other purposes that are not intended for research or teaching, without the permission of the copyright owner.

However, in practice, it is not possible to completely prevent the use of personal copies for purposes other than scientific research and teaching. Still, it is important for Vietnam to recognize them as an absolute exception to copyright for personal use, not limited to the purposes of teaching and scientific research. In order to balance the conflict of interest between the copyright holder and the users, as well as to be in line with the “Three-step Test” principle, Vietnam must establish a mechanism of remuneration for copyright holders for produced personal copies. It can be included in the sale price of recording and copying devices such as computer disks, writable CDs and DVDs, photocopy machines, hard drive integrated players, and CD and DVD players. The calculation of payment can be based on the working capacity of the devices.

Libraries (as well as data centers) enjoy a number of privileges including the ability to make copies. Paragraph 1.e of Article 25 of the Law on Intellectual Property of Vietnam stipulates that libraries have the right to reproduce works for archival purposes. For the number of copies, Clause 2 of Article 25 of Decree No. 100/2006/ND-CP states that libraries may “not make more than one copy” and “the library may not copy and distribute copies of works to the public, including digital copies.”

Similar to the right to reproduce a work, Vietnamese law recognizes an exception to the right to perform the work for the benefit of the individual. This is the case of

performance at home. A reason for this exception is the inability to control the performance of the work within the family. It should be added that the exception to the right to perform works is not found in Article 25 or Article 26 of the Law on Intellectual Property, but in Article 20. In Article 20, when talking about the nature of the right of performance, the law uses the term “public” (“right to communicate the work to the public”). It means that if the work is performed at home, it does not need the acceptance of the copyright holder. This is recognized in Decree No. 100/2006/ND-CP: “the performance of a work before the public includes the performance of the work at any place, except at home.”

## 2. Cases of Using a Work Without Permission but Paying Remuneration

Another form of exception to property rights is the use of works without obtaining the permission of the copyright owner, but having to pay royalties.

As discussed, copyright owners should make the work available to the public. However, in order to facilitate the development of culture, education and communication as well as to balance conflicts of interest between authors and communities, the Vietnam Law on Intellectual Property has provided in Article 26 the use of work by paying remuneration, even without permission from the copyright holder. This exception is only for broadcasting organizations. According to this provision, when a work has been published, the broadcasting organization has the right to use it for broadcasting without the consent of the copyright owner, but must pay the remuneration.

The amount of remuneration shall be agreed upon by the broadcasting organization and the copyright owner. In the absence of such agreement, it shall be governed by the government’s regulations or the court’s decision, if it is for commercial purposes. In cases where the broadcasting organizations use the published works for broadcasting without sponsorship or advertising in any form, the remuneration shall be paid according to the government’s regulations.

In line with the principle of "Three-step Test" provided for in international treaties to which Vietnam is a contracting party, Article 26 of the Law on Intellectual Property also provides that broadcasting organizations should not affect the normal exploitation of the work, nor cause prejudice to the rights of the author or the copyright owner.



However, it is noted that this exception shall not be applied to cinematographic works. It is because this kind of work is too expensive—there has to be agreement with the right holder before using the work.<sup>26</sup>

## E. Protection Measures to Violation of Copyright

### 1. Civil Measures

Article 202 of the Intellectual Property Law of Vietnam provides for five civil measures to deal with infringements of intellectual property rights in general, as well as of copyright in particular: termination of the infringement; apology and public correction; forced performance of civil obligations; damages; and forced destruction or forced distribution or use for non-commercial purposes.

**Termination of infringing acts.** The copyright owner has the right to request the violator to terminate the act of infringement.

**Apology and public correction.** Vietnam's intellectual property law recognizes civil measures whereby the offending person expresses his or her apology through public media, at the request of the copyright owner. In addition, the offender must also make a public correction of false information that affects the reputation and dignity of the author. Accordingly, the public media includes newspapers online or in paper, television, radio, and social networks. These measures specifically apply to an infringement of the author's moral rights, which is judged to be detrimental to the author's reputation.

**Forcible performance of civil obligations.** Where an act of using a protected work is committed without the consent of the copyright owner, the owner of copyright may request the infringer to fulfill the obligation to pay a sum of money for the use of that work from the time of use.

**Damages.** This measure is stipulated in Vietnamese law, in line with Article 45 of the TRIPS Agreement. Under the provisions of Vietnamese law, compensation for damage must meet the following conditions: violating act, damage, and the causal relationship between the violating act and damage.<sup>27</sup> Accordingly, the offender who commits intentional or unintentional acts (other than force majeure) prescribed in Article 28 of the Law on Intellectual Property—causing damage to the copyright owner—shall be obliged to pay compensation. Therefore, in order to claim damages, the party incurring damages must prove that the actual loss occurred and, afterwards,

---

<sup>26</sup> LAW ON INTELLECTUAL PROPERTY, art. 26.3.

<sup>27</sup> CIVIL CODE OF 2015, art. 584.

determine the damage in accordance with the provisions of Articles 204 and 205 of the Law on Intellectual Property.

