

THE ISSUE OF PROTECTING INTELLECTUAL PROPERTY RIGHTS UNDER FREE TRADE AGREEMENTS FROM THE CRIMINAL PERSPECTIVE AND THE COMPATIBILITY OF VIETNAM'S CRIMINAL LAW

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ABSTRACT:

This article presents an overview on regulations of protecting intellectual property rights under free trade agreements that Vietnam has joined from the perspective of criminal laws. This article also compares these provisions with the internal laws to assess Vietnam's compatibility to international commitments; thereby suggesting the direction of completing the provisions of Vietnam's criminal law in accordance with the requirements of free trade agreements.

Keywords: Intellectual property, free trade agreements, criminal law, crime, compatibility.

1. Introduction

Intellectual property is increasingly recognized worldwide as an important commercial asset, a driving force for technological innovation and progress, playing a significant role in the sustainable development of countries.¹ Acutely aware of the meaning and importance of such intellectual property (IP), Vietnam and other countries around the world are making more and more efforts in encouraging creative activities and protecting the results of such activities. Building and perfecting the legal system in general and the criminal law in particular on intellectual property rights protection is an effective solution to this issue.

On the other hand, the protection of intellectual property rights by criminal measures is not only a legal issue prescribed in national law but also a regulated area of international law. The international community is paying more attention to the protection of intellectual property rights by criminal measures. The clearest evidence is the provisions on crimes and criminal procedures in a number of international treaties on intellectual property and the fact that these

provisions are increasingly set out in Free Trade Agreements.

It can be said that in the context of the current international economic integration, the proliferation of Free Trade Agreements is opening up the countries' opportunities for economic development, raising their position in foreign relations but also bringing in many challenges. One of the challenges for Vietnam (as well as other parties) in joining FTAs is the issue of perfecting the legal system to be compatible with the provisions of the FTAs. For the protection of intellectual property rights by criminal measures, this requires a review and evaluation of the current provisions of Vietnam's criminal law and amendments its to harmonize FTAs' requirements.

2. Overview

2.1. Protection of intellectual property rights from the perspective of criminal law in the free trade agreements (FTAs) Vietnam has signed

Traditionally, FTA is an economic cooperation agreement signed between at least two countries with the aim of reducing trade barriers, specifically, tariffs, import quota (and other non-tariff barriers),

simultaneously, promoting trade in goods and services among these countries.

In addition to traditional FTAs, there exist more and more comprehensive new generation FTAs which go beyond the scope of the liberalization of trade in goods. Compared to the former, the latter governs more deeply the inherent cooperation essence of the traditional FTAs; at the same time, may contain additional contents such as: investment, competition, public procurement, e-commerce, the encouragement of developing small and medium enterprises, technical assistance to developing countries,... and even includes contents that are considered "non-commercial" such as labor, environment, commitment to sustainable development and governance...²

There are many specific forms of FTAs such as trade area agreements, economic partnership agreements, economic alliances or free trade agreements... however, not all of them have agreements on IP in general as well as protecting IP rights in particular which are usually found in certain FTAs in the form of economic partnership agreements, free trade agreements such as the Vietnam and Eurasian Economic Union (EAEU) Free Trade Agreement, the European Union and Vietnam Free Trade Agreement (EVFTA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)...³ Requirements towards protection of IP rights in general and protecting IP rights by criminal measures in particular in FTAs are also different. Nevertheless, most are based on the international treaties on intellectual property rights in two aspects of industrial property rights and copyright and related rights,⁴ for example: Clause 1, Article 12.43. Sub-Section I. Section C Chapter 12 EVFTA provides for the general obligation to enforce the intellectual property rights as follows: *"The Parties affirm their rights and obligations under the TRIPS Agreement, in particular Part III thereof. Each Party shall provide for the complementary measures, procedures and remedies under this Section necessary to ensure the enforcement of intellectual property rights."*

It can be said that the TRIPS Agreement is one of the few international treaties on intellectual property (to which Vietnam is a party) that clearly and directly stipulates the content of protecting intellectual property rights by criminal measures as follows: *"Members shall provide for criminal procedures and*

penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale." (Article 61).

