

Chapter 8

Intellectual Property Rights

8-1. Importance of protecting IPRs in the motorcycle industry

Infringement on intellectual property rights (IPRs) seriously harms the Vietnamese society in its development process in the age of integration. Protection of IPRs is the international requirement in global business. Moreover, IPRs concerning motorcycles and motorcycle parts are central to the IPR question in Vietnam because motorcycles are highly popular and visible in every corner of the country³⁵. In this sense, IPRs cannot be established in Vietnam unless IPRs in the motorcycle industry are properly protected.

The protection of IPRs in the motorcycle industry benefits consumers, producers and society in general.

Consumers are protected from being cheated into purchasing products which are unsafe, defective or low quality. Because the proper functioning of the motorcycle has a direct bearing on road safety, unaware consumers face the risk of death or injury in addition to having to put up with low performance and the trouble of frequent repairs and replacements.

Producers benefit from the healthy growth and competitive business environment of the motorcycle industry in general, and from the elimination of illegal copies of their models and the increased value and prestige of genuine products in particular.

Vietnamese society as a whole will also benefit. Successful protection of IPRs in the motorcycle industry will prepare a favorable background for and have spillover effects on the development of other industries.

³⁵ Intellectual property rights consists of industrial property rights and copyrights. In the case of motorcycles, only the former is relevant.

Protection of IPRs in an industry as important as the motorcycle industry will encourage creativity instead of unauthorized copying as the main engine of industrial growth, establish an early track record of WTO consistency in IPRs (especially in comparison with China), and build a good image of Vietnam as a latecomer country which plays by international rules.

Some argue that cheap copies should be allowed in developing countries to make industrial products available to the poor at affordable prices. This view is wrong because the existence of fake products not only harms consumers, but also prevents the dynamic growth of honest and competitive producers. The country which adopts such a strategy cannot have long-term growth based on skills and knowledge, or improve the living standard of the general population. It is also highly questionable whether the poor is really better off and can save money by purchasing fake products, if low performance, short product life, and high repair cost are taken into account. The poor are forced to buy cheap copies mainly because they do not have cash at hand and cannot borrow from anyone. This is a cash constraint problem which should be solved through the provision of consumer loans instead of permitting illegal copies.

8-2. IPR infringements in the motorcycle industry

IPR infringements in motorcycles is rampant in Vietnam. It occurs in manufacturing of parts, assembly, transporting and sales. However, accurate data is difficult to obtain because of the nature of the problem. Reported arrests are just the tip of the iceberg, as violators are far more numerous than official raids. The entire scope of IPR violation can only be estimated.

Honda and Yamaha motorcycles are the most popular targets of fakes and counterfeits. According to NOIP data, there were about 300 infringement cases related to motorcycles in Vietnam in the first six months of 2006³⁶.

³⁶ This is the latest data available from NOIP. On July 1, 2006, NOIP was discharged of the responsibility to make decisions on infringement cases.

According to another source, it is estimated that about 560,000 fake Honda motorcycles were sold in the first ten months of 2006 but only 5,986 were seized by the authorities.

Industrial IPRs have three principal categories: (i) invention (patent); (ii) trademark; and (iii) industrial design³⁷.

Invention—anyone other than the invention patent holder or the licensee is prohibited from using a technical solution similar to the patent, even if details of concrete structure may be different from the product of the patent holder.

Trademark—anyone other than the trademark holder or the licensee is prohibited from using any mark that is sufficiently similar and therefore may be mistaken as the registered trademark.

Industrial design—anyone other than the design patent holder or the licensee is prohibited from using outer shape that is not significantly different from the patented design.

By far, the most common infringements in Vietnam's motorcycle industry are industrial design, especially regarding external plastic cover, in which manufacturers or traders of low quality motorcycles use fake decors similar to originals. It is very difficult for law enforcement authorities to find production lines of fake products since manufacturers and traders usually assemble copies in secret places instead of registered factories. Only naked motorcycles, without exterior plastics, are in their factories to avoid persecution. Another common way of violating companies is to produce visibly different models from the ones they register. Illegal copies can be sold with impunity since photo verification is not required at the point of sales. In addition, dishonest producers even blame enforcement authorities and complain to the public that their arrest was unlawful and caused only by inconsistent policies among concerned authorities such as Vietnam Register, MMDs, and police.