However, it can be seen that identifying physical damage is much easier than identifying mental damage. Accordingly, the benefits are lost when property rights infringed can be determined in a variety of ways; for example, based on signed contracts of transfer or use of copyright. And for damage to personal rights, similar to French law, Vietnamese judges have full competence to determine damages based on reasonable information. Furthermore, it should be added that in accordance with Article 45(2) of the TRIPS Agreement, Vietnamese law also provides that the offender is obliged to pay the copyright owner the costs for hiring lawyers in the litigation.<sup>28</sup>

**Forced destruction or forced distribution or use for non-commercial purposes.** This measure is applied to goods, raw materials, materials, and means used primarily for the production and trading of infringing goods. However, when applying this measure, we must ensure that it does not affect the ability to exploit the rights of copyright holders.

## 2. Administrative Measures

### a. *Violation Acts*

As stated, the author is entitled to personal and property rights. As a consequence, infringements of copyright through the use of a work without the consent of the author or the owner of the copyright shall be prohibited by law. Article 211 of the Law on Intellectual Property of Vietnam provides a list of infringements of intellectual property rights that may be subjected to administrative penalties. These are acts that “infringe upon intellectual property rights causing damage to authors, owners, consumers or the society[.]”<sup>29</sup> However, it may be noted that this provision is still general, because it shall be detailed by the government’s regulations. Accordingly, the government issued Decree No. 131/2013/ND-CP dated October 16, 2013 on sanctioning of administrative violations of copyright and related rights, which detailed the acts violating copyright.

### b. *Administrative Sanctions*

For administrative sanctions of infringements of copyright, Article 214 of the Law on Intellectual Property of Vietnam provides for two main forms of sanctions—warnings and fines. However, although the Intellectual Property Law recognizes the

---

<sup>28</sup> LAW ON INTELLECTUAL PROPERTY, art. 205.3.

<sup>29</sup> LAW ON INTELLECTUAL PROPERTY, art. 211.1.

existence of a warning, this measure is not used in practice. In the Decree of the Vietnamese government, only the fine is mentioned. And the fines are limited to VND 500,000,000, depending on the nature and seriousness of the violation.<sup>30</sup>

In addition to the main sanctions, additional sanctions and remedies are also provided for in Article 214 of the Law on Intellectual Property of Vietnam.

### c. *Competence Authorities*

According to current Vietnamese law, many authorities are given competence to sanction administrative violations, including specialized inspection, chairmen of people's committees at all levels, people's police, border guard maritime, customs, tax authorities, and market management agencies.<sup>31</sup>

In practice, as there are many authorities in one field, the overlapping responsibility can cause some difficulties in copyright protection. There is no one person or entity who is mainly responsible to detect violations and protect copyright.

## 3. Criminal Measures

In Vietnam, criminal measures against copyright infringements are governed by Article 225 of the Penal Code (2015), amended in 2017. The severity of penalties for copyright infringement shows the dangers of these behaviors in the current economic and cultural development of Vietnam, in accordance with international law. When copyright is not well protected, intellectual creativity will be less. It can affect socio-economic development and foreign investment in Vietnam.

However, there are only certain acts of violations sanctioned by criminal measures, such as copying works, phonograms and video recordings, and distributing copies of works, copies of phonograms, and copies of video recordings to the public. This means that for other kinds of acts of violations, other measures and not criminal measures will be applied.

According to this Penal Code, subjects of criminal measures are not only individuals, but also commercial moral persons. Depending on the amount of money they earn from the violation of copyright or damages made to the right holder, the violator can be subject to criminal sanctions ranging from a fine of 50 million to 3 billion Vietnamese dong, imprisonment of up to 5 years, and prohibition of business of up to 5 years.

---

<sup>30</sup> Decree 131/2013/ND-CP.

<sup>31</sup> *Id.*

## REFERENCES

- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf)
- Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), <http://www.wipo.int/treaties/en/ip/berne/>
- Colombet C., *Grands principes du droit d'auteur et des droits voisins dans le monde*, Paris, Litec, 1990
- Desbois H., *Le droit d'auteur en France*, Paris, Dalloz, 3<sup>rd</sup> edition, 1978
- Lucas A. and Lucas H.-J., *Traité de la propriété littéraire et artistiques*, Paris, Litec, 3<sup>rd</sup> edition, 2006
- Nguyen Thi Hong Nhung, *Copyright in cyberspace*, Ho Chi Minh City, Publishing house of National University of Ho Chi Minh City, 2015
- Steward S.-M., *International copyright and neighbouring rights*, London, Butterworths, 2<sup>nd</sup> edition, 1989
- Vietnam National Assembly, Civil Code of 2015, <http://www.wipo.int/edocs/lexdocs/laws/en/vn/vn079en.pdf>
- Vietnam National Assembly, Law on intellectual property of 2005 revised in 2009 and in 2019, [http://www.noip.gov.vn/en\\_US/web/english/legal-documents](http://www.noip.gov.vn/en_US/web/english/legal-documents)
- Vietnam National Assembly, Law on intellectual property of 2005, [http://www.noip.gov.vn/noip/resource.nsf/vwResourceList/6A7273451828D79C472576720020482D/\\$FILE/Intelletual%20Property%20Law%20of%20Viet%20Nam%202005](http://www.noip.gov.vn/noip/resource.nsf/vwResourceList/6A7273451828D79C472576720020482D/$FILE/Intelletual%20Property%20Law%20of%20Viet%20Nam%202005).
- Vietnam National Assembly, Penal Code of 2015, <http://www.wipo.int/wipolex/en/details.jsp?id=17225>
- WIPO Copyright Treaty, <http://www.wipo.int/treaties/en/ip/wct/>