Studying the provision of Article 61, it illustrates that TRIPS imposes mandatory requirements on member states to prescribe at least acts of wilful trademark counterfeiting or copyright piracy on a commercial scale as crimes and handle those acts by criminal measures.

Furthermore, TRIPS also provides open rules for the Parties to apply criminal measures in other cases of infringement of intellectual property rights, especially cases of intentional infringement and infringement on a commercial scale. Therefore, the Parties may stipulate additional acts of infringement of IP rights as crimes and handle them by criminal measures. This content indicates the flexibility in which each Party can take the initiative to formulate criminal law provisions more strictly than the minimum requirements of TRIPS.

In addition to invoking or reaffirming the Parties' obligations to comply with the TRIPS Agreement, certain FTAs mention additional requirements related to the protection of intellectual property rights by civil and administrative measures without requiring the criminalization of the above-mentioned acts and handling by criminal measures.⁵

Among the FTAs that Vietnam has negotiated and signed, it can be said that the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is the FTA including the most comprehensive and profound provisions on protecting intellectual property rights in terms of international legal practice, concurrently providing specific requirements for criminalizing violations in this area. Criminal procedures and penalties are prescribed in Articles 18.77 and 18.78 Chapter 18 CPTPP with the following basic contents:

Firstly, each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale⁶ (paragraph 1, Article 18.77). This content is similar to the content specified in Article 61 of the TRIPS Agreement.

Secondly, each Party shall treat wilful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties (paragraph 2, Article 18.77). For the purpose of clarifying the text in the paragraph 2, footnote 128 states the recommendation: The Parties understand that a Party may comply with its obligation under this paragraph by providing that distribution or sale of counterfeit trademark goods or pirated copyright goods on a commercial scale is an unlawful activity subject to criminal penalties.

Thirdly, each Party shall provide for criminal procedures and penalties to be applied in cases of wilful importation and domestic use, in the course of trade and on a commercial scale, of a label or packaging to which a trademark has been applied without authorisation that is identical to, or cannot be distinguished from, a trademark registered in its territory; and that is intended to be used in the course of trade on goods or in relation to services that are identical to goods or services for which that trademark is registered (paragraph 3, Article 18.77 CPTPP).

Footnotes 129 and 130 of the Agreement further elaborates that: "A Party may comply with its obligation relating to importation of labels or packaging through its measures concerning distribution". "A Party may comply with its obligations under this paragraph by providing for criminal procedures and penalties to be applied to attempts to commit a trademark offence".

Thus, according to paragraphs 2 and 3, Article 18.77, acts of intentionally importing goods bearing counterfeit trademarks or acts of intentionally importing and using domestically illegal labels and packages that are identical or indistinguishable from domestically registered trademarks for the purpose of use in the trade in goods and services identical to the registered goods and services must be handled by criminal measures.

Fourthly, it is necessary to address the unauthorised copying of a cinematographic work from a performance in a movie theatre that causes

significant harm to a right holder in the market for that work. Each Party shall adopt or maintain measures, which shall at a minimum include, appropriate criminal procedures and penalties for such offences (paragraph 4, Article 18.77).

Fifthly, with respect to the offences for which Article 18.77 requires a Party to provide for criminal procedures and penalties, each Party shall ensure that criminal liability for aiding and abetting is available under its law (paragraph 5, Article 18.77).

Sixthly, stipulating the directions for handling and criminal procedures (paragraph 6, Article 18.77), specifically:

- Penalties that include sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future acts of infringement, consistent with the level of penalties applied for crimes of a corresponding gravity.

- Its judicial authorities have the authority, in determining penalties, to account for the seriousness of the circumstances, which may include circumstances that involve threats to, or effects on, health or safety.

- Its competent authorities may act upon their own initiative to initiate legal action without the need for a formal complaint by a third person or right holder.⁷

In addition, the points (c), (d), (e) and (f) paragraph 6, Article 18.77 also provide for measures to seize, confiscate and destroy infringing goods; access to physical evidences and proof to carry out civil procedures for criminal acts.

Finally, unauthorised and wilful acts of infringing on trade secrets in one of the following forms: (i) access to a trade secret held in a computer system; (ii) misappropriation or fraudulent disclosure of a trade secret, including by means of a computer system (see paragraph 2 Article 18.78).

