

Notice and takedown regime against online IPR infringement in Vietnam

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Online IPR infringement is a serious issue in Vietnam, where a large number of offending rogue websites continue to operate and grow in popularity. This results from various reasons, firstly, the lack of adequate legislation or the current ineffective statutory regulations, and secondly, the weak enforcement. In common sense, Notice-and-Takedown refers to situations in which a rights holder may send a notice to an Internet Service Provider (“ISP”), search engine service provider, or link service provider, notifying them of relevant infringing contents being uploaded onto the ISP’s information storage spaces and providing preliminary evidence as a proof; the ISP, upon receipt of the notice, may evade liabilities by entering into a safe harbor if it timely removes the allegedly infringing contents or disconnects the links, provided that all other exempt terms are met. The Notice-and-Takedown regime is said to not only allow parties to an IPR infringement dispute to resolve it amicably, but also to alleviate judicial burden and increase judicial efficiency.

The question of how the notice and takedown regime actually works in practice in Vietnam is of great interest to IPR stakeholders. Please see our Q&A section below for additional information on this subject.

1. What are intermediary services in Vietnam?

Intermediary service includes 5 categories, namely:

- (i) Telecommunication service,
- (ii) Internet service,
- (iii) Service of online social network,
- (iv) Service of digital information search, and
- (v) Service of leasing digital information storage space including service of leasing website storage space
(See Article 3.1 of Inter-ministerial Circular No. 07/2012/TTLT-BTTTT-BVHTTDL dated 19 June 2012)

2. Who are intermediary service providers in Vietnam

Intermediary service providers in Vietnam include 5 entities, namely:

- (i) Internet service providers (ISPs),
- (ii) Telecommunication service providers;
- (iii) Leasing digital information storage space service providers, including service providers of leasing website storage space;
- (iv) Online social network service providers;
- (v) Digital information search service providers.

(See Article 3.2 of Inter-ministerial Circular No. 07/2012/TTLT-BTTTT-BVHTTDL dated 19 June 2012)

3. Who are major Internet service providers (ISPs) in Vietnam?

There are 9 major ISPs Vietnam as follows:

- (i) CMC Telecom (website: <https://cmctelecom.vn/en/>)
- (ii) FPT (website: <https://www.fpt.com.vn>)
- (iii) Hanoi Telecom (website: <https://vnptonline.com.vn/>)
- (iv) Netnam Company (website: <https://netnam.com/>)
- (v) Saigon Post and Telecommunications Services Corporation (website: <https://www.spt.vn/>)
- (vi) Vietnam Data Communication Company (website: <https://www.vnnic.vn/>)
- (vii) Viettel Company (website: <http://viettel.com.vn>)
- (viii) Vinaphone (website: <https://www.vinaphone.com.vn/>)
- (ix) VNPT (website: <https://www.vnpt.com.vn/>)

4. How is an ISP liable to online copyright infringement in Vietnam?

An ISP in Vietnam must resume the following liabilities in the event of online copyright infringement:

- (i) Obeying works of inspection, check of competent state management agencies under provisions on copyright and related rights.
- (ii) Removing and deleting content of digital information which violates copyright and related rights, cutting, stopping and suspension of the Internet line, telecommunication line as receiving request in written of the inspector of the Ministry of Information and Communications or inspector of the Ministry of Culture, Sports and Tourism or other competent State agencies as prescribed by law.
- (iii) Supplying information of customers hiring websites, digital information storage space and customers using other intermediary services at the request of the inspector of the Ministry of Information and Communications or the inspector of the Ministry of Culture, Sports and Tourism or other competent State agencies.
- (iv) Having responsibility directly for paying damages due to violation of copyright and related rights as prescribed by law on intellectual property and other related laws in the following cases:
 - (a) Being source to start publishing, transmitting or supplying content of digital information by Internet and telecommunication network without permission of the subject having right;
 - (b) Editing, truncating, copying content of digital information in any manner without permission of the subject having right;
 - (c) Intentionally canceling or disabling technical measures performed by the subject having right for protection of copyright and related rights;
 - (d) Operation as source of secondary distribution of content of digital information that is obtained due to violation of copyright and related rights.

