

Determining Illegal Gains from Intellectual Property Infringement in Vietnam

Depriving infringers of all benefits obtained from their unlawful acts is a core principle intended to deter violations and eliminate the motivation to infringe. Vietnamese law has established a clear system of regulations for identifying and handling illegal gains, or illicit profits, that organizations and individuals obtain from [infringing upon intellectual property \(IP\) rights](#). However, the mechanisms for determining and calculating these infringing profits are not uniform and vary depending on the context of the proceedings: from administrative sanctions to civil lawsuits and criminal prosecution. Therefore, a thorough understanding of how to apply the appropriate method for each type of procedure is a prerequisite for IP rights holders to effectively protect their interests.

KENFOX IP & Law Office provides in-depth analyses of the mechanisms for determining and calculating illegal gains, helping IP rights holders understand how to apply this mechanism in administrative, civil, or criminal proceedings.

1. In Administrative Sanctions

In the field of administrative sanctions for IP rights, determining **illegal gains** is a core element for applying the measure of forcing violating organizations and individuals to remit these gains to the **state budget** as a form of remedial action. The **illegal gains** from an infringing act are **all material benefits** obtained from the commission of the violation, including money, assets, or valuable papers. The determination of this amount is specifically regulated by Circular 11/2015/TT-BKHCN (amended and supplemented by Circular 06/2024/TT-BKHCN) and detailed guidance in Circular 65/2022/TT-BTC, with the following general principles:

[i] Where the illegal gain is money:

The competent authority will calculate the illegal gain using the following formula:

Illegal Gains = (Quantity of infringing goods/services sold) × (Unit Price) - (Valid Direct Costs)

- **Quantity of infringing goods/services:** Determined based on the violator's declaration and the results of a physical inspection and verification.
- **Unit Price:** Taken from invoices and documents presented by the violator; if none are available, the market price of equivalent goods/services at the time the violation was discovered will be applied.
- **Direct Costs:** Can only be deducted if the violator can prove them with legitimate documents and records. If they cannot be proven, the entire revenue will be considered illegal gains.

In cases of processing for a foreign trader: If an organization or individual performs processing of infringing goods that violate regulations on origin, then:

- The illegal gain is the amount of rent/processing fees received, after deducting legitimate direct costs (and with sufficient supporting documentation).
- If the organization or individual consumes, transfers, disposes of, or illegally destroys the goods, the illegal gains to be remitted include: (i) The entire amount from the processing activity; and (ii) The value corresponding to the infringing exhibits that have been destroyed, disposed of, or sold illegally.

Accurately and fully calculating illegal gains in administrative sanctions not only helps restore fairness to the market but also serves as a deterrent, eliminating the profit motive for [IP infringement](#). This is a crucial factor that businesses need to understand to cooperate effectively with authorities during the handling of violations.

[ii] Where the illegal gain is valuable papers or other assets:

Not all administrative violations in the field of intellectual property generate profits in the form of cash. In reality, many infringing acts provide benefits to the violating organization or individual through valuable

papers or other tangible assets. In these cases, the determination of illegal gains is carried out in accordance with Articles 6 and 7 of Circular 65/2022/TT-BTC, combined with the guidance in Circular 11/2015/TT-BKHCN (amended and supplemented by Circular 06/2024/TT-BKHCN).

Illegal gains as valuable papers (Article 6 of Circular 65/2022/TT-BTC): This refers to all valuable papers that the violating party has obtained from the infringing act. Valuable papers are defined by the Civil Code and specialized laws (e.g., bonds, promissory notes, stocks, etc.). If the papers have been transferred, the value of the illegal gains is calculated as the actual amount of money received at the time of transfer. If the papers have been destroyed or disposed of, the value is calculated based on the book value of the issuing organization at the time of disposal/destruction.