Paragraph 3 Article 18.78 also suggests the Member States to limit the application of criminal sanctions to infringement acts specified in paragraph 2 upon accompanying by one of the following signs: for the purposes of commercial advantage or financial gain; relating to a product or service in national or international commerce; intended to injure the owner of such trade secret; acts directed by, or for the benefit of or in association with a foreign economic entity; acts that are detrimental to a Party's economic interests, international relations, or national defence or national security.

The above requirements of the CPTPP clearly

show the tendency of increasingly broader and more comprehensive agreement in FTAs related to the protection of IP rights from a criminal perspective. This does not mean that the Parties have to expand as much as possible the scope of handling IP infringement by criminal measures. It is not difficult to notice, besides the general requirements, the CPTPP also often has recommendations for the Parties to be able to comply with the required obligations by setting out specific limits. This limitation may relate to certain objects of IP rights (but not all) or other forms of infringement, consequences of damages, purposes of acts... The reason for this provision comes from the purpose of negotiating most FTAs that is firstly to reduce trade barriers and enhance economic development for countries as well as regions and the globe. Therefore, the protection of IP rights, regardless of measures, procedures and sanctions, must be balanced with the above purposes, avoiding creating barriers to legal trade.

In general, if in the past, the issue of IP protection was often viewed only from civil and administrative perspectives, the criminal aspect with the most severe handling measures has gradually been paid more attention.

2.2. Vietnamese criminal law in meeting the requirements of FTAs on the protection of IP rights

Vietnam has largely codified international commitments (of which Vietnam is a member), creating a national legal basis for the implementation of these commitments. This policy has been stated in the Resolution of the 4th Central Party Congress XII on the effective implementation of the international economic integration process in the context of Vietnam's participation in free trade agreements, that is: *"Urgently review, supplement and complete laws directly related to international economic integration, in accordance with the Constitution, fully and properly comply with the market economy rules and international economic integration commitments; internally legislate as scheduled in accordance with the international treaties to which Vietnam is a member, first of all the laws on trade, investment, intellectual property, technology transfer and labor - trade union ... in order to take advantage of opportunities, advantages and overcome difficulties and challenges of participating and implementing new-generation free trade agreements."*

Regarding the protection of intellectual property rights by criminal measures, Vietnamese criminal law

also has regulations corresponding to the requirements set out in FTAs (specifically CPTPP) to a certain extent, however, there are still incompatible contents, which need to be improved:

2.2.1. Compatible contents

Firstly, the current Vietnam Penal Code (The Penal Code 2015, amended and supplemented in 2017 hereinafter referred to as the PC 2015) provides for crimes of infringing upon IP rights, namely:

- Crimes of manufacturing and trading counterfeit goods. The objective acts described in these crimes include acts of manufacturing and trading counterfeit goods⁸ that satisfy the condition of having "bad" personal identification or one of the quantitative conditions, that is, the value of goods or damage to human health and life or gain of illicit profits as prescribed in Articles 192, 193, 194, 195 of the PC 2015.

- Crime of infringing upon copyright and related rights (Article 225 of the PC 2015) and Crime of infringing upon industrial property rights (Article 226 of the PC 2015). The objective acts of these crimes include the followings:

- + Unauthorized acts of intentionally copying or distributing to the public copies of works, copies of phonograms, copies of video records without the permission of copyright and related rights owners;

- + Acts of intentionally infringing upon industrial property rights to trademarks or geographical indications currently protected in Vietnam, whose objects are goods of counterfeit trademarks or geographical indications;

These acts only constitute crimes upon satisfying one of the following signs:

- + Infringement on a commercial scale; or
- + Quantitative gain: illicit gain or damage to the owners of copyright or related rights, trademark or geographical indications or value of infringing goods to a certain extent (see Article 225, 226 of the PC 2015).

Secondly, the PC 2015 provides for complicity in Article 17.

Complicity is an additional regulation of penal liability in which two or more people deliberately commit the same crime. This is the basis for prosecuting accomplices for the acts of organizing, inciting and helping others to commit crimes of infringing upon industrial property rights, copyright and related rights.