³⁷ The right to fight against unfair competition, in which the creator takes an action to stop other people from abusing the creator's achievement to compete unfairly, such as unauthorized use of unpatented design, is an IPR component which is also recognized internationally. However, this right is not stipulated in the current intellectual property law in Vietnam, and therefore it is not included in this master plan.

Patent infringements in Vietnam mainly occur in the unauthorized use of clutch release mechanism and frame structure.

Trademark infringements are common in sales rather than in manufacturing. Violating shops display signboards or decoration indicating that they are authorized dealers of Honda, for example, when they are not.

IPR infringements are spread all over the country although degrees may vary across provinces. Informal survey conducted by motorcycle companies in 2006 classified the frequency of spotting IPR infringements at retail outlets into three levels--widespread, average and few. A large number of motorcycle dealers that sell fake Honda products were found all over Vietnam except some Northwest Mountain provinces, such as Lai Chau, Lao Cai, Tuyen Quang and Cao Bang, where motorcycle sales are relatively low.

In 2005, the Prime Minister assigned the Ministry of Industry (MOI) to conduct a national survey on the situation of IPR infringements in the motorcycle industry. Since this was conducted through pre-announced visits to factories, discovered infringements greatly understated what really went on. Nonetheless, the survey's general conclusion was that violation was related to Chinese technology and it was mainly in the form of design infringement. One FDI company appeared to be the principal source of illegal parts manufactured in Vietnam. However, since the survey was conducted by MOI alone, which did not have the authority to inspect joint venture companies (only MPI has such authority), the survey team could not visit this company for investigation.

8-3. Actions by government and producers

The government is taking actions to prevent and punish IPR infringements. Producers are also implementing measures to prevent others from violating their IPRs. However, the protection level of IPRs in Vietnam still remains low. This is partly because Vietnam is a latecomer in global business interaction with little experience in dealing with IPRs and

partly because there is no agency which has sufficient power to cope with the issue in a comprehensive manner.

Legal framework

The law and decree stipulating IPR related issues in Vietnam are the Law on Intellectual Property dated November 29, 2005 and Decree No. 105/2006/NĐ-CP and 103/2006/NĐ-CP on State Management of Intellectual Property. The new law on intellectual property came into effect on July 1, 2006, partly to address the problems under the old law and partly to fulfill requirements of WTO accession. Previously, violations were rampant and punishment was light. Although the implementation decision for the new law has not been issued as of May 2007 and its application is thus pending, the new law, when it is fully implemented, is expected to strengthen law enforcement.

Overall, Vietnam's legal framework for protecting IPRs is sufficiently developed and at international levels. However, there are some shortcomings in actual implementation: authority is decentralized, some clauses are considered too advanced for Vietnam, and there are other issues that merit discussion.

Decentralized authority

One salient feature of Vietnam's IPR organizations is decentralization. The power to oversee IPR related issues is diversified across many official bodies as follows (see Tab.8-1 for details):

- National Office for Intellectual Property (NOIP) and Inspection Department under the Ministry of Science and Technology
- Market Management Department (MMD) under the Ministry of Trade
- Economic Police (EP) under the Ministry of Police
- Ministry of Industry
- Vietnam Register under the Ministry of Transport
- Provincial People's Committees
- Steering Committee 127

No single organization takes the leading responsibility in coordinating IPR protection in the motorcycle industry, which causes problems and inconsistencies in coping with infringement. Moreover, under the new law, decentralization has accelerated further. The authority to examine violation was moved from NOIP to a number of enforcement bodies such as Market Management Department (MMD), Economic Police (EP), Customs, etc. This may be justified from the viewpoint of division of labor among related bodies and building capacity at each enforcement organization. On the other hand, however, this increases the risk of inaction or inconsistent action against IPR infringements, because individual enforcement bodies at present lack skills and experience to take over the role of examining violation, and therefore they may decide punishments which are mutually inconsistent.

For example, under MOST which handles industrial design issues, NOIP is supposed to function as a central organization to make final judgments on difficult cases only, while individual violations are regularly to be dealt with by 64 Departments of Science and Technology (DOST) offices at the provincial level. In practice, however, DOSTs are mostly preoccupied with establishing IPRs rather than protecting them. Therefore, all violation cases are referred to and handled by NOIP in Hanoi, which overburdens it.

MMD in each province is under the direction of its People's Committee. MMD's budget is also allocated by the People's Committee. In some cases, local leaders who are interested in promoting local industries are not very keen on solving IPR infringements in the motorcycle industry. This leads to weak implementation of the intellectual property law at the provincial level.

Tab. 8-1 Authority of IPR-related Organizations

	<i>Judge violation</i>	<i>Inspect</i>	<i>Decide punishment</i>	<i>Strength</i>	<i>Weakness</i>	<i>Issues</i>
National Office for Intellectual Property (under MOST)	No more	No	No	Expertise	No more enforcement functions	
Inspectors (under MOST)	Yes but executed only infrequently	Yes	Penalty up to VND 5 million; Chief Inspector can give penalty up to VND 20 million	Authority to inspect anytime, anywhere	Small personnel in ministerial level; weak power in local level	Few inspections conducted
Minister of MOST	Yes but executed only infrequently	Yes	Penalty up to VND 20-100 million	Authority to penalize serious cases	Too busy with other issues	
Market Management Department (under MOT)	Yes but executed only infrequently	Yes	Financial penalty	Authority to inspect anytime, anywhere	Investigation	Budget and human resource constraints; response only to requests by IPR holders
Economic Police (under MOP)	Yes but executed only infrequently	Yes	Financial penalty	Investigation	Complicated procedure (by law)	Budget and human resource constraints; response only to requests by IPR holders
Ministry of Industry	No	Yes	Order to stop production	Authority to prevent violation at every stage of project	Inspection only in response to order or request	Checking prior to granting production permit only; inability to examine FDI suppliers which are under MPI's authority
Vietnam Register (under M of Trans)	No	Yes	Suspend model approval	Authority to prevent violation at initial stage	Inspection only in response to order or request	
Provincial PCs	No	No	Penalty up to VND 10 million	Local power and guidance to local MMDs	Inspection only in response to order or request	Tendency to avoid heavy penalty to violators
Steering Committee 127 (inter-ministerial under M of Trade chairmanship)	No	Yes	Penalty up to VND 10 million	Coordination	Too many industries	Weak coordination with local authorities; Issuance of document that limits MMD's power to examine infringements in transit.

Steering Committee 127, an inter-ministerial body, is responsible for coordinating activities of all related authorities. However, its coordinating function has not fully developed. On the other hand, the Committee issued Document 4880 dated October 2005, stipulating that MMD can stop and inspect a vehicle transporting illegal motorcycles only if there is clear evidence in advance that it is doing so. This severely limits the authority of MMD to stop suspicious vehicles.

Another requirement that reduces MMD's capability under the new law is the stipulation that all receipts of penalties be transferred to the state budget. Previously, MMD could retain 7% of penalties for conducting investigation of IPR infringements.

Light penalties

Police and other authorities destroy plastic parts, front covers, mud shield and other exteriors of fake motorcycles when they are seized. However, the average fine is small (about 160,000VND per vehicle) compared with the sales price of the vehicle and thus does not significantly deter violators from repeating the offense. Moreover, seized motorcycles can later be refitted with new plastic and other exterior parts for sale. This is quite different from and much lighter than international practice. In Malaysia, for example, the authorities destroy fake motorcycles completely.

On the other hand, in 2005, NOIP switched to the "double protection" of both overall design and part design in conformity with international practice. Previously, NOIP only allowed overall design to be protected, which prevented the punishment of producers of illegally copied parts³⁸.

The role of civil court

The current law stipulates that the civil court should settle IPR related cases. Only those violations that are "significantly harmful to society," namely those in food and medicine, are to be dealt with by administrative raids and penalties (Article 23.1.d). All other violations are to be solved

³⁸ At present, thanks to reverse engineering, almost all fake motorcycle parts for assembly in Vietnam are made in Vietnam, unlike previously when Chinese parts were imported. Because of this, illegal parts must be eliminated through domestic raids and penalties rather than seizure at customs inspection points.

through the civil court because administrative raids and penalties require too many evidences to be collected (Article 23.1.b, c, e; also see Decree 105-2006/ND-CP dated Sept 22, 2006). As a result, illegal motorcycles are no longer a priority target of NOIP.