Illegal gains as other tangible assets (Article 7 of Circular 65/2022/TT-BTC): This includes all other tangible and intangible assets as defined [by the Civil Code](#) (property, assets, property rights, etc.). If the asset does not fall into the category of prohibited goods, counterfeit goods, or smuggled goods and has been transferred, consumed, or destroyed, the illegal gains are determined in one of the following ways: (i) the market value of similar assets; (ii) the book value if there is no market; or (iii) the value recorded on the customs declaration, after deducting direct costs (if there is sufficient proof). For prohibited goods, counterfeit goods, or smuggled goods that have been consumed, the illegal gain is the entire amount of money obtained from the transfer.

According to Article 5.3 of Circular 11/2015/TT-BKHCN, when it is not possible to determine illegal gains in monetary form, the competent authority will proceed to determine them in the form of valuable papers or other assets, in accordance with the guidance of the Ministry of Finance in Circular 65/2022/TT-BTC. This combination forms a complete and flexible mechanism for quantifying infringing profits, ensuring the principle of stripping all profits obtained from the infringing act, regardless of their form.

Example: If a manufacturing facility sold 1,000 infringing products at 100,000 VND per product, earning 100 million VND, and can prove 40 million VND in legitimate costs, the illegal gain would be calculated as 60 million VND. Conversely, if the costs cannot be proven, the entire 100 million VND earned would be considered an illegal gain and could be subject to remittance.

In the case of the "LACTOMASON" trademark infringement that KENFOX IP & Law Office requested the Hanoi Market Management Agency (Hanoi MMA) to handle in July 2025, nearly 8,500 products infringing [on the "LACTOMASON" trademark](#) were discovered, confiscated, and destroyed by the Hanoi QLTT. The total value of the infringing goods was nearly 1.5 billion VND, and close to 70 million VND in illegal gains were recorded by the Hanoi MMA in the minutes.

2. In Civil Lawsuits for Damages

When an IP rights holder initiates a civil lawsuit seeking damages, the profits the defendant earned from the infringing act are not only a factor reflecting the actual consequences but may also be considered by the court as part of the material damages to be compensated, provided that this profit has not already been accounted for in determining the plaintiff's losses. This approach clearly demonstrates the principle of not allowing the infringing party to benefit from their unlawful conduct.

Material Damages and Illegal Gains: Material damages include actual financial losses suffered by the plaintiff, such as the value of the infringing goods, reduced revenue/output, decreased profits due to competition from infringing products, lost business opportunities, reasonable costs to prevent and remedy the infringement, etc. In addition, the profits the defendant obtained from the infringing act can be added by the court to the total material damages to compel the defendant to pay compensation, if these profits have not been included in the determination of the plaintiff's damages.

Principle for Determining Profits from Infringing Acts: According to Joint Circular No. 02/2008/TTLT-TANDTC-VKSNDTC-BVHTTDL-BKHCN-BTP, the principle for calculating the profits obtained by the defendant is as follows:

- The total revenue from the infringing goods or services is determined based on actual invoices and documents.

- From this revenue, all reasonable costs (raw materials, production, advertising, distribution, etc.) with supporting invoices are deducted to determine the net profit.
- If the defendant has multiple business activities, the revenue and profits from the infringing products must be separated.

In other words, the court may compel the defendant to disgorge all illicit profits obtained from the infringing act as a form of supplementary compensation, in addition to compensating the plaintiff for actual losses.

Difficulties with Evidence and the Burden of Proof: In practice, calculating profits from an infringing act requires evidence of the defendant's revenue and costs related to [the infringing products/services](#). The court may demand that the defendant provide invoices and sales records for the infringing goods. However, this is often challenging because the defendant will conceal or refuse to voluntarily provide records and invoices related to the infringing goods/services. If the defendant does not provide invoices or sales documents for the infringing goods, it is almost "impossible to determine the profits the defendant has obtained." Therefore, the burden of proof falls on the plaintiff; the plaintiff often has to present indirect evidence, such as estimating the market share captured, the volume of counterfeit goods on the market, or requesting inspectors or market management agencies to collect evidence beforehand.

In reality, many rights holders have chosen to first request administrative handling so that the police or market management authorities can seize the infringing goods and the violator's accounting books, providing a basis for data calculation when a civil lawsuit is filed later.