Finally, the Penal Code provides specific types and levels of penalties to be applied, showing a clear differentiation perspective in handling crimes.

For example: Crimes of manufacturing and trading in counterfeit goods are prescribed in 4 different Articles.¹⁰ Crimes are distinguished mainly by the object of infringing goods. Different types of counterfeit goods result in different nature and degree of danger of the criminal offences. Counterfeit goods which are food, food additives, medicines for treatment or prevention of diseases; or animal feeds, fertilizers, veterinary medicines, pesticides, plant varieties and animal breeds not only cause economic losses but also have the possibility of directly damaging human life, health, property and the growth of plants and animals. Therefore, different groups of counterfeit goods are regulated by different offenses and corresponding penalties. For example, a person who manufactures counterfeit goods (Article 192) may be subject to a maximum penalty of 15 years in prison (Clause 3); those who manufacture counterfeit food and food additives (Article 193) may be subject to a maximum penalty of life imprisonment (Clause 4); those who manufacture counterfeit medicines (Article 194) may be subject to a maximum penalty of death penalty (Clause 4).

In addition, the crimes of manufacturing and trading counterfeit goods, crimes of infringing upon industrial property rights, crimes of infringing upon copyright and related rights are all crimes that apply criminal liability of commercial legal entities. This is a key new point of the PC 2015 compared to the previous provisions. The provision of commercial legal entities' criminal liability is an important legal basis to strictly and thoroughly handle all violating subjects.

Thereby, it can be said that Vietnam's criminal law has met many of the requirements of the CPTPP related to the criminal aspect of infringement of intellectual property rights.

2.2.2. Incompatible contents

Firstly, certain offences have not yet been stipulated as crimes in the PC 2015, specifically as follows:

Acts of intentionally importing and using domestically, in commercial activities and on a commercial scale, the label or packaging on which there is a trademark affixed without permission, identical or indistinguishable from a registered trademark in the Party's territory; that are intended for

commercial use in goods or in connection with a service that is identical to goods and service of a registered trademark (see paragraph 3 of Article 18.77 CPTPP).

The current Penal Code of Vietnam only stipulates criminal liability for infringement of industrial property rights to trademarks or geographical indications protected in Vietnam, whose objects are counterfeit trademark goods or counterfeit geographical indication goods on commercial scale or gaining illicit profits of VND 100,000,000 or more; or causing harm to the owner of the trademark or geographical indications assessed at VND 200,000,000 or more; or the value of the counterfeit goods assessed from VND 200,000,000 and above. In other words, the infringement of industrial property rights to a trademark must be attached to the specific infringing goods.

As such, the acts of importing labels or packages bearing trademarks that are identical to those currently protected in Vietnam but not yet associated with specific goods or services (including for the purpose of using these labels or packages on goods or services identical to the goods or services of the registered trademark in commercial activities) shall not be subject to criminal liability for infringing upon industrial property rights (Article 226 of the PC 2015). On the other hand, the criminal prosecution of this offence at the stage of preparation for crimes of infringement of industrial property rights as recommended in footnote 130 Chapter 18 CPTPP is also not applicable. Since Article 14 of the PC 2015 on preparation for crimes does not stipulate criminal liability for infringement of industrial property rights at this stage.

In addition to the provision of Article 226, the PC 2015 has not yet provided for any independent crimes whose signs of determining crimes satisfy this offence.

- Unauthorized acts of intentionally infringing trade secrets in one of the following forms: (i) access to a trade secret held in a computer system; (ii) misappropriation or fraudulent disclosure of a trade secret (see paragraph 2, Article 18.78). Most national or international laws define trade secrets as objects of protection of industrial property rights in addition to trademarks, geographical indications, etc. The FTAs that Vietnam has recently signed have begun to require criminalization of the acts of intentionally infringing trade secrets (possibly accompanied by

certain recommendations to the Party about limiting this scope to specific cases). However, to any extent, Vietnam's criminal law has not yet stipulated criminal liability for this offence.

Secondly, there are still legal signs determining a crime that have not yet been understood in a manner corresponding to the CPTPP's provisions.

