MUTRAP
EU - VIETNAM MUTRAP III
MULTILATERAL TRADE ASSISTANCE PROJECT
9th Floor, Minexport Building, 28 Ba Trieu, Ha Noi, Viet Nam
Tel: 04 62702158 Fax: 04 62702138
Email: mutrap@mutrap.org.vn; Website: www.mutrap.org.vn

REPORT

ON INTELLECTUAL PROPERTY RIGHTS PROTECTION REGULATIONS IN THE CONTEXT OF E-COMMERCE ACTIVITIES

ACTIVITY CODE: WTO-C2K

Prepared by: ***Goce Naumovski***
Lai Viet Anh
Nguyen Van Thoan
Nguyen Hoang Long
Nguyen Thanh Hung
Nguyen Thanh Ha

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EXECUTIVE SUMMARY

The importance of intellectual property derives from the indispensability of providing adequate legal protection of the creations of mind. Intellectual property rights are structured in several components: patents, trademarks, geographical indications, industrial designs, copyright and related rights, as well as rights in plant varieties, topographies of integrated circuits and protection from unfair competition in broader sense.

Due to its complexity, emerging e-commerce law strives to provide mechanisms for coexistence of the concepts of commerce and intellectual property in the digital environment, in the wider context of legal certainty and issues affecting both consumers and companies.

Subject and objective of the research
The subject of the research is a study of the characteristics of intellectual property legislation of the US, EU and China and their relation with e-commerce legislation, in the function of efficient drafting of provisions regarding intellectual property protection in the e-commerce Decree of the Socialist Republic of Viet Nam, and successful application of the provisions.

The objective of the study is to determine the interdependence of intellectual property and e-commerce on international level and in the EU, US and China, having in mind the importance of on-line commercial activities.
The basic content of the study structure mainly consists of presentation of essential indicators for the possibility of drafting relevant provisions concerning: trademarks and their relation to domain names, copyright and related rights in the digital environment, patents and enforcement issues with respect to the IP legal framework and the New Decree on e-commerce of Viet Nam.

Methodology of the Research
To achieve the research objective, appropriate basic and special scientific methods have been applied.
The comparative method is applied during collection of data concerning the development of regulation of intellectual property in the context of e-commerce. Primary and secondary sources (written material) are particularly examined. This examination included legal acts and documents referring to intellectual property and e-commerce. Internal and external critics and evaluation of the data in the sources have been conducted.

The study of the research subject was realized by application of the descriptive method, i.e. its minor methods: analytical, synthetic and normative.

The obtained data are treated with inductive and deductive methods of interpretation of facts relevant to intellectual property law and its relations to e-commerce.

The interpretation of the empirical data collected is realized by logical approach of the essence of the influence of intellectual property protection regulations on contemporary law on e-commerce solutions.

1. Intellectual Property Legislative Framework in the Socialist Republic of Vie Nam

The drafting of relevant e-commerce decree provisions on intellectual property, would take into account the current legislation framework of Viet Nam, namely:

1.1. National Legislation

1.1.1. Laws

- Intellectual Property Law 2009 (revised some provisions of Intellectual Property Law 2005)
- Criminal Code 2009 (revised some provisions of Criminal Code 1999 and 2004)
- Civil Code (No. 33/2005/QH11 of 14 June 2005)
- Criminal Code 2004 (IP-related provisions)
- Civil Procedure Code (2004)
- Criminal Procedure Code (2003)
- Intellectual Property Law (No. 50/2005/QH11 of 29 November 2005)
- Customs Law 2001
- Competition Law
- Science and Technology Law
- Technology Transfer Law
- Seed Ordinance 2004
- Ordinance on Handling of Administrative Violations (No. 04/2008/PL-UBTVQH12)
- Ordinance on Handling of Administrative Violations (2002)
- Ordinance on Procedures for the Settlement of Administrative Cases (2006)
- Ordinance on Procedures for the Settlement of Administrative Cases (1996)

1.1.2. Decrees

- Decree No. 100/2006/ND-CP of September 21,2006,detailing and guiding the implementation of a number of articles of the Civil Code and the Intellectual Property Law regarding copyright and related rights
- Decree No. 103/2006/ND-CP of September 22,2006,detailing and guiding the implementation of the Intellectual Property Law regarding Industrial Property
- Decree No. 104/2006/ND-CP of September 22,2006,detailing and guiding the implementation of the Intellectual Property Law regarding rights to plant varieties
- Decree No. 105/2006/ND-CP of September 22,2006,detailing and guiding the implementation of the Intellectual Property Law on the protection of intellectual property rights and on the State management of intellectual property
- Decree No. 106/2006/ND-CP of September 22,2006,providing for sanction of Administrative Violations in the field of intellectual property
- Decree No. 56/2009/ND-CP on sanctioning administrative violations in cultural and information activities
- Decree No 57/2005/ND-CP of 27 April 2005 on penalties for the administrative violations in the field of Plant Varieties
- Decree 172//2007/ND-CP revising and supplementing of some Articles of the Decree No 57/2005/ND-CP of 27 April 2005 on penalties for the administrative violations in the field of Plant Varieties

- Decree 154/2005/ND-CP dated 15/12/2005 detailing some provisions of the Customs Law on the Customs procedure,Customs checking and Customs supervision
- Instruction Number 04/2007/CT-TTg of 22 February 2007 on the strengthening of computer program copyright protection
- Decision No. 68/2005/QD-TTg by the Prime Minister on approval of the Program for Support to Development of Enterprises' IP Assets.

1.2. International Conventions and Agreements:

-Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)
-Convention establishing the World Intellectual Property Organization (Stockholm Convention)
-Paris Convention for the Protection of Industrial Property
-Patent Cooperation Treaty (PCT)
-Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure
-Washington Treaty on Intellectual Property in Respect of Integrated Circuits
-Madrid Agreement Concerning the International Registration of Marks
-Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks
-Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement
-Trademark Law Treaty
-Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs (Act 1999)
-Berne Convention for the Protection of Literary and Artistic Works
-Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite
-Rome Convention for the Protection of Performers,Producers of Phonograms and Broadcasting Organizations
-WIPO Copyright Treaty
-WIPO Performances and Phonograms Treaty
-International Convention for the Protection of New Varieties of Plants
-ASEAN Framework Agreement on Intellectual Property Cooperation
-ASEAN Economic Community Blueprint
-ASEAN-Japan Comprehensive Economic Partnership Agreement
-ASEAN - Australia - New Zealand Free Trade Agreement
-Vietnam - U.S. Bilateral Trade Agreement Agreement between Viet Nam and the United States on Science and Technology Cooperation
-Agreement between the Government of the Socialist Republic of Vietnam and the Swiss
-Federal Council on the Protection of Intellectual Property and on Co-operation in the Field of Intellectual Property
-Viet Nam - Japan Economic Partnership Agreement

2. Intellectual Property Issues Relevant to E-commerce

2.1. Trademarks

One of the most cited definition of trademarks is the one given in article 15 of TRIPS Agreement:

> *"Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks."*

The system of international registration of trademarks is organized by the Madrid Agreement Concerning the International Registration of Marks from 1891 and the Protocol Relating to the Madrid Agreement.