Statutory Damages: In cases where actual damages cannot be precisely determined (including the inability to determine the defendant's profits), the court has the authority to award statutory damages. The IP Law stipulates a maximum amount of 500 million VND for material damages in such cases. This mechanism is intended to ensure a minimum level of protection for the plaintiff when evidence of damages is insufficient.

In summary, the civil mechanism not only aims to compensate the infringed party for actual losses but also seeks to thoroughly disgorge all benefits the infringing party may have obtained, thereby ensuring the principle of fairness and preventing future infringements. If the plaintiff can prove that the defendant earned profit X from selling infringing goods, the court may compel the defendant to pay that amount X. If the specific amount cannot be determined, the court has the right to consider relevant factors to determine a reasonable amount of compensation within the statutory limit.

3. In Criminal Proceedings

In the field of intellectual property, the determination of illicit profits from an infringing act is not only a factor for quantifying the consequences but also a decisive legal element for constituting a crime and determining the severity of the act in criminal proceedings. This is a clear distinction from administrative and civil mechanisms.

Investigation Phase - Forensic Assessment to Clarify Illicit Profits: The investigating authority and judicial assessors will conduct an appraisal or forensic assessment to conclude the value of the infringing goods, the extent of the damages, and the amount of illicit profits earned by the violator. According to regulations, these issues must be objectively concluded by the Council for Property Valuation in Criminal Proceedings or a specialized Judicial Assessment Council. For example, in a copyright infringement case, if the defendant is accused of "earning 70 million VND in illicit profits", the assessment conclusion must determine this figure of 70 million based on the quantity of infringing products consumed and the actual sale price. The judicial assessment conclusion will be used as evidence in court.

Application of Criminal Thresholds: The 2015 Penal Code sets illicit profit thresholds of **50 million VND** (for copyright) and **100 million VND** (for industrial property rights) to establish a crime for individuals. For commercial legal entities, if the illicit profits are below the threshold (from 200,000,000 VND to less than 300,000,000 VND) but they have been administratively sanctioned for [copyright or industrial](#) property rights infringement or have been convicted of this crime, and their criminal record has not been expunged, they can still be criminally prosecuted. This prevents individuals from intentionally committing multiple small-scale violations to evade criminal sanctions.

Confiscation of Property and Forfeiture: In addition to primary penalties such as fines, non-custodial reform, or imprisonment, the court may apply supplementary penalties such as the confiscation of exhibits and instrumentalities of the crime and the confiscation of illicit profits from the IP infringement. These profits will be forfeited to the state budget, similar to the measure of "forced remittance of illegal gains" in administrative sanctions - but based on a legally effective criminal judgment.

A key feature of the criminal mechanism is the mandatory and objective nature of determining illicit gains. Unlike in civil proceedings, where the plaintiff bears most of the burden of proof, in criminal proceedings, the responsibility for valuation and assessment lies with the competent state authorities, ensuring the reliability and official nature of the data used for prosecution.

Conclusion

The identification and recovery of illegal gains from intellectual property (IP) infringement are not merely technical measures in the application of law but are also crucial levers for neutralizing the profit motive and ensuring the integrity of [the IP protection system in Vietnam](#).

Current legal provisions, from administrative sanctions and civil compensation mechanisms to criminal prosecution, have established a relatively comprehensive framework for calculating the illicit profits that infringing organizations and individuals obtain from their actions and for compelling the restitution of these gains to the rights holder (in civil cases) or their remittance to the state budget (in administrative and criminal cases).

Practical enforcement shows that while some challenges remain in proving damages and tracing revenue from infringements, especially in civil lawsuits, law enforcement agencies such as courts, investigating bodies, and market management authorities are becoming more proactive in applying legal provisions related to illicit gains, thereby enhancing the effectiveness of IP rights protection.

The analyses above make it clear that the total disgorgement of the infringer's illegal gains is an effective deterrent mechanism. It also affirms that IP rights are not just rights on paper but are substantively protected through sanctions capable of eliminating the economic benefits of infringement.

As Vietnam continues [its deep integration into the knowledge-based economy](#), the strict enforcement of IP rights, including the handling of illegal gains, will remain an important basis for attracting investment, fostering innovation, and protecting a healthy competitive environment.

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