Crime of infringement of copyright and related rights and crime of infringement of industrial property rights specified in the PC 2015 both require infringement on "commercial scale" as a sign of indictment. Earlier, the term "commercial scale" had been mentioned in Joint Circular No. 01/2008/TTLT-TANDTC - VKSNDTC - BCA - BTP dated February 29, 2008 of the Supreme People's Court, the Supreme People's Procurator, the Ministry of Public Security and the Ministry of Justice guiding the prosecution of infringements of intellectual property rights (hereinafter referred to as Circular No. 01/2008) in which explains the signs of "causing serious consequences", "causing very serious consequences" and "causing particularly serious consequences" in the crime of infringement of copyright and related rights.¹¹ However, the Circular does not specifically explain the concept of "commercial scale".

Identifying the sign of "commercial scale" in crimes of intellectual property infringement is of great importance in prosecution. The practice of applying international law shows a case in which the United States filed an application to the WTO's DSB regarding the issue of criminal justice protection mechanism towards IP rights in China in April 2007. This is the first dispute accepted by the DSB arising from the issue of protecting intellectual property rights under the mechanism of criminal law. The core dispute of this case is how to interpret a user's "commercial scale" under Article 61 of the TRIPS Agreement as a "criminal threshold".¹² In the outcome of the case, the Council concludes, "A "commercial scale" is the magnitude or extent of typical or usual commercial activity for a given product in a given market".¹³ Commercial scale varies not only by market but also by products in the same market.¹⁴ Accordingly, it can be seen that "commercial scale" is an open and flexible term according to TRIPS.¹⁵

To avoid the occurrence of similar cases, the concept of "commercial scale" has been specified in paragraph 1 of Article 18.77 CPTPP, to include at least:

- Acts carried out for commercial purpose or financial gain (a); and

- Significant acts that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace (b). Footnotes 126 and 127 further elaborates this content as follows: "126. The Parties understand that a Party may comply with subparagraph (b) by addressing such significant acts under its criminal procedures and penalties for non-authorized uses of protected works, performances and phonograms in its law."; "127. A Party may provide that the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace."

This provision of the CPTPP shows that the purpose of obtaining a commercial advantage or financial gain; significant harm to the interests of the rights holder in relation to the marketplace (which can be determined by the volume and value of any infringing items) are the grounds for determining the "commercial scale" of the infringement. Meanwhile, the provisions of Article 225 and Article 226 of the PC 2015 show that the sign of infringement on a commercial scale is prescribed as independent sign besides the quantitative signs such as "earning profits", "causing harm to the rights owner", "the value of infringing goods". This shows the incompatibility between the two regulations in the understanding of "commercial scale".

Finally, the provisions on procedures for prosecuting a criminal case are incompatible.

According to sub-paragraph g, paragraph 6 of Article 18.77, the Party's competent authorities may act upon their own initiative to initiate legal action without the need for a formal complaint by a third person or right holder. Footnote 135 further provides recommendations: "With regard to copyright and related rights piracy provided for under paragraph 1, a Party may limit application of this subparagraph to the cases in which there is an impact on the right holder's ability to exploit the work, performance or phonogram in the market." From which, it can be understood that the Parties are allowed to limit the scope of criminal liability for crimes specified in paragraph 1 of Article 18.77 on the condition that the act has caused damage to the possibility of exploitation of works, performances, sound recordings of the right holder in the market.

It should also be agreed that when this limitation has been codified in the penal code, criminal proceedings shall be applied to all those offenses. In other words, the content of footnote 135 does not limit the circumstances of prosecuting a criminal case by the procedures conducting authorities' initiation.

With reference to the provisions of Article 155 of the Criminal Procedure Code 2015 (CrPC), cases of prosecution at the request of the victim include the crime specified in Clause 1 Article 226 of the PC 2015 (basic component constituting the crime of infringing industrial property rights). Accordingly, the prosecution of the offense provided in Clause 1, Article 226 of the PC 2015 procedurally requires the victim's request for prosecution or that request of the victim's representative in case the victim is a person under 18 years old, a mentally or physically disadvantaged person or dead person.

Therefore, the provisions of the 2015 CrPC have limited cases of prosecution by the competent authorities's initiation than those specified at subparagraph g, paragraph 6, Article 18.77 CPTPP.

