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LAW ON INTELLECTUAL PRORERTY

Export of goods: an act of use or not?

By Nguyen Thi Thu Ha

THAT question, “Is export of goods bearing a trademark an act of use of such trademark?” in full, has been raised and become controversial in Vietnam when a number of allegations about trademark infringement has occurred recently against export-involving companies.

The theme for the scene is that under Vietnamese laws, to allege a party to commit a trademark infringement, the plaintiff should prove that such party has conducted an act of use of the infringing trademark. In case the defendant has succeeded in proving that he/she does not take any act of use, or its use is not an act of use of trademark under laws, he/she may be free from any allegations.

Early this year, we coped with a typical case of the issue in question where an export company exported goods bearing a mark that was closely similar to our client’s registered trademark. Our client claimed that the act of exportation of those goods had constituted a trademark infringement upon the client’s trademark rights and requested such company to cease the exporting and pay for damages.

At the first stage, the export company and its lawyer seemed to have a very good standing with an argument that “they just conduct the exporting; as the exporting is not an act of use of the trademark under Vietnamese laws, no trademark infringement is constituted then”. Further, they obtained a confirmation from the IP assessment institution of Vietnam to confirm that “conducting the exporting is not an act of use of trademark under Vietnamese laws”.

When we looked up the definition on the use of trademark under the current Law on Intellectual Property of Vietnam 2005¹ (“the Law”), it seemed so easy to find the answer. Article 124.5 of the Law expressly provides a list of the acts which shall be considered as the acts of use of a trademark, which include:

- (i) Affixing the protected mark on goods, goods packages, business facilities, means of service provision or transaction documents in business activities;
- (ii) Circulating, offering, advertising for sale or stocking for sale goods bearing the protected mark;
- (iii) Importing goods or services bearing the protected mark.

The act of exporting of goods or services is not expressly included in the above list and thus, the answer for the subject question is, at the first glance, probably NO.

Fortunately, the evidence we collected suggested some clues. We found out that the export company did not conduct the exporting only. More exactly, in other words

¹ The Law on Intellectual Property of Vietnam 2005 as revised under Law No. 36/2009/QH12 dated 10 June 2009.

this export company, and probably other export companies as well, cannot conduct their exporting business without engaging in other acts that have involved the infringement of the trademarks. In fact, the export company in question did order other companies to produce the goods, canning and packaging the same before exporting them. The act of exporting was the last step in the *chain of events* that may have constituted the infringement of the trademarks. In other words, the exporting may serve the purpose of the whole chain of events.

We also tried to find a precedent. Although no prior case is available in relation to the question whether the act of exporting shall constitute an act of use of a trademark, we have found a similar case concerning an act of outsourced processing, which also is not mentioned in the foregoing Article 124.5 of the Law. In that case, in accordance with the decision issued in 2007, the National Office of Intellectual Property of Vietnam opined that the outsourced processing was deemed to be comprised of various events that may include producing, labelling, packing of the goods, and thus, outsourced processing should be considered as an act of use of the trademark.

Those arguments were submitted to various competent enforcement authorities of Vietnam in an effort to persuade them to rule in favour of our client, that is, to conclude that the act of exporting should be considered as an act of use of the trademark. Finally, the people's committee of the location where the defendant resides issued their decision in our client's favor. In such a decision, they did not recognize the act of exporting as a single act but a whole chain of events including ordering the production and labelling and packaging of the infringing goods and in the end, exporting those goods. A monetary fine at the highest rate applicable under Vietnamese laws was imposed on the export company.

The case was concluded in favor of our client, but a black and white answer, either YES or NO, to the subject question is still not yet available. It still depends on individual cases. Thus, we are of the opinions that there is a need for a guideline or regulation to be issued by a competent body as a official confirmation on the issue for the purpose of avoiding the risk that an infringer can take advantage of the laws as to gain illegal benefits from infringing the trademark rights of others./.