The role of the civil court in settling IPR-related disputes is well established in advanced countries where IPR infringements are relatively rare, the civil court has long experience in judging such cases, and enforcement is very effective. Under such circumstances, IPR infringements can be regarded as a civil matter between related parties with no substantial damage in social order or the nation's competitiveness. Even in such cases, the law does not specify which particular fields or industries damage society more than others.

In Vietnam, by contrast, IPR infringements are widespread, the civil court has not yet started hearing IPR cases, and enforcement needs to be guaranteed in the future. It is also fairly clear that IPR infringements are a central problem in Vietnam harming consumers' rights and the healthy development of industries. While activation of the civil court is a reasonable goal in the long run, Vietnam also needs a more practical strategy to reduce IPR infringements in the transition period. The traditional method of administrative raids and penalties should not be ruled out as an important component of such strategy.

The official statement that IPR infringements in only food and medicine are significantly harmful to the society, but not those in cosmetics, gas cookers, motorcycles, etc. is not rational. This may even give the wrong signal that infringements in other industries are less serious and can be tolerated.

Another problem in Vietnam is the absence of cumulative concrete cases on which new cases can be judged. In IPR-related disputes, there are no globally common quantifiable criteria to decide which products are original and which are imitations. Criteria for similarity must be built up in each country by the accumulation of experts' evaluation on similar cases over the years. In Vietnam, it will take time to develop such judgment capability.

In the future, when the judiciary system is strengthened to judge IPR-related cases, different courts should be available depending on the type of violation, including a special court for IPR-related cases, civil courts, criminal courts, and administrative courts. Trademark infringements can be brought to the criminal court since the offense combines both IPR infringement and infringement of consumers' rights. By contrast, unauthorized copying of industrial design constitutes IPR infringement only. Whether the case should be dealt with administratively or brought to the criminal court depends on the degree of "seriousness," whose criteria must also be established in each country by responding to actual situations³⁹.

Producers' actions

To protect themselves from IPR infringements, leading FDI assemblers in Vietnam are taking the following measures: (i) market investigation and taking photos of illegal copies; (ii) training courses for law enforcement officers to improve their ability to spot violating vehicles; (iii) producing evidence and bringing violators to law authorities; and (iv) PR campaigns through TV and magazines as well as exhibitions comparing originals and copies to raise popular awareness.

These self-protection measures incur costs for producers. They are forced to act on their own since the current IPR enforcement is ineffective. Ideally, public agencies should take the lead in effectively enforcing IPRs, while producers should cooperate with the government as partners.

8-4. Establishment of an industry association

It is common international practice to establish an industry association with the participation of manufacturers of a certain industry in that country. Such an association performs various functions which are

³⁹ In China, previously a company was brought to the criminal court after violating IPR laws three times. Recently, the rule was changed to bring a company to the criminal court if it made an illegal profit greater than 50,000 RMB.

beneficial to member companies, such as data collection, symposiums and trade fairs, programs to improve productivity and competitiveness, interface with policy makers, public relation activities, international cooperation, and so on.

At present, Vietnam does not have an industry association that exclusively and comprehensively represents the interest of all motorcycle producers. As a result, above-mentioned functions are largely absent for the motorcycle industry. To receive technical assistance or strengthen international cooperation, such an association is a must. For instance, Vietnam currently cannot join the Federation of Asian Motorcycle Industry (FAMI), a regional organization consisting of seven countries and areas, because an eligible association does not exist in Vietnam. Cooperation with the Japanese government or the Japan Automobile Manufacturers Association (JAMA) will also be made easier if there is such an association on the Vietnamese side.

The existing two associations, namely the Vietnam Bicycle and Motorcycle Association (VBMA) and the Vietnam Automobile Manufacturers Association (VAMA), only partly cover the interest of the motorcycle industry. VBMA has no participation by FDI companies and VAMA mainly promotes the interest of the automobile industry.