2.2.3. Orientations to improve Vietnam's criminal law

A comparative study of the provisions of the CPTPP and the above-mentioned current regulations of the Vietnam's criminal law shows the incompatibility between these two legal mechanisms. Vietnam has a time limit of three years from the date of entry into force of the CPTPP to compatibilize the above-mentioned contents to the CPTPP (see Article 18.83, Section K, Chapter 18 of the CPTPP). Therefore, in order to meet this requirement, the following issues need to be amended and supplemented into the system of Vietnam's criminal law and criminal procedure law:

Firstly, supplementing the provisions of the following acts as crimes in the Penal Code: wilful importation and domestic use, in the course of trade and on a commercial scale, of a label or packaging, to which a trademark has been applied without authorisation that is identical to, or cannot be

distinguished from, a trademark registered in Vietnam; unauthorized and wilful acts of infringing trade secrets. The provision of penal liabilities for such acts may be limited according to the recommendations of the CPTPP.

Secondly, there should be provisions to clarify the concept of "commercial scale" as a criminal threshold upon dealing with IP crimes.

Finally, the provision of prosecution at the victim's request for offenses prescribed in Clause 1 Article 226 of the PC 2015 should be removed from Article 155 of the 2015 CrPC.

3. Conclusion

Under the impact of the global integration trend, free trade agreements are entering a period of full bloom and bringing many opportunities as well as requirements and challenges for countries, in which Vietnam is not an exception. One of the basic requirements of FTAs is that upon participating, the Party shall build a national legal corridor in accordance with the "common rules". And the Parties' codification of these requirements is indispensable for participating in the "international playing field" in all agreed matters, including the protection of intellectual property rights by criminal means. Up to this point, the CPTPP is an FTA providing the most strict and specific requirements related to the protection of IP rights by criminal means.

The results of the review of Vietnam's current criminal law provisions show that the points of inconsistency with CPTPP regulations are focused on two issues: Firstly, some IPR infringements have not been Penal Code of Vietnam regulations is a crime; Secondly, there are still legal signs determining a crime that have not yet been understood in a manner corresponding to the CPTPP provisions. These are all issues that need to be revised early in the process of Vietnam implementing the member country' legal obligations for the CPTPP in particular and the FTAs involved in general ■

ENDNOTES:

¹Shahid Alikhan. (2000). Socio-Economic Benefits of Intellectual Property Protection in Developing Countries. World Intellectual Property Organization, 2

²Nguyen Thanh Tam (2016). Overview of new generation FTAs. [online] Available at: <http://giaoducvaxahoi.vn/tin-phap-luat/t-ng-quan-v-cac-fla-th-h-m-i.html> [Accessed 15 February 2020].

³As of June 2020, Vietnam has participated in signing, implementing and negotiating 16 FTAs, of which 12 have entered into force (7/10 was implemented as an ASEAN member; 4 FTAs signed bilaterally with Chile, Japan, Korea and EEC and 01 multilateral signing of the Trans-Pacific Comprehensive Partnership Agreement (CPTPP); 01 signed FTA is a Free Trade Agreement between Vietnam and the EU (EVFTA), approved by the European Parliament and the European Council on February 12, 2020 and approved by the Vietnamese National Assembly on June 8, 2020, which shall take effect from August 1, 2020; 03 FTAs under negotiation include the Regional Comprehensive Economic Partnership (RCEP), the FTA with Israel and the FTA with the European Free Trade Area (EFTA).

⁴For example: Agreement on trade-related aspects of intellectual property rights (TRIPS) (15/4/1994); Paris Convention on the Protection of Industrial Property Rights (March 20, 1883); Berne Convention on the Protection of Art and Literature (September 9, 1886); International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (October 26, 1961 - Rome Convention); Convention on the Protection of Producers of phonograms for unauthorized copies of their phonograms (October 29, 1971 - Geneva Convention); Madrid Agreement on Trademark International Registration (April 14, 1891) and the Madrid Protocol on Trademark International Registration (June 27, 1989); Patent Cooperation Treaty (June 19, 1970); The WIPO Treaty on Copyright and the WIPO Treaty on Performances and Sound Recording, adopted in Geneva on December 20, 1996...

