

Use Evidence from Online Sales to Increase your Damage Compensation: Possible in Vietnam?

The protection and enforcement of intellectual property (IP) rights are fundamental to innovation and economic development. However, one of the biggest challenges rights holders face when their rights are infringed is obtaining adequate compensation for the damages suffered. In Vietnam, as in many other countries, determining and claiming actual damages encounters numerous difficulties, often resulting in court-awarded compensation that does not truly reflect the losses.

KENFOX IP & Law Office provides analysis on the reality of IP [damages compensation](#) in Vietnam, contrasts it with the new approach in China, and offers some useful recommendations regarding this issue.

The Reality of IP Damages in Vietnam: Still Modest Figures

IP infringement cases in Vietnam show that the amount of damages (including legal costs) awarded by Vietnamese courts tends to be quite low compared to the plaintiff's initial claims and the actual damages. An analysis of several specific recent cases clearly illustrates this trend, even when considering reasonable legal costs as provided for under Article 205 of the IP Law:

- **Piaggio vs. E Vietnam (Industrial Design):** Claimed VND 700 million (VND 500 million direct damages, VND 200 million legal costs). The court awarded total compensation of VND 214.8 million (including VND 200 million legal costs). The portion for other direct damages was only **~VND 14.8 million**.
- **Piaggio vs. Detech (Industrial Design):** Similar claim of VND 700 million. The court awarded total compensation of VND 217.6 million (including VND 200 million legal costs). The portion for other direct damages was only **~VND 17.6 million**.
- **OSR GmbH vs. Mr. Nguyen Duc T (Trademark, Domain Name):** Initial claim VND 700 million, later reduced to VND 203.96 million (VND 200 million legal costs, ~VND 4 million other damages). The court awarded VND 203.96 million. The portion for other direct damages was only **~VND 4 million**.
- **Thien An vs. Company P (Industrial Design, Trademark):** Claimed VND 327 million (VND 315 million legal costs). The court awarded total compensation of VND 169.5 million (VND 157.5 million legal costs). The portion for other direct damages was only **VND 12 million**.
- **Hung Phu Thanh vs. Tran Dat (Utility Solution):** Claimed VND 318.3 million (VND 150 million legal costs, VND 168.3 million other damages). The court awarded damages of **VND 56 million**. (Award for legal costs unclear).
- **Bay vs. Company N (Patent):** Initial claim VND 200 million, later reduced to VND 59.5 million. The court awarded **VND 59.5 million**.

Analysis of these six cases reveals a fairly clear trend: the compensation awarded for direct damages (excluding legal costs) is often very low compared to the initial claims, while legal costs may be awarded at a considerably higher rate. This raises questions about the effectiveness of the current compensation mechanism in truly compensating rights holders for their actual losses and deterring infringing activities.

Lessons from China: Similar Challenges and Breakthrough Solutions

This situation is not unique to Vietnam. In China, IP rights holders have faced similar challenges. Low damage awards often stemmed from inexperienced local courts handling IP cases, the influence of local protectionism, and particularly the unreliability of accounting records provided by infringers.

Although Article 63 of China's Trademark Law (similar to mechanisms in Vietnam) allows courts to order infringers to produce financial records, this provision has often proven ineffective in practice. Many infringers, especially small businesses or individuals, lack proper bookkeeping systems, often conceal revenue, or deliberately falsify data. This puts plaintiffs in a difficult position, as the burden of proving damages remains heavy and often insurmountable based on such evidence. The typical result was courts resorting to awarding statutory damages, which were often merely symbolic.

However, a significant shift has occurred in China since 2020.

New Direction: Accepting Online Sales Data as Evidence

Facing the limitations of traditional methods, the Chinese court system has taken breakthrough steps. Since 2020, a series of court decisions in China has paved a new path for plaintiffs in IP infringement cases, including trademark disputes. Chinese People's Courts have begun allowing plaintiffs to submit sales and inventory data from e-commerce platforms, considering it lawful evidence of the infringer's sales volume and profits.