Other Sectors

Finance

- Decision No. 1425/QD-BTC dated June 13, 2011 of the Ministry of Finance correcting Circular No. 55/2011/TT-BTC dated April 29, 2011 of this Ministry providing guidelines for the regime of reporting market prices of domestic goods and services and prices of imported goods.
- On June 8, 2011, the Prime Minister issued Decision No. 889/QD-TTg on the supplement to State Budget's expenditure estimate of 2011 for the localities.
- Decision No. 1348/QD-BTC dated June 2, 2011 of the Ministry of Finance promulgating the internal inspection process with regard to units under the Ministry of Finance.

Banking

- On June 3, 2011, the Prime Minister stipulated Decision No. 853/QD-TTg on the adjustment in lending levels and loan interest rates applicable to pupils and students.
- Decision No. 29/2011/QD-TTg dated June 1, 2011 of the Prime Minister promulgating the list of branches and domains eligible to enjoy preferential interest rates when re-borrowing ODA loans from the Government.
- On June 1, 2011, the State Bank of Vietnam issued Decision No. 1209/QD-NHNN on the adjustment in ratio of obligatory reserves in foreign currencies applicable to credit institutions.
- Circular No. 14/2011/TT-NHNN dated June 1, 2011 of the State Bank of Vietnam providing for the maximum interest rates on capital mobilization in the U.S Dollar applicable to individuals and organizations at credit institutions.

Taxation

- On June 17, 2011, the Government stipulated Decree No. 45/2011/ND-CP on the registration charges.
- Decision No. 36/2011/QD-TTg dated June 29, 2011 of the Prime Minister promulgating import tax rates applicable to second-hand passenger-transporting cars with 15 seats or less.
- On June 20, 2011, the Ministry of Finance issued Circular No. 91/2011/TT-BTC amending the preferential import tax rates applicable to a number of items in the Preferential Import Tariff.

- Circular No. 90/2011/TT-BTC dated June 20, 2011 of the Ministry of Finance providing guidelines for the exemption of export tax applicable to aloe wood produced from or made of cultivated Aquilaria woods.
- On June 10, 2011, the Ministry of Finance stipulated Circular No. 82/2011/TT-BTC providing guidelines for the implementation of preferential import tax rates regarding a number of items under Group 2710 in the Preferential Import Tariff.
- Circular No. 77/2011/TT-BTC dated June 7, 2011 of the Ministry of Finance amending preferential import tax rates applicable to ammonia item bearing code 2814.10.00.00 in the Preferential Import Tariff.

Trade

- On June 14, 2011, the Government issued Decree No. 44/2011/ND-CP on the amendment and supplement to Article 3 of Decree No. 189/2007/ND-CP dated December 27, 2007 providing for the functions, duties, authority and organizational structure of the Ministry of Industry and Trade.
- Decision No. 3098/QD-BCT dated June 24, 2011 of the Ministry of Industry and Trade approving a master planning on Vietnam's trade development for the period from 2011 to 2012 with orientation to 2030.
- On June 17, 2011, the Ministry of Industry and Trade stipulated Decision No.2992/QD-BCT approving the planning on development of Vietnam's plastic branch until 2020, with orientation to 2025.
- Decision No. 1413/QD-BTC dated June 9, 2011 of the Ministry of Finance correcting Circular No. 61/2011/TT-BTC dated May 12, 2011 of the Ministry of Finance on the amendment and supplement to Circular No. 41/2005/TT-BTC dated May 26, 2005 of this Ministry providing guidelines for a number of articles of Decree No. 10/2005/ND-CP dated January 31, 2005 providing for traditional flags, pennants, symbols, customs badges, insignias, stripes, clothing and customs certificates.
- On June 2, 2011, the Ministry of Industry and Trade issued Decision No.2755/QD-BCT on recognition of enterprises qualified for production and assembly of motorcycles.
- Circular No. 25/2011/TT-BCT dated June 30, 2011 of the Ministry of Industry and Trade providing for the works of examining, handling, checking, systemizing and supervising the implementation of legal documents in the field of industry and trade.
- On June 17, 2011, the Ministry of Finance stipulated Circular No. 88/2011/TT-BTC providing guidelines for the supporting financial mechanism funded by the State budget to implement the national trade promotion programs.