⁵For example: See the provisions of Subsection 2 - Civil Enforcement, Subsection 4 - Border Control Section C Chapter 12 EVFTA.

⁶See also footnotes 126, 127 Chapter 18 CPTPP.

⁷See also footnote 135 Chapter 18 CPTPP.

⁸The concept of "counterfeit goods" is not explained in the Penal Code but explained in the by-law document (see Decree No. 185/2013/ND-CP dated November 15, 2013 of the Government stipulating the sanctioning of administrative violations in activities of trading, manufacturing, trading counterfeit goods, banned goods and protecting the rights and interests of consumers and the Government's Decree No. 124/2015/ND-CP dated November 19, 2015 amending and supplementing certain articles of Decree No. 185/2013/ND-CP). However, the fact of prosecuting crimes of manufacturing and trading counterfeit goods shows that not all types of counterfeit goods are subject to criminal liability under Articles 192, 193, 194, 195 of the Penal Code but it requires the sign of counterfeit goods being inferior in their content (quality, utility ...) compared to the genuine goods (possibly accompanied by signs of being counterfeit in appearance such as bearing counterfeit trademark or geographical indications). This fact still has different opinions (see: Mai Thi Thanh Nhung (2020). Distinguish counterfeit goods in manufacturing and trading goods and fake goods on brands or geographic indications in crimes of industrial property rights. *Journal of science (Hanoi Open University)*, 67, 63-72).

⁹This sign means that the offender has been administratively sanctioned for one of the acts prescribed in one of the Articles 188, 189, 190, 191, 192, 193, 194, 195, 196 and 200 of the PC 2015 or has been convicted of one of these crimes, which has not been expunged.

¹⁰Crime of manufacturing and trading of counterfeit goods (Article 192); Crime of manufacturing and trading of counterfeit food or food additives (Article 193); Crime of manufacturing and trading of counterfeit medicines for treatment or prevention of diseases (Article 194); Crime of manufacturing and trading of counterfeit animal feeds, fertilizers, veterinary medicines, pesticides, plant varieties, animal breeds (Article 195).

¹¹See subsections 1.1, 1.2, 1.3, section 1, Circular No. 01/2008

¹²Xiaoyong (2009). Sino-US disputes over "criminal threshold" of intellectual property rights [online] Available at: https://www.researchgate.net/publication/248114626_Sino-US_disputes_over_criminal_threshold_of_intellectual_property_rights [Accessed 10 March 2020]

¹³World Trade Organization. (2009). China—Measures Affecting the Protection And Enforcement Of Intellectual Property Rights – Report of the Panel, WT/DS362/R, para.7.577

¹⁴World Trade Organization (2009). China—Measures Affecting the Protection And Enforcement Of Intellectual Property Rights – Report of the Panel, WT/DS362/R, para.7.606

¹⁵Danlu Huang. Intellectual Property Infringement on a 'Commercial Scale' in Light of the Ongoing Multilateral Agreement. [online] Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2990008 [Accessed 10 March 2020]

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**VẤN ĐỀ BẢO VỆ QUYỀN SỞ HỮU TRÍ TUỆ
DƯỚI GÓC ĐỘ HÌNH SỰ TRONG CÁC HIỆP ĐỊNH
THƯƠNG MẠI TỰ DO VÀ MỨC ĐỘ ĐÁP ỨNG
CỦA PHÁP LUẬT HÌNH SỰ VIỆT NAM**

● ThS. MAI THỊ THANH NHUNG

Khoa Pháp luật Hình sự, Trường Đại học Luật Hà Nội

TÓM TẮT:

Bài viết trình bày một cách cơ bản các quy định bảo vệ quyền sở hữu trí tuệ dưới góc độ luật hình sự trong các Hiệp định thương mại tự do mà Việt Nam đã ký kết; đối chiếu các quy định này với nội luật để đánh giá mức độ đáp ứng của Việt Nam trước các cam kết quốc tế; từ đó, có những gợi mở về hướng hoàn thiện quy định của pháp luật hình sự Việt Nam đảm bảo yêu cầu các FTA.

Từ khóa: Sở hữu trí tuệ, hiệp định thương mại tự do, pháp luật hình sự, tội phạm, tính tương thích.