2.1.1. United States

United States law applicable to trademarks includes the regulations of the following acts:

-U.S. Trademark Law, Rules of Practice, 37 C.F.R. 2 et seq. & Federal Statues, 15 U.S.C. § 1051 et seq. and 35. U.S.C. 1;

-U. S. Trademark Law, 15 U.S.C. §§ 1051 et seq.

The secondary sources include: Trademark Manual of Examining Procedure (Sixth Edition, Revision 1, Oct. 2009) as well as the Listing of Some United States Code Sections Protecting Specific Names, Terms, and Marks (16 Jan 2009).

Concerning regional treaties, the United states are party to the General Inter-American Convention for Trade Mark and Commercial Protection (1931).

2.1.2. European Union

According to the Article 1 of the Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark (Codified version):

> *"A Community trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings."*

Based on the unique Trade mark Law of the European Union, rules have been established and the Office for Harmonization in the Internal Market, located in Alicante, Spain.

The **First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks** is also relevant, since it provides for the

EU Member States that they do not need to prescribe registration of certification or collective marks, but if they do so, they have to abide by the registration rules, especially the special conditions for the collective and certification mark.

Following Directives and Regulations are also applicable to trademarks in the EU:

- *Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel.*
- Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark (Codified version)(Text with EEA relevance)
- Directive 2008/121/EC of the European Parliament and of the Council of 14 January 2009 on textile names
- Directive 2008/95/EC of the European Parliament and the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version)
- Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91
- Council Regulation (EC) No 1992/2003 of 27 October 2003 amending Regulation (EC) No 40/94 on the Community trade mark to give effect to the accession of the European Community to the Protocol relating to the Madrid Agreement concerning the international registration of marks adopted at Madrid on 27 June 1989
- Council Regulation (EEC) No. 3842/86 of 1 December 1986 Laying Down Measures to Prohibit the Release for Free Circulation of Counterfeit Goods

2.1.3. China

Trademark regulation in China is mostly determined by the Trademark Law of the People's Republic of China of 1982, last amended in 2001. The definition of trademark, according to the law, focuses on the characteristics and functions of the trademark:

"…Any visible sign that can serve to distinguish the goods of a natural person, legal person, or other organization from those of another, including any work, design, letter of the alphabet, numeral, three- dimensional symbol and color combination, or any combination of the above, may be made a trademark for application for registration…(Article 8) "

A trademark submitted for registration shall bear noticeable characteristics and be readily distinguishable, and it may not conflict with the legitimate rights obtained by others earlier (Article 9)."

Secondary Chinese trademark legislation includes:

- Implementing Measures on Management of Automobile Brand Marketing (2005)
- China Measures for the Administration of the Trademark Agency (2009)
- China Regulations on the Determination of Well-Known Trademarks (2009)
- China Provisions on Utilizing the Marks of the Most Competitive Brands on the Market (2009)
- China Trial Measures for Evaluating and Protecting Brands in the Commercial Field (2007)

- China Notice on Interim Regulation Concerning Intensified Interlinking and Coordination in the Combat against Trademark Exclusive Right Infringing Criminal Offenses (2006)
- China Rules for Trademark Review and Adjudication (2005)
- China Regulations on the Protection of the World Exposition Symbols (2004)
- China Provisions on the Determination and Protection of Well-known Marks (2003)
- China Measures for the Registration and Administration of Collective Marks and Certification Marks (2003)
- China Measures for the Implementation of International Registration of Marks under the Madrid Agreement (2003)
- China Regulations for the Implementation of the Trademark Law of the People's Republic of China (2002)
- China Opinions on Resolution of Several Issues Concerning Trademarks and Enterprise Names (1999)
- China Opinions on Several Issues Concerning Service Trademark Protection (1999)
- China Provisions on the Management of Trademarks in Foreign Trade (1995)
- China Certain Regulations on Prohibiting Unfair Competition activity concerning imitating specific Names, Packaging or Decoration of Well-known Commodities (1995)
- China Rules for Foreigners or Foreign Enterprises Applying for Trademark Registration in China (1983)

2.2. Domain Names

The domain name differs from the trademark by several characteristics. First, the domain is present in the virtual space and territoriality does not apply as in the trademark. Second, the domain is unique and there cannot be coexistence, as is the case with the trademarks of different categories of goods and services. The domain or IP address is unique, which means that two business entities may have the same mark, but cannot have the same domain name. Hence, the domain is unique and unrepeatable.[1] Trademarks, which enable differentiation of the goods and services (especially in terms of the quality and value) by the consumer, may be an integral part of the domain's name.

This is particularly important regarding the phenomenon of **malicious, deliberate registration of domains that correspond to trademarks or names of some entities in order to make profit "*domain hijacking*" or "*cybersquatting*".** The subject

[1] It is obvious why a trademark is very valuable and significant as a domain name. With its registration, the trademark loses the characteristics of territoriality and specialty. The trademark transformed into a domain is present worldwide. The issue is a virtual monopoly right, bearing its own characteristics.

undertaking domain hijacking activities is known as "*cybersquatter*". This subject acts in *mala fides,* contrary to the principles of consciousness and honesty, "occupying" an attractive domain, with the intention of later offering it to the carrier of the eponymous trademark and make profit.

Cybersquatting may also appear in the social media. The main social media main characteristic is the so called user generated content (Web 2.0) which according to the OECD is actually: i) content made publicly available over the Internet, ii) which reflects a certain amount of creative effort., and iii) which is created outside of professional routines and practices (OECD, 2006). An example of the possibility to register a personal name as social media user name, is the Facebook user name feature, established in 2009, which is in fact a distinct web addresses, i.e. "vanity URL". This can be achieved by each user simply at www.facebook.com/username. This feature allows creation of vanity URLs involving names of personalities or trademarks. Typical example is *the La Russa* case. [2] Similar situation of the use of reserved username without permission of the TM owner involving sport products is myspace.com /nike[3]. In this case, the owner of the profile is NIk!, a nickname of a physical person.

2*.2.1. Procedure for Resolving Domain Disputes*

Two parties appear in the disputes dealing with the domains: one of the parties is the person who is most often the trademark holder or a legal or physical person who believes that his/her interest is endangered by the domain *(petitioner, appellant, complainant)*, while the other party is the person who registered the domain (domain holder, respondent).Due to the sensitivity of the matter, but also from economical reasons, disputes regarding domains are most commonly subject to alternative dispute resolution. The parties, however, may initiate a court procedure for the domain, even if a decision had already been made in the alternative dispute resolution procedure.