(See Article 5.2 of Inter-ministerial Circular No. 07/2012/TTLT-BTTTT-BVHTTDL dated 19 June 2012)

5. Can a copyright holder send a "takedown notice" to an ISP upon detecting a copyright infringement in Vietnam?

While you may consider sending a "takedown notice" to an ISP, requesting that it remove an infringement of your copyright, at this current stage (*when the revised IP Law is still under public consultation process*), such an ISP is not obligated to comply with your requirement. Under Article 5.2.3 of Inter-ministerial Circular No. 07/2012/TTLT-BTTTT-BVHTTDL, ISPs in Vietnam are only required to remove and delete copyright infringements from their internet service sources/means upon receipt of a written request from the

Vietnamese competent enforcement authorities. This means that an ISP will remove a copyright infringement only after a case is received and confirmed by a Vietnamese competent enforcement authority. In a broader sense, you need to submit a case (on copyright infringement claim/allegation) to a Vietnamese for settlement under either/both administrative or/and civil proceedings so that such a Vietnamese competent enforcement authority may request the IPS to take down the infringing material.

Due to subordinate regulations outlined in Inter-Ministerial Circular No. 07/2012/TTLT-BTTTT-BVHTTDL, ISPs in Vietnam are unable to take direct action against pirate websites or online copyright infringement/piracy without government involvement/intervention.

Vietnam's current "notice and takedown" regime has hampered enforcement actions aimed at preventing and combating online copyright infringement/piracy in a cost-effective and timely manner. Thus, Vietnam's "notice and takedown" regime has been widely criticized in numerous reports by EUROCHAM, IIPA, and AUSCHAM, among others.

Numerous countries, including the United States, have adopted a very progressive "notice and takedown" regime under which a copyright holder may directly send a notice (a takedown notice) to an ISP that hosts a website that contains infringing material. The ISP that is hosting the content is required to remove it immediately upon receipt of the notice. Additionally, it must notify the alleged infringer that their content has been removed and explain why. The alleged infringer has the option of filing a counter-notice at this point. For the counter-notice to be valid, it must include the user's contact information, identification of the removed content, a statement under penalty of perjury that the user believes the content was removed in error, consent to the jurisdiction of the appropriate federal court in the United States, and the user's signature. If the alleged infringer fails to submit such a counter-notice or if the counter-notice is deemed invalid, the copyright holder is not required to take any further action. The ISP is required to notify the copyright holder if a valid counter-notice is submitted. The copyright holder may then pursue legal action in court. If a lawsuit is filed within a specified time period, the ISP will be prohibited from re-uploading the material until a judgment is rendered. However, if a valid counter-notice is filed and the copyright holder does not take legal action within the specified time period, the content will be restored online.

The above US "takedown notice" regime provides valuable experience to not only Vietnam but other developing countries in dealing with online copyright infringement/piracy, which is still increasing at an alarming rate.

What can we expect from Vietnam's soon-to-be-revised intellectual property law?

As a result of the recent signing of the above-mentioned major trade pacts (including EVFTA, CPTPP, RCEP and UKVFTA), Vietnam issued another draft amendment to its IP Law in 2020 although its IP Law was just amended and approved in 2019. Notable in the 2020 draft Law is the proposal to increase ISP liability. In detail, under the draft Law, ISPs are required, *inter alia*, to [[Quickly remove or block access to information upon becoming aware that it is illegal, upon receipt of a written request from the rights holder or a competent state agency in accordance with the law](#)] (see [full text of Article 198\(b\) of the draft Law below](#)). The draft Law is expected to come into effect in 2022. Although the aforementioned provision has not yet taken effect and, if retained in the law, much work will be done to detail how to enforce such regulation in order to properly facilitate and avoid abuse of the "notice and takedown" regime as well as to further detail rights and obligations of (i) notifiers and (ii) counter-notifiers, IPR holders view this provision as a significant and positive development in the course of Vietnam's IPR protection against online infringement.

Alternative options

While waiting for draft Law to take effect, IPR holders may pursue other administrative avenues to quickly combat online IPR infringement. You may find more details from our articles in the following links:

- ✓ <https://kenfoxlaw.com/coping-with-counterfeit-trading-on-e-commerce-websites-platforms-in-vietnam>
- ✓ <https://kenfoxlaw.com/handling-of-trademark-infringement-found-in-an-e-commerce-website-in-vietnam-some-noteworthy-points/>
- ✓ <https://kenfoxlaw.com/what-should-be-aware-about-the-liabilities-of-internet-service-providers-to-deal-with-ip-infringement-in-vietnam>

Article 198(b) of draft IP Law of Vietnam in 2020:

Rights and obligation of intermediary service providers

1. An intermediary service provider means an enterprise that provides technical means to put works on public telecommunications and Internet networks; provide online connections for the public to access and use works on public telecommunications and Internet networks.
2. Intermediary service providers include:
 - a) *Enterprises providing internet access services, Internet connection services;*
 - b) *Telecommunication service providers;*
 - c) *Enterprises leasing server space, leasing private servers, leasing space to store digital information*
 - d) *Enterprises providing online social networking services;*
 - e) *Enterprises providing digital information content search services;*
 - f) *Other enterprises regulated by the Government.*
3. Enterprises providing intermediary services are exempt from liability for infringements of copyright and related rights occurring on the telecommunications network and the public Internet in connection with the provision or use of Your service falls into one of the following cases:
 - a) The transmission of information posted/provided by service users on the telecommunications network and public Internet; the provision of access to telecommunication networks and the public Internet ("mere conduit");
 - b) The transmission of information that is automatically stored, intermediately stored and temporarily stored by service users posted/provided on the public Internet and telecommunication for the sole purpose of making more efficient the information's onward transmission to other users of the service upon their request ("caching"), on condition that the provider:
 - (i) does not modify the information other than for technical, technological reasons; use technology techniques that are widely recognized and used in the field of information and communication to obtain data in the transmission specified in this point without affecting the content of the transmitted information.
 - (ii) complies with conditions on access to the information;
 - (iii) complies with current statutory rules regarding the updating of the information,

- specified in a manner widely recognised and used by industry;
- (iv) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
 - (v) removes or disables access to the information it has stored upon obtaining knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled; or
- c) The storage of information provided by a user of the service at the request of a user of the service ("hosting") on condition that the provider:
- (i) does not have the knowledge of illegal information; and
 - (ii) upon obtaining such knowledge, acts expeditiously to remove or to disable access to the information concerned upon receipt of a written request from a rights holder or a competent state agency in accordance with law.
4. The provisions of Clause 3 of this Article do not apply to the intermediary service provider monitoring its service, or seeking facts indicating infringing activity
5. Intermediary service providers are under obligation to:
- a) Store content of digital information in their system of service provision, that only have transshipment, provisional, automatic, terminable character, be sufficient to meet technical requirements of digital information content transmit.
 - b) Obey works of inspection, check of competent state management agencies under provisions on copyright and related rights.
 - c) Remove and delete content of digital information which violates copyright and related rights upon receipt of a written request from a rights holder or a competent state agency in accordance with law.
 - d) Cut, stop and suspend the Internet line, telecommunication line upon receipt of a written request from a competent state agency in accordance with law.
- dd) Provide information about customers renting space to store digital information, websites and customers using other intermediary services at the request of competent state agencies as prescribed by law.
- e) To be directly responsible for compensation for damage caused by infringement of copyright and related rights in accordance with the law on intellectual property and other relevant laws in the following cases:
- (i) Being the starting source for posting, transmitting or providing digital information content via telecommunications networks and the Internet without the permission of the rights holder;
 - (ii) Modifying, mutilating, copying digital information content in any form without permission of the rights holder;
 - (iii) Deliberately canceling or nullifying technical measures taken by the right holder to protect copyright and related rights;
 - (iv) Acting as a secondary distribution source of digital information content obtained by infringing copyright or related rights.
- g) Intermediary service providers that do not directly relate to the provision of information content, but only provide information transmission functions, do not have the right to read and control information transmitted on the network (telecommunications

enterprises) must comply with the provisions at Points a, b, d, dd and e of this Clause, except for the case specified in Clause 4 of this Article.

h) Enterprises providing intermediary services directly create an environment, a tool for posting, sharing and providing information to users (online social networking services, websites, platform...), in addition to complying with the provisions at Points a, b, c, dd and e of this Clause, must also perform the following responsibilities:

- (i) Build a tool to review and monitor content posted and shared on their platforms and remove content that violates copyright and related rights;
- (ii) Request service users to commit to their responsibility to ensure the lawful use of digital information content uploaded and posted on the Internet and telecommunications networks;
- (iii) Warning of liability for civil damages, possibility of administrative fines, criminal prosecution for organizations and individuals using online social networks that commit acts of copyright infringement , related rights;
- (iv) Take joint responsibility for violations of copyright and related rights if they do not remove and handle the infringing information content after being requested in writing by a competent authority.

6. Contents of digital information specified in this Article are copyrighted works and related rights protected under this Law expressed in digital form.