- Circular No. 24/2011/TT-BCT dated June 16, 2011 of the Ministry of Industry and Trade on amendment and supplement to Circular No. 07/2011/TT-BCT dated March 24, 2011 of the Ministry of Industry and Trade providing for the list of consumer commodities in service of determination of term for payments of import tax.
- On June 9, 2011, the Ministry of Finance issued Circular No. 80/2011/TT-BTC providing guidelines for the implementation of a number of articles of Decree No. 14/2011/ND-CP dated February 16, 2011 providing for conditions for operational registration of customs clearance agents.
- Circular No. 43/2011/TT-BGTVT dated June 9, 2011 of the Ministry of Transport providing for the warranty and maintenance of automobiles by automobile importing traders.

Labour

- On June 17, 2011, the Government stipulated Decree No. 46/2011/ND-CP dated June 17, 2011 on amendment and supplement to a number of articles of Decree No. 34/2008/ND-CP dated March 25, 2008 providing for the employment and management of foreigners working in Vietnam.
- Decision No. 34/2011/QD-UBND dated June 3, 2011 of the People's Committee of Ho Chi Minh City on a number of policies regarding cadres, civil servants and employees of health and education branches in the area of City's districts.
- On June 2, 2011, the Prime Minister issued Decision No. 31/2011/QD-TTg providing for the public disclosure, transparency, inspection and supervision of implementation of provisions of laws on social well-fare.
- Circular No. 18/2011/TT-BLDTBXH dated June 23, 2011 of the Ministry of Labour, War Invalids and Social Affairs providing guidelines for materials, colours, design, management and use of costumes, stripes and nameplates of inspectors, cadres of inspection agencies and units of the branch of labour, war invalids and social affairs.
- On June 23, 2011, the Ministry of Finance stipulated Circular No.92/2011/TT-BTC providing guidelines for the implementation of difficulty allowance for the employees in enterprises in accordance with Decision No. 471/QD-TTg dated March 30, 2011 of the Prime Minister.
- Circular No. 78/2011/TT-BTC dated June 8, 2011 of the Ministry of Finance providing guidelines for the exclusion of support amounts for examination and treatment of fatal diseases in favour of labour and their relatives, which are funded by the enterprises' after tax income sources, welfare fund and reward fund, from taxable incomes subject to personal income tax.

- On June 1, 2011, the Ministry of Transport stipulated Circular No. 42/2011/TT-BGTVT providing guidelines for the implementation of working time and rest time with respect to labour doing works that have special characters in the aviation branch.

Education

- Decree No. 40/2011/ND-CP dated June 8, 2011 on amendment and supplement to a number of articles of Decree No. 49/2005/ND-CP dated April 11, 2005 on sanctioning of administrative violations in the field of education.
- On June 16, 2011, the Ministry of Education and Training, the Ministry of Science and Technology, and the Ministry of Health jointly issued Inter-ministerial Circular No. 26/2011/TTLT-BGDDT-BKHCH-BYT providing guidelines for standards of furniture for pupils of elementary schools, secondary schools and high schools.
- Inter-ministerial Circular No. 06/2011/TTLT-BNV-BGDDT dated June 6, 2011 of the Ministry of Home Affairs and the Ministry of Education and Training providing for the standards, duties and working regime of and policies on lecturers at training and improvement establishments of ministries, ministerial-level agencies, bodies under ministries, politic schools in provinces and cities directly under the Central Government.