2.2.2. Selected Countries Experiences

In most national legislations, there are several regimes for regulating cases involving domains, especially in terms of cybersquatting. In this regard, the practice of the USA, EU and China is indicative.

In the **United States of America**, the so called Anticybersquatting Protection Act (Truth in Domain Names Act) applies since 1999. This Act forbids behavior of individuals, who have a bad faith intent to profit from someone else's trademark, by registering or using domain names that are identical, confusingly similar or delusive of a trademark. The most interesting aspect of this piece of legislation is 15 USC s. 1125 (d) 2 C. Pursuant to this

[2] In 2009, anonymous user created: www.twittter.com/TonyLaRussa. Antony La Russa , who is actually a Major League Baseball manager sued Twitter for enabling the author to use La Russa name mala fides. According to the complaint launched by La Russa, the Twitter page was act of cybersquatting, which has been defined as the "deliberate, bad-faith, and abusive registration of Internet domain names in violation of the rights of trademark owners." See: ANTHONY LA RUSSA VS. TWITTER INC. DELAWARE CORPORATION et al. Case Number: CGC-09488101, Superior Court of the State of California, City and County of San Francisco; United States District Court for the Northern District of California.

[3] Curtin, T.J. (2010). The Name Game: Cybersqautting and Trademark Infringement on Social Media Websites, *Journal of Law and Policy, 19*(1), 353-394.

Article, the domain names are subject to an *in rem* action, in the judicial district where the domain name was registered. If, however, the cybersquatter is a legal person, then an *in personam* action is filed. Some familiar cases dealing with this issue are: Kremen vs. Stephen Michael Cohen, Network Solutions et al, who disputed over the sex.com domain.[4]

In **China**, the rules on domains are contained in the following legislation acts:

- The China Internet Network Information Center (CNNIC)Implementing Rules of Domain Name Registration
- China Rules for the China Internet Network Information Center (CNNIC) Domain Name Dispute Resolution Policy;
- China CNNIC Domain Name Dispute Resolution Policy;
- China Internet Domain Name Regulations;
- China Implementation Rules for Provisional Regulations of the Administration of International Networking of Computer Information in the People's Republic of China;
- China Interim Administrative Measures on Domain Name Registration;
- China Interim Regulations on the Management of International networking of Computer Information;
- Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network.

China's case law includes several important cases dealing with cybersquatting and applicability of the trademark law.[5]

As per the **European Union** legislation, specific rules have been enacted concerning the .eu domain:

- European Union Commission Decision of 21 May 2003 on the designation of the .eu Top Level Domain Registry;
- European Union Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu TopLevel Domain and the principles governing registration;[6]
- European Union Commission amending Regulation (EC) No 874/2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration.

EU domain name legislation provides that the cases of suspicious domain registrations and their abuse are settled in a court procedure or in an alternative dispute resolution

[4] Yi Fen Lim, Cyberspace Law, Oxford, 2001.

[5] Inter Ikea Systems B.V. v. Beijing Cinet Information Systems Company Limited - IP Decision No. 76 of 2000 (Higher People's Court); The Procter & Gamble Company v. Beijing Tiandi Electronics Group - IP Decision No. 27 of 2001 (Higher People's Court); E.I.Du Pont De Nemours and Company v. Beijing Cinet Information Systems Company Limited - IP Decision No. 47 of 2001(Higher People's Court); Cartier International B.V. v. Beijing Cinet Information Systems Company Limited - IP Decision No. 13 of 2001 (Higher People's Court); Pfizer Inc. v. Shenzhen Wanyong Information Network Company Limited - IP Decision No. 48 of 2001 (Higher People's Court); The Procter & Gamble Company v. Beijing Cinet Information Systems Company Limited - IP Decision No. 83 of 2000 (Higher People's Court).

[6] Amended by Regulations : 1654/2005 of 10 October 2005; 1255/2007 of 25 October 2007 and 560/2009 of 26 June 2009.

procedure. Regulation 874/2004 provides that a registered domain name may be subject to revocation where that name is identical or confusingly similar to a name in respect of which a right is recognised or established by national and/or Community law,[7] and where it:

(a) has been registered by its holder without rights or legitimate interest in the name; or

(b) has been registered or is being used in bad faith.

A legitimate interest of the holder may be demonstrated where:

(a) prior to any notice of an alternative dispute resolution (ADR) procedure, the holder of a domain name has used the domain name or a name corresponding to the domain name in connection with the offering of goods or services or has made demonstrable preparation to do so;

(b) the holder of a domain name, being an undertaking, organisation or natural person, has been commonly known by the domain name, even in the absence of a right recognised or established by national and/or Community law;

(c) the holder of a domain name is making a legitimate and non-commercial or fair use of the domain name, without intent to mislead consumers or harm the reputation of a name on which a right is recognised or established by national and/or Community law.[8]

2.2.3. Uniform Domain Name Dispute Resolution Policy (UDRP)

In 1999, the Internet Corporation for Assigned Names and Numbers (ICANN) adopted the Uniform Domain Name Dispute Resolution Policy (UDRP), as well as the UDRP Rules that regulate the administrative procedure for resolving domain disputes.[9] Under the UDRP rules, the domain name dispute resolution procedure may take place before one of the following ICANN approved service providers:[10] the Asian Domain Name Dispute Resolution Centre (ADNDRC)[11], with offices in Beijing, Hong Kong and Seoul; the National Arbitration Forum (NAF)[12]; the WIPO Arbitration and Mediation Center[13] and the Czech Arbitration Court (in regard to the .eu domain).

The UDRP rules have double goals: to remove bad faith domain holder from the virtual space and to enable the complainant (mark holder) to get the domain to which he has a legitimate right. UDRP rules apply to dispute resolution regarding generic top-level domains (gTLD): .com, .net, .org, .biz, .name, .info, .pro, .coop, .aero, .museum, .job and .travel. UDRP is accepted only for some of the national domains (e.g., .nu, .tv, .ws).[14]

Under the UDRP Rules, it is quite probable that the domain holder would lose the right to the domain, in case when the trademark holder submits a complaint, which proves: 1) that the manner in which the domain name(s) is/are identical or confusingly similar to a trademark or

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[7] COMMISSION REGULATION (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration (Official Journal of the European Union L 162/43).

[8] Ibid.

[9] http://www.icann.org/udrp/udrp-rules-24oct99.htm.

[10] http://icann.org/udrp/approved-providers/htm.

[11] http://www.adndrc.org/adndrc/index.html.

[12] http://domens.adrforum.com.

[13] http://www.wipo.int/amc/en/.

[14] The maintenance of the national top-level domains (ccTLD) is under the authority of a separate Agency of the International Standardisation Organisation (ISO 3166 Maintenance agency (ISO 3166/MA)), in accordance with the IANA procedures (http://www.iana.org/domains/root/cctld/)

service mark in which the Complainant has rights; 2) why the Respondent (domain-name holder) should be considered as having no rights or legitimate interests in respect of the domain name(s) that is/are the subject of the complaint; and 3) why the domain name(s) should be considered as having been registered and being used in bad faith *(mala fides)*.

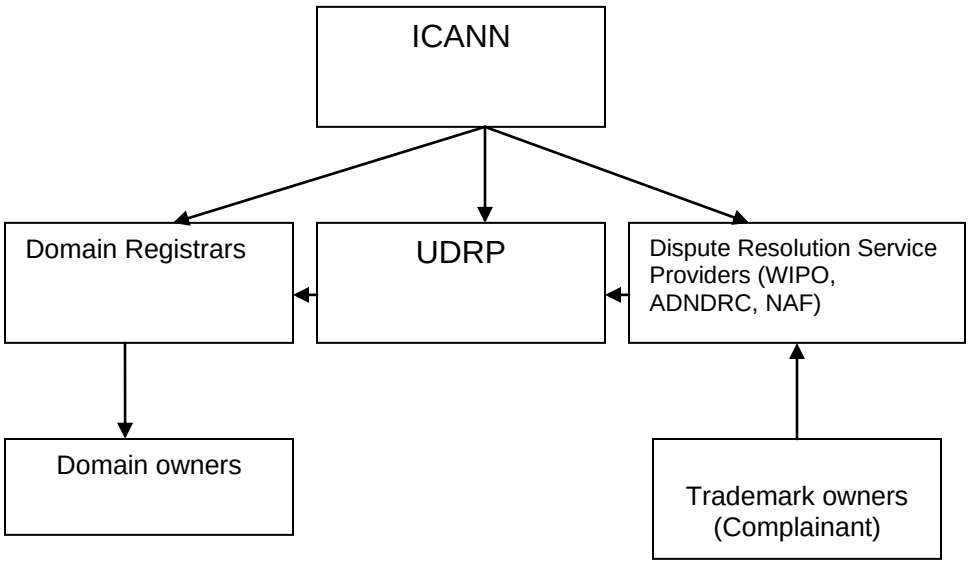
If found by the Panel to be present, the following is considered to be evidence of the registration and use of a domain name in bad faith:

1) circumstances indicating that the domain name has been registered or acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of documented out-of-pocket costs directly related to the domain name; or

2) the domain name has been registered in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that there was an engagement in a pattern of such conduct; or

3) the domain name has primarily been registered for the purpose of disrupting the business of a competitor; or

4) by using the domain name, there has been an intentional attempted to attract, for commercial gain, Internet users to the domain owner's web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the web site or location or of a product or service on the web site or location.



Organisational chart of the participants in the proceeding under UDRP (A.Christie).[15]

2.2.3.1. *Asian Domain Name Dispute Resolution Centre (ADNDRC)*

ADNDRC was approved for dispute resolutions under the UDRP Rules in February 2002. ADNDRC is a joint undertaking of several bodies: the China International Economic and Trade Arbitration Commission (CIETAC)[16]; the Hong Kong International Arbitration Centre (HKIAC),[17] and the Korean Internet Address Dispute Resolution Committee (KIDRC).[18] The ADNDRC has four: Beijing, Hong Kong, Seoul and Kuala Lumpur. Each of these offices has supplemental rules to the UDRP ones, which mostly regulate technical and costs issues.

2.2.3.2. *WIPO Arbitration and Mediation Centre*

Globally, the WIPO Centre is the most popular provider organization for domain-name dispute resolution, among other things because of the First and Second WIPO Internet Domain Name Processes, which result in adoption of final reports focusing on the conflict between domain-names and trademarks. Since its establishment in 1999, the WIPO Center has received over 22,500 UDRP based cases of around 40,500 domain names including generic and country code Top Level Domains (Table 1).

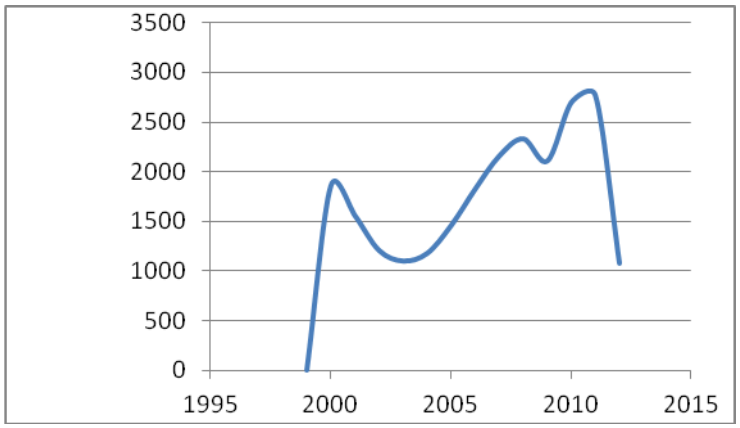


Table 1: Number of WIPO Domain Name Cases in the period 1999 – 2012 (Source: WIPO)

[15] A.Christie, The ICANN Domain Name Dispute Resolution System: A Model for other Transborder Intellectual Property Disputes on the Internet?, International Conference on Dispute Resolution in Electronic Commerce, Organized by the WIPO Arbitration and Mediation Center, Geneva, November 6 and 7, 2000.
[16] http://www.cietac.org.cn/.
[17] http://www.hkiac.org/HKIAC/HKIAC_English/main.html.
[18] http://www.idrc.or.kr/

2.2.4. Domain name disputes in Viet Nam

Viet Nam legislation regulates cybersquatting in Article 130d of the 2005 Intellectual Property Law (No. 50/2005/QH11 of 29 November 2005), as an act of unfair competition, namely:

"registering or possessing the right to use or using domain names identical with, or confusingly similar to, protected trade names or marks of others, or geographical indications without having the right to use, for the purpose of possessing such domain name, benefiting from or prejudicing the reputation and popularity of the respective mark, trade name or geographical indication".

According to the country statistics of the WIPO Arbitration and Mediation Centre, in terms of Vietnamese Respondents, the number of cases in 2011 is 11, while in terms of Vietnamese complainants, there has been only one case in 2010 (Table 2).

Year	Number of Cases	
2002	1	
2003	2	
2004	2	
2005	2	
2006	2	
2007	12	
2008	7	
2009	5	
2010	2	
2011	11	
2012	4	

Table 2: Respondent filing by country (Viet Nam)
Source: WIPO Arbitration and Mediation Centre[19]

2.3. Metatags

Since metatags are embedded in the code for the web page, not being visible for viewers of the web page and aimed to be read by search engines, they remain one of the key issues in the relations of trademarks and e-commerce. Verbauwhede mentions the example with the "Godiva" metatag as part of the web site of a small chocolate shop, so that anyone searching for "Godiva"

[19] http://www.wipo.int/amc/en/domains/statistics/countries_yr.jsp?party=R&country_id=184.

on the internet would be directed to the shop's web page, and not to Godiva's site. This might be analyzed as potential trademark infringement or unfair competition.[20]

One of the most relevant cases in the **United States** jurisprudence is the case of *Playboy Enterprises, Inc. v. Welles,* often cited as the most typical metatags case.[21] The defendant (T. Welles, former "playmate of the year") was using "Playboy" and "Playmate" as meta tags in his web site. Playboy Enterprises, Inc. considered this as trademark misuse and launched an action against Welles. However, the 9th Circuit Court ruled that "…The metatags use only so much of the marks as reasonably necessary and nothing is done in conjunction with them to suggest sponsorship or endorsement by the trademark holder", i.e. declared a fair use of the metatag.

The jurisprudence concerning metatags is in fact application of the Section 32 of the Lanham Act, namely:

> *"... (1) Any person who shall, without the consent of the registrant*
> *(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or*
> *(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive..."*

Concerning the **European Union,** metatags issues have been in the focus of the European court of Justice (ECJ), in the case Google France v. Louis Vuitton Malletier,[22] as a typical example of the scope of relevant IP and E-commerce EU legislation: Directive 89/104/EEC (Article 5); Regulation (EC) No 40/94 (Article 9) and Directive 2000/31/EC ('Directive on electronic commerce') concerning the liability of the operator.

The ECJ ruled that the operator (in this case Google) can not be liable if someone else is using a copmetitor's trademark as a key word, since the mark is used by the advertiser and not by the operator:

"*….Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce,*

[20] L. Verbauwhede, Intellectual Property and E-Commerce: How to Take Care of Your Business' Website.
[21] No. 97-Z-1592, 1998 U.S. Dist. LEXIS 18359.
[22] Joined Cases C-236/08 to C-238/08.

in the Internal Market ('Directive on electronic commerce') must be interpreted as meaning that the rule laid down therein applies to an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned…"

2.4. Copyright and Related Rights in the Digital Environment & Fair Use doctrine

From a legal perspective, copyright refers to protection of all kinds of literary and artistic works that constitute the intellectual property of the author. Despite the differences between the common and civil law approaches, copyright has become equally attractive at national and international level.

Simultaneously with the copyright protection (whose main pillar is the Berne Convention), a supplement system for the protection of rights of performers and producers was established in 1961 with the so called Rome Convention (International Convention for Protection of Performers, Producers and Broadcasting Organizations). The necessity of regulating these so called neighboring (or related) rights was a result of the acknowledgement of the rights of all factors that "give life" to a certain work, i.e. that make the work available for the public. The protection of databases is also part of the copyright and neighboring rights, getting even more prominence, particularly from the aspect of *sui generis* protection.

Modern development issues related to management, e-commerce, rights management information and technological measures for protection have become field of interest for the contemporary copyright law, as well.

However, copyright and neighboring rights dimensions go much beyond the legal dimensions. The two opposite premises of copyright are well elaborated by Goldstein (2001), who suggests that the philosophy of copyright is quite utilitarian, since its purpose is to stimulate production of creative goods at lowest possible price.[23] This means that legislators would adopt copyright laws if this is indispensable for stimulation of new works, while the authors will seek protection as this is one of her or his natural rights.[24]

[23] Goldstein, P., 2001, International Copyright, Principles, Law and Practice, Oxford, pp. 3-5.
[24] Ibidem.

One of the key issues, is the "fair use" doctrine, i.e. the limitations of copyright, as prescribed by international and national legislation. According to Li, Fair Use has several social functions:[25]

-In the American jurisprudence, it is considered as a "safety valve", i.e. a mediator between U.S. Constitution and the copyright concept;

-it provides possibilities for a potential user to utilize part of the work in certain cases, without licensing, specially in cases where the value of the license exceeds the value of the work;

-it provides reverse engineering, i.e. has an important role in study of computer programs.

Following international treaties are directly relevant for the Fair Use doctrine:

-Berne Convention: Article 2 bis; Article 9; Article 10; Article 10bis; Article 11.

-TRIPS: Article 13 (Limitations and exceptions).

Fair use doctrine in the provisions of the WIPO Copyright Treaty-WCT and the WIPO Performances and Phonograms Treaty-WPPT is given bellow.

2.4.1. Digitization of works

Every author is authorized to forbid or to allow reproduction of his/her creation in different forms.

Copyrights encompass two categories of rights: substantive (that bring the author financial gain as a reward for his/her creation); and moral (that refer to the connection of the author with the work).

The related rights on the other hand are those who offer similar protection of numerous entities such as: artists-performers, phonogram and film producers, radio and television organisations and publishers.

The copyrights and the related rights are established in order to stimulate people‟s creativity and to ensure valorization of creative labor.

Usually the substantive copyrights encompass: right to reproduction, right to translation and adaptation of the work; right to public performance, broadcasting and public presentation and the so-called "DROIT DE SUITE" (right to follow), while as a moral right is considered the right to paternity (right to authorship recognition), and a right to integrity (the right to keep the work as a whole).[26]

In the area of information technology the copyrights and related rights protection gain completely new meaning. That stems from the digitalization of the creators‟ works i.e. their transformation in an electronic form.

The Internet access enables "downloading" of musical files, films, books and publications in a digital form, etc. In many cases this process is a violation of the substantive and/or the moral copyrights and it represents grounds for sanctioning.

[25] M.Li, Fair Use of Copyrighted Works in the Digital Age, Collection of Research Papers, Master of Laws in Intellectual Property, Turin, 2007.

[26] WIPO Worldwide Academy, DL-202, Electronic Commerce & IP.

The creators works that are usually in a form of text, image or sound or combination of these could be transformed into a digital form. With the language of the information technology it means that they are turned into files i.e. in zeros and ones (in compliance with the binary system that the computers use).
The characteristics of the Internet as a global network contribute for the transfer of digitalised works to be done globally, on supranational level that makes its monitoring difficult.[27] The negative consequences for the authors are manifested in the area of moral, but especially in the area of substantive rights because there is a possibility for illegal and unlimited copying as a form of piracy.[28]

2.4.2. File transfer

The appearance of the mp3 files has enabled utterly easy transfer of musical works. According to the International Federation of the Phonographic Industry-IFPI data the illegal selling of music via the Internet resulted in USD 4.6 billion in losses in 2004.[29]

Similarly, the film industry has been suffering huge losses from the illegal transfer of films on the Internet. The US Motion Picture Association-MPA estimates that between 400,000-600,000 films are downloaded as files on daily bases. The companies losses due to the Internet piracy according to the same source were USD 2.3 billion in 2005. [30] Cases of Internet piracy are possible also within the framework of the so-called peer-to-peer (p2p) file sharing that enables the individual users using computer networks to search, exchange and distribute musical, film, text and other files mutually.

In many p2p cases , charges have been brought for violation of copyright and related rights. [31] The reaction of the music and film industry has been the creation of legal music and film web sites at which one could legally download certain files, such as iTunes Music Store, Rhapsody, MusicNet, RealOne Music, Window sMedia and many others. [32]

2.4.3. International Sources

[27] WIPO Worldwide Academy, DL-201, Copyright and Related Rights.
[28] www.cachelogic.com (quoted according to WIPO Academy, DL-202, Electronic commerce & IP).
[29] WIPO Worldwide Academy, DL-202, Electronic commerce & IP.
[30] The cost of movie piracy: An analysis prepared by LEK for the Motion Picture Association.(www.mpaa.org).
[31] WIPO Academy, DL-202, Electronic Commerce & IP.
[32] Ibid.

As a result of the need for greater level of effective and efficient protection of copyright and related rights on the Internet, there was comprehensive initiative for the adoption of international legal instruments that would regulate those sensitive issues.

Concrete contribution to that is the adoption of two important 1996 conventions of the World Intellectual Property Organisation (WIPO): WIPO Copyright Treaty-WCT and WIPO Performances and Phonograms Treaty-WPPT. Both treaties are known under the name "WIPO Internet Treaties".

2.4.3.1.WIPO Copyright Treaty (WCT)

WCT went into effect on 2 March 2008. 65 states signed or ratified this treaty by 5 May 2008, inclusive. WIPO Copyright Treaty is based on the fundamental international source for copyright and related rights i.e. the Berne Convention for the Protection of Literary and Artistic Works.
The Treaty regulates two important issues that could be protected with copyrights: computer programmes regardless of the manner of their expression; and compilations of data and other materials (databases) in any form. In regard to the copyrights the Treaty regulates three: the right to distribution, the right to renting and the right to communication.[33] Each of these rights is exclusive, but also some limitations and exceptions are envisaged.[34]
Among the more significant obligations of the states is to provide legal remedies against evading the technological measures (encryption) used by the authors in order to exercise their rights as well as legal remedies against removal or altering information and data that indentify the works or their authors necessary for managing, licensing, collecting and distribution of compensation for their rights ("rights management information").[35]
Concerning the Fair Use, WCT provisions provide that:

"…(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author..." (Article 10)

2.4.3.2. *WIPO* Performances and Phonograms Treaty (WPPT)

[33] http://www.wipo.int/treaties/en/ip/wct/summary_wct.html (Summary of the WCT).
[34] Ibidem.
[35] Ibidem.

WIPO Performances and Phonograms Treaty-WPPT contains rules for protection of the following categories of persons: performers (actors, singers, musicians, etc.) and creators. [36]In regard to the rights that are protected the Treaty protects the following rights: the right to reproduction, the right to distribution, the right to renting and the right to accessibility.[37]

WPPT also contains provisions regarding the Fair Use doctrine:

> *"....(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.*
>
> *(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram... (Article 16)".*

2.4.4. European Union

2.4.4.1. Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society)

The Directive represents a logical consequence of the the fact that: "… technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation."[38]

The Directive has set up a consistent framework for "limitations and exceptions" in Article 5:

> "..1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
>
> (a) a transmission in a network between third parties by an intermediary, or
>
> (b) a lawful use
>
> of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.
>
> 2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
>
> (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects,

[36] http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html (Summary of WPPT).
[37] Ibidem.
[38] Preamble (5).

with the exception of sheet music, provided that the rightholders receive fair compensation;

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder..”

2.4.5. United States

The main law concerning copyright and related rights is the U.S. Copyright Act of 1976, 17. U.S.C. §§ 101 et seq. Implementing rules and practices are contained in the Copyright Office and Procedures, 37 C.F.R. §§ 201.1 et seq., and Copyright Arbitration Royalty Panel Rules and Procedures, 37 C.F.R. §§ 251.1 et seq.

Fair use *doctrine is regulated by section 107 of the U.S. Copyright Act:*

> *“...Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*

(1)*the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
(2)*the nature of the copyrighted work;*
(3)*the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
(4)*the effect of the use upon the potential market for or value of the copyrighted work.*
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors....”

2.4.6. China

The Copyright Law of the People's Republic of China, in Article 22 regulates the following types of exceptions:

“....In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced:
(l) use of a published work for the purposes of the user's own private study, research or self-entertainment;
(2) appropriate quotation from a published work in one's own work for the purposes of introduction to, or comments on, a work, or demonstration of a point;
(3) reuse or citation, for any unavoidable reason, of a published work in newspapers, periodicals, at radio stations, television stations or any other media for the purpose of reporting current events;
(4) reprinting by newspapers or periodicals, or rebroadcasting by radio stations, television stations, or any other media, of articles on current issues relating to politics, economics or religion published by other newspapers, periodicals, or broadcast by other radio stations, television stations or any other media except where the author has declared that the reprinting and rebroadcasting is not permitted;
(5) publication in newspapers or periodicals, or broadcasting by radio stations, television stations or any other media, of a speech delivered at a public gathering, except where the author has declared that the publication or broadcasting is not permitted;
(6) translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed;
(7) use of a published work, within proper scope, by a State organ for the purpose of fulfilling its official duties;
(8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or any similar institution, for the purposes of the display, or preservation of a copy, of the work;
(9) free-of-charge live performance of a published work and said performance neither collects any fees from the members of the public nor pays remuneration to the performers;
(10) copying, drawing, photographing or video recording of an artistic work located or on display in an outdoor public place;

(11) translation of a published work of a Chinese citizen, legal entity or any other organization from the Han language into any minority nationality language for publication and distribution within the country; and
(12) transliteration of a published work into Braille and publication of the work so transliterated.
The above limitations on rights shall be applicable also to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations. .."

2. 5.Hyperlinking

The concept of hyperlinking relevant both for trademark and copyright, since the contents retrieved might be protected with copyright or trademark law.[39] Davidson argues that the host of the data has granted an implied license for the user to view the content, mentioning [40]an important case from the U.S. jurisprudence (Ticketmaster Corporation et al. v. Tickets. Com, inc):

"Further, hyperlinking does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved, the customer is automatically transferred to the particular genuine web page of the original author. There is no deception in what is happening. This is analogous to using a library's card index to get reference to particular items, albeit faster and more efficiently".

2.6 Patents Developments

As far as the patents are concerned, recent academic works focus on several issues of importance of patents: the actual impact of strong patents on innovation, commercialization, and economic growth; institutional factors, ranging from the structure of research organizations to seemingly tangential laws, the translation of patent policy into innovation and R&D, etc.[41] Main recommendations for future activities in using patents encompass data collection of R&D output by the government agencies, research on patent policy implementation and policy changes.[42]

Besides the presentation on general patent legal framework n selected countries, an assess of business method patent legislation in the U.S and Europe is given bellow.

2.6.1. United States

United States patent law is mostly based on the following legislation:

- Leahy-Smith America Invents Act (AIA)

[39] A.Davidson, The Law of Electronic Commerce, Cambridge, 2009, p. 109.
[40] 54 U.S.P.Q.2D (BNA) 1344.
[41] Hahn, R. W., 2003, The Economics of Patent Protection: Policy Implications From The Literature, AEI-Brookings Joint Center for Regulatory Studies, Washington, DC.
[42] Ibidem.

- U.S. Trademark Law, Rules of Practice, 37 C.F.R. 2 et seq. & Federal Statues, 15 U.S.C. § 1051 et seq. and 35. U.S.C. 1
- Prioritizing Resources and Organization for Intellectual Property Act of 2008, Public Law 110-403
- U.S. Patent Law, 35 U.S.C. §§ 1 et seq.
- American Inventors Protection Act of 1999, Public Law 106-113, 113 Stat. 1501

  Secondary legislation concerning procedure and implementation is based on the following rules:
  - Rules of Practice in Patent Cases, 37 C.F.R. 1
  - U.S. Trademark Law, Rules of Practice, 37 C.F.R. 2 et seq. & Federal Statues, 15 U.S.C. § 1051 et seq. and 35. U.S.C. 1
  - America Invents Act: Effective Dates (30 Sept 2011)
  - Manual of Patent Examining Procedure (Eighth Edition, Revision 7, July 2008)
  - Antitrust Guidelines for the Licensing of Intellectual Property (@ U.S. Department of Justice and the Federal Trade Commission 1995)

2 6.2. European patent law

2.6.2.1. European Patent Convention

The Convention on the Grant of European Patents (European Patent Convention, EPC) , establishes a system of law for the grant of patents for invention (European patents), that have the effect of and be subject to the same conditions as a national patent granted by each state party to the convention. Currently, 38 countries are parties to the EPC.[43]

2.6.2.2. EU Legislation

European Union legislation includes the following Regulations and Directives:

- European Union Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (Codified version)Text with EEA relevance;
- European Union Regulation (EC) No. 816/2006 of the European Parliament and of the Council of 17 May 2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems;
- European Union Directive 98/44/EC of the European Parliament and of the Council of July 6, 1998, on the Legal Protection of Biotechnological Inventions;

2.6.3 China

Legislation acts on Patents in China include:

- Patent Law of the People's Republic of China

[43] Albania, Austria, Belgium, Bulgaria, Switzerland, Cyprus, Czech Republic, Germany, Danmark, Estonia, Spain, Finland, France, United Kingdom, Greece, Croatia, Hungary, Irelandl, Iceland, Italy, Lichtenstein, Lithuania, Luxembourg, Latvia, Monaco, Macedonia, Malta, The Netherlands, Norway, Poland, Portugal, Romania, Serbia, Sweeden, Slovenia, Slovakia, San Marino, Turkey.

- China Measures for Compulsory License on Patent Implementation concerning Public Health Problems
- China Regulation on National Defense Patent
- China Provisions of the State Intellectual Property Office on Electronic Patent Application
- China Measures for Compulsory Licensing of Patent Implementation
- China Measures for the Administration of Patent Agency
- China Provisions on the Methods for Marking the Patent Marks and Patent Numbers
- China Opinions of the MOFTEC and the State Intellectual Property Office on Strengthening the Administration of Patents in Foreign Trade
- China Measures of executive enforcement of patents
- China Implementing Regulations of the Patent Law of the People's Republic of China
- China Provisions for Investigation and Handling of Acts of Passing Off Patent by Administrative Authority for Patent Affairs
- China Order No.7 of the State Intellectual Property Office (SIPO) amending Provisions Concerning Implementation of Patent Cooperation Treaty in China
- China Provisions Concerning Implementation of Patent Cooperation Treaty in China
- China Regulations on Patent Commissioning
- China Provisional Measures Concerning Entry Quarantine for Micro-Organisms and Culture used for Patent Procedures

2.7. Computer Implemented Business Method Patents

E-commerce is mostly affiliated the business method patents, i.e. the core of the significance of patents for e-commerce is dependable on the patentability of software. In this sense, legislations providing business method patents are actually dealing with patent aspects of e-commerce.

2.7.1. United States

Computer Implemented Business Method Patents are usually related to processes resulting with tangibile outcomes useful for business or commerce, by use of a computer.[44]

The emerging business method patents applications in the United States, including their connection to e- commerce in general context, was an outcome of the jurisprudence position, manifested in the *State Street Bank & Trust Co. vs. Signature Financial Group, Inc.* [45]

One of the key issues addressed in the judgment was referring to the nature of business method patents:

> *"…Today, we hold that the transformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share*

[44] Intellectual Property in E-Commerce, Tutorial Prepared for World Intellectual Property Organization's Worldwide Academy by Franklin Pierce Law Center. Available at: www.wipo.int/academy/en/.
[45] *State Street Bank & Trust Co. vs. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998).

price, constitutes a practical application of a mathematical algorithm, formula, or calculation, because it produces "a useful, concrete and tangible result"-a final share price momentarily fixed for recording and reporting purposes and even accepted and relied upon by regulatory authorities and in subsequent trades."

In accordance with U.S. legislation, business method patents are reaffirmed in the USPTO White Paper on Automated Business Methods (Section III Class 705).

However, objections on business method patents rely on the lack of prior art, lack of novelty and nonobviousness, in terms of patentability requirements.

2.7.2. Europe

Certain autors, such as Wagner,[46] outline the importance of article 52 of the European Patent Convention (EPC), regarding the possibility for business method patens in Europe. Following business method patents characteristics are essential in this context:

-business method patents applications cite slightly less previous patents but more non-patent

documents and receive a significantly higher number of forward citations.

- more frequent revocation of applications in opposition proceeding at the EPO;

at the EPO;

- business method patents are more controversial than other patents, in terms of the risks of litigation costs[47].

This position is also in line with the Board of Appeal of the European Patent Office decisions on computer programs, allowing patents in cases where a certain "technical effect", i.e. an effect higher than the normal physical interaction of the software and hardware.[48]

3. Enforcement Issues

3.1. Digital piracy as a phenomenon

Digital piracy as a form of violation of copyright and related rights, is a phenomenon that causes enormous material losses. According to Graborsky and Smith, digital piracy often is defined as illegal reproduction of works that belong to somebody else in order to be used free of charge or presented as their own intellectual works.[49]

According to the report of the United States Report of the Working Group on Intellectual Property Rights[50] the violations of copyrights on the Internet result from:

[46] S. Wagner, Business Method Patents in Europe and their Strategic Use: Evidence from Franking Device Manufacturers, Discussion paper 2006-15, November 2006, School of Management University of Munich.
[47] Ibid.
[48] A. Davidson, The Law of Electronic Commerce, Cambridge 2009, p.120.
[49] P. N. Graborsky, R.G. Smith, Crime in the Digital Age: Controlling Telecommunications and Cyberspace Illegalities, Transaction Publishers, 1998, p.89.
[50] United States Report of the Working Group on Intellectual Property Rights, U.S. Information Infrastructure Task Force 1995.