- **Angelo vs. Wu (2020):** The court accepted the plaintiff's method of calculating business volume based on the higher value between the *number of customer reviews* and the *total sales figures displayed* on the webpage.
- **SANTAK vs. Changsha Mingwei (2020):** When the defendant failed to provide sales data and audit reports, the court used the *online inventory quantity* and *sales unit price* as a reference point to determine the quantity sold.
- **FILA vs. Xiao Zhenyu (2021):** The court affirmed that, in the absence of rebuttal evidence, *notarized sales data publicly disclosed on the e-commerce platform* submitted by the plaintiff (appellant) could serve as a valid basis for determining sales volume and calculating infringing profits.

This approach has also been strengthened by the **Supreme People's Court (SPC) of China** through its *Opinion on Strengthening Punishment for IP Infringement* (September 2020), which stipulates that courts shall actively use data provided by the parties from *"(...) third-party commercial platforms, the infringer's own websites, promotional materials, or lawfully disclosed documents, along with industry average profit margins, to determine the infringer's unlawful gains"*, along with industry average profit margins, to determine the infringer's unlawful gains.

What if the Online Data is Fake?

A pertinent question arises: what happens if the defendant argues that the online data (sales, reviews) was artificially inflated by themselves ("brushing," fake orders, fake reviews) and is inaccurate?

Fortunately, Chinese courts have addressed this issue in favor of rights holders by applying provisions from the China E-commerce Law (mandating truthful disclosure) and the principle of good faith. In the *Angelo* case, although Mr. Wu argued that the sales data was inflated due to fake orders and reviews orchestrated by friends and relatives, the court, citing Article 17 of the E-commerce Law, found his claim unsupported. The court held that *"Mr. Wu attracted consumers to his online store by using sales and review data for the relevant products to increase sales"*. Because he failed to present concrete evidence or explain in detail how the fabricated transactions occurred, the court ruled that his argument lacked a factual basis. Therefore, if an infringer knowingly engages in deceptive practices (like falsifying sales or reviews) to **attract customers**, they cannot later rely on their own dishonest conduct to discredit that same data in court to evade liability. Such attempts are viewed as a breach of the principle of good faith and are not accepted.

Recommendations for Vietnam: Learning from International Experience

The reality of low IP damage awards in Vietnam, as evidenced by specific cases, calls for more effective solutions. The rapid growth of e-commerce in Vietnam creates a vast potential source of data regarding business activities, including those of infringers.

China's approach of recognizing and utilizing online sales data, inventory levels, and customer reviews from e-commerce platforms as evidence for determining damages offers valuable experience. Vietnam could certainly study and adapt this direction:

Legislation: Consider amending or clarifying legal texts (IP Law, guiding Resolutions from the Judicial Council of the Supreme People's Court) to explicitly accept these types of electronic data as valid evidence for determining material damages, including the infringer's profits. Clearly define the obligations for providing such data and its evidentiary value.

Judicial Practice: Encourage and guide courts to actively collect, assess, and utilize electronic evidence. Similarly, apply the principle of good faith to reject dishonest arguments by infringers seeking to discredit data they themselves used for promotional and sales purposes.

Rights Holders: Proactively [collect such evidence](#) lawfully (e.g., through bailiff-recorded evidence capturing data displayed on e-commerce platforms, websites, etc.) to submit to the court. Adopting this approach could not only help overcome difficulties in proving damages when the infringer's accounting records are unreliable but also enable courts to determine damage awards that are closer to reality. This would, in turn, enhance the deterrent effect of the law and more effectively protect the legitimate rights and interests of IP holders in Vietnam.

Closing thoughts

The fight against IP infringement requires strong and effective legal tools. Chinese courts pioneering the use of online sales evidence to determine damages opens a promising path. It is time for Vietnam to seriously study, learn from, and apply this experience to improve the effectiveness of [IP rights enforcement](#), contributing to a healthier business environment and encouraging innovation.

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