With an increasing size of Vietnam's motorcycle industry, such an industry association should be set up in Vietnam as a matter of priority. This can be done either by creating an entirely new association or restructuring one of the existing associations. In either case, FDI assemblers should take a lead in light of their dominance in Vietnam's motorcycle market.

8-5. Targets and policy directions

Two policy targets are advanced as follows.

First, domestic suppliers which produce illegal motorcycle parts should be eliminated completely, regardless of nationality or ownership type of the supplier, by 2010.

Second, there shall be no IPR infringements of any kind in the motorcycle industry in Vietnam's territory by 2015.

In order to attain these targets, the following policy directions are proposed.

- Coordination among public authorities must be strengthened encompassing NOIP, MMD, Economic Police, Vietnam Register, courts, MOI, MPI, Provincial People's Committees, and Steering Committee 127.
- Strong public-private partnership should be established, in which producers cooperate closely with public authorities and support policy targets set forth above. Top leaders of concerned businesses should be involved deeply.
- Punishment for IPR infringements should be made more severe to a level which effectively deters IPR-related crimes.
- Protection of IPRs in the motorcycle industry should be one of the top priorities of MMD and Economic Police. Protection must cover not only sales and distribution but also manufacturing, which includes assembly and part production.
- The intellectual property law should continue to be reviewed and revised as necessary and as experience is accumulated⁴⁰. The law should be implemented effectively and without exceptions.
- The Vietnam Motorcycle Manufacturers Association (tentative name) should be established with the participation of both FDI and Vietnamese producers in both assembly and part supply. This association should become the main channel through which international cooperation for the motorcycle industry is received.

More specifically, the following concrete measures should be considered.

⁴⁰ Based on the Chinese experience after the accession to WTO, a JAMA expert stated in February 2007 that the intellectual property law needed to be revised every five or ten years to catch up with changing situations and improve implementation.

Inter-ministerial actions

- Steering Committee 127 should request Provincial 127 Committees to eliminate illegal motorcycles in all cities and provinces.
- Steering Committee 127 should abolish Document 4048, which requires MMD to secure sufficient evidence of IPR infringement before stopping motorcycle-transport vehicles for inspection.
- The government should set up an inter-ministerial taskforce to regularly examine the situation of IPR protection in all motorcycle companies in Vietnam, including domestic and FDI companies, as well as assemblers and part suppliers. All related government ministries and agencies should participate in the delegation.

IPR-related bodies

- MMD and Economic Police should be given the leading role in dealing with IPR infringement cases. To support them, the following programs should be conducted for MMD and Economic Police: (i) training courses with instructors from NOIP, producers and international experts; and (ii) follow-up activities to assist them to make actual IPR punishment decisions.
- Budget should be allocated directly to MMDs. In addition, 7-10% of fines collected for IPR infringements should be retained by MMDs for their activities.
- The Vietnam Register Office should stop registering fake motorcycles.
- Traffic Police should have the authority to stop and confiscate any fake motorcycles on the road or in the market.

Law and its implementation

- The policy of separate treatment of IPR infringements of food and medicines on the one hand and all other products on the other in the current intellectual property law (Article 211 Point 1 Item a) should be revised . Each relevant ministry or agency should

decide which IPR infringements are serious based on actual situation.

- Fines for IPR infringements in the motorcycle industry should be revised and implemented effectively. In principle, the fine should be 1-5 times the value of the original motorcycle with genuine parts, not 1-5 times the value of the motorcycle which uses fake parts.

Industry association

- FDI companies should take the lead in establishing an industry association which includes both FDI companies and Vietnamese companies.
- The industry association, in cooperation with FAMI, should launch an IPR Communication Program for motorcycles in Vietnam to raise the public awareness on the matter and improve the effectiveness of law enforcement.
- The industry association should organize the following activities for its member companies: (i) encouragement of licensing between Japanese and Vietnamese producers; (ii) dispatch of Vietnamese members to Japan to deepen the understanding of IPR-related issues; (iii) assistance for its members to establish an intellectual property department and implementation of the intellectual property law; and (iv) organize regular meetings between its members and government authorities.

IPR court

- Steering Committee 127 should propose to the Parliament the establishment of a court specializing in IPRs to take over this responsibility from local civil courts which are not familiar with the issue.