- Placing creator's work on the computer (disk, floppy, CD-Rom or other device for storing data as well as in RAM memory) for a period longer than "very short time".
- Scanning creator's work in digital format;
- Digitalisation of works such as photographs or sound recordings;
- Uploading digital file from the user's computer to another server;
- Downloading digital file from a server;
- Transfer of files from one to another computer;
- Every transfer of files where a note appears on the screen.

According to the European Union data the losses from digital piracy amount to hundreds of billions Euros and about 200,000 jobs are threatened.[51]

The violation of the intellectual property rights in the context of e-commerce results from the following: firstly, the perpetrators of the violation tactically and strategically are capable of avoiding the measures of civil-legal protection; secondly, usually these are perpetrators that repeat the violations, and thirdly a criminal organization in the field of intellectual property is characterized with illegal distribution through a network that intends to avoid police and customs controls.[52]

The violation of intellectual property rights exists when information and computer technology is used as means. Regulations on these violations, could be covered either by the criminal codes or by the laws that regulate the right to intellectual property.

3.2. TRIPS issues and selected countries legislation on enforcement

Among the more significant examples from the comparative law are the so-called Digital Millennium Copyright Act from 1998 (DMCA) and Lanham Act from 1946 in the US law as well as Copyright, Designs and Patents Act (complemented by the 2002 Copyright and Trademark-Offences and Enforcement Act) in the UK law.

Within the European Union the so-called EU Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights-IPRED2 was prepared. Still this Directive has not been adopted because there are reactions among the scientific and expert public, both in regard whether the EU is at all competent about this matter and in regard to the procedure.[53]

Providing enforcement procedures is one of the general obligations of the parties to the TRIPS Agreement:

> *"...Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further*

[51] Combating Counterfeiting and Piracy in the Single Market COM (98) 569, Final act.
[52] L. Harms, The Enforcement of Intellectual Property Rights by Means of Criminal Sanctions, An Assessment. WIPO Advisory Committee on Enforcement, Geneva, November 2007.
[53] More about the reactions on the Directive's text see: Letter of the Dutch Parliament to EU Commissioner Frattni, concerning the IPERD2 Directive, July 2006, available at europapoort.nl.

infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse (Article 41.1.)."

This obligation, according to some scholars (Correa), includes several components:[54]

-"effective legal action" should be interpreted in a way that the legal actions should be instrumental to the pursued end;

-the acts that are considered "acts of infringement" are defined by national laws;

-measures cover all intellectual property rights;

-the procedures are both administrative and judicial (with the focus on civil law actions).

4. Conclusions

On the basis of the analysis of the available national and international legislation, particularly from the aspect of the subject and the aim of the research, in terms of relevant intellectual property rights issues in e-commerce, having in mind the considerations for further development and application of e- commerce regulations, numerous findings have been synthesized. These findings directly contribute towards the determination of the influence and interdependence of intellectual property rights on e-commerce, in the context of its contemporary legal tendencies and functions.

In accordance with the above, following conclusions could be derived, regarding the use of EU, US and China experiences and practices for the further intensification of steps on advancement of the legislation of the Socialist Republic of Viet Nam:

- The globalisation and the rapid increase of international trade with IPRs, goods and services and the rapid development of new technologies and possibilities offered by use of IPRS are complementary to the e-commerce trends and developments, are reflected in the international conventions and agreements, but also in the EU, US and China legislation.

- The interdisciplinary approach of trademark law, copyright law, e-commerce law and information technology law are important and consistent theoretical framework for regulation of the protection of intellectual property law in e-commerce policy and practices. This invokes the special attention of lawyers, but also the appropriate approach of the primary and secondary legislation.

- E-commerce and IP regulations should reflect the forms of innovation developed by new economic activities and assume the intervention of the law in order to control the intangible assets and to optimize their valorization. This would also have a positive effect on foreign direct investments (FDI).

[54] C. Correa, Trade Related Aspects of Intellectual Property Rights, A Commentary to the TRIPS Agreement, Oxford, 2007, p.411.

- The primary national legislation would countinue to adapt to the permanent changes of international legislation, since intellectual property is considered a "moving target" of legal and economics science. In this sense, a continuation of the policy of implementing measures on permanent of evaluation (self-evaluation) of the quality of legislation according to references of international standards.

- There is a necessity for affirmative secondary legislation actions and strategies, reflecting the legal and economic aspects of the inter-dependability of IP and e-commerce. These actions would enable concerned target groups, the business sector (chambers of commerce; IP companies) and particularly practitioners (IP managers and valuation experts) to have an active role in realization of the socio-economic goals of e-commerce.

- The relations between the application of trademark law on domain name registration practices could be used as an advantage for web page owners, in terms of trademark creation processes. Obtaining a corresponding domain names would individualize a certain product or service in cyberspace, similar to the function of the trademark.

- In terms of cybersquatting, the possibilities for using the UDRP model or similar national model could be explored in terms of domain name dispute resolution. The process could be carried out in coordination with the entity that has competencies in the field of domain names registration (National Office of Intellectual Property of Viet Nam and the Viet Nam Internet Center (VNNIC)).

- The awareness of the web page owners and developers concerning linking, framing, metataging and related issues relevant for trademark and copyright law, remains one of the key challenges.

- Stimulation of the use of technological protection measures techniques could be promoted (such as encryption, on-line agreements etc) including establishing rules on prevention of circumvention of technological protection measures, as one of the priorities of WPPT and WCT.

- Issues on the determination of the degree of liability of contracting parties should be clarified, specially from the aspect of relative transformation of intellectual property rights protection in the digital environment. Rational mechanisms for efficient dispute resolution could be developed as part of this process.

- From the aspect of the enforcement, the quality of the IP related provisions in the E-commerce legislation would contribute in the decreasing of piracy and infringement cases. It would also be a strong component in the initiatives for positive institutional reforms.

- With reagard to the labour market demand, related reforms should promote the roles of IP managers and IP intermediaries due to the IP compontents E-commerce. The IP

offices, judges' associations, and chambers of commerce will play an important role in the process .

- In order to encourage successful licensing and technology transfer component of e-commerce, concrete steps are indispensable for improving the skills and competence of companies, attorneys, IP agents, judiciary, and enforcement agencies. This would contribute to proper intellectual property rights and intangible assets valuation. It will also be a strong input for research and development, particularly in terms of the activities of small and medium size enterprises.

- Further studies and consistent normative support of the encouragement of practicing of e-commerce should be promoted, by outlining the advantages of intellectual property as a tool for economic development.

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