Transport

- On June 21, 2011, the Government stipulated Decree No. 49/2011/ND-CP on amendment and supplement to Article 11 of Decree No. 173/2007/ND-CP dated November 28, 2007 on the organization and operation of maritime pilots.
- Decision No. 949/QĐ-TTg dated June 23, 2011 of the Prime Minister approving the Agreement on the co-operation in the field of maritime transport between the Government of the Socialist Republic of Vietnam and the Government of the People's Democratic Republic of Algeria.
- On June 30, 2011, the Ministry of Transport issued Circular No. 47/2011/TT-BGTVT providing for the receipt, transmission and handling of information about maritime security.
- Circular No. 46/2011/TT-BGTVT dated June 30, 2011 of the Ministry of Transport providing the grant and recovery of certificates of insurances or financial guarantees in accordance with the International Convention on Civil Liability for Bunker Oil Pollution Damage of 2001.
- On June 10, 2011, the Ministry of Transport stipulated Circular No. 44/2011/TT-BGTVT dated June 10, 2011 of the Ministry of Transport providing for the

costumes, insignias and nameplates of cadres, public officials and public servants of the air-port authorities.

- Inter-ministerial Circular No. 75/2011/TTLT-BTC-BGTVT dated June 6, 2011 of the Ministry of Finance and the Ministry of Transport providing guidelines for setting up and managing prices of public-use products and services in the field of management and maintenance of domestic land roads and water ways in the form of order and plan allocation funded by the State Budget.

Construction - Land

- On June 10, 2011, the Prime Minister issued Decision No. 33/2011/QD-TTg on the exemption of residential land use levies in favour of households of fishing villages and people living on waterways and lagoons who are moved to settle in resettlement zones and points.
- Circular No. 94/2011/TT-BTC dated June 29, 2011 of the Ministry of Finance on amendment and supplement to Circular No. 120/2005/TT-BTC dated December 30, 2005 of this Ministry providing guidelines for the implementation of Decree No. 142/2005/ND-CP dated November 14, 2005 on the collection of land rentals and water surface rentals.
- On June 29, 2011, the Ministry of Finance stipulated Circular No. 93/2011/TT-BTC on amendment and supplement to Circular No. 117/2004/TT-BTC dated December 7, 2004 of the Ministry of Finance providing guidelines for the implementation of Decree No. 198/2004/ND-CP dated December 3, 2004 on the collection of land use levies.
- Circular No. 05/2011/TT-BXD dated June 9, 2011 of the Ministry of Construction providing for the inspection, evaluation and take-over of survey work for setting up topographic maps in service of planning and construction design.

Natural Resources - Environment

- On June 29, 2011, the Ministry of Industry and Trade issued Decision No.3209/QD-BCT on supplementing the Vietnamese zoning plan for exploration, exploitation, processing and use of tin, wolfram and antimony ores from the period from 2007 to 2015, with orientation to 2025.
- Decision No. 3133/QD-BCT dated June 27, 2011 of the Ministry of Industry and Trade on supplementing the Vietnamese zoning plan for exploration, exploitation, processing and use of the group of industrial minerals (serpentine, barite, graphite, fluorite, bentonite, diatomite and talc) up to 2015, with orientation to 2025.

- On June 11, 2011, the People's Committee of Ho Chi Minh City stipulated Decision No. 37/2011/QD-UBND repealing Decision No. 49/2010/QD-UBND dated July 24, 2010 of the People's Committee of Ho Chi Minh City on the amendment and supplement to its documents providing for procedures applied at the Management Authority for the Southern Area in the field of construction and land.
- Decision No. 899/QD-TTg dated June 10, 2011 approving the detailed planning on the development and application of radiation in meteorology, hydrography, geology, minerals and environmental protection until 2020.
- On June 6, 2011, the Prime Minister issued Decision No. 855/QD-TTg approving a project on environmental pollution control in transport activities.
- Circular No. 21/2011/TT-BTNMT dated June 20, 2011 of the Ministry of Natural Resources and Environment on the amendment and supplement to a number of contents in norms of elaboration of cadastral maps at 1:200, 1:500; 1:1000; 1:2000; 1:5000 and 1:10000 scales accompanying Decision No. 08/2008/QĐ-BTNMT dated November 10, 2008 of the Minister of Natural Resources and Environment.
- On June 20, 2011, the Ministry of Natural Resources and Environment stipulated Circular No. 20/2011/TT-BTNMT amending socio – economic norms of environmental survey activities with respect to the surrounding air and continental surface water; technic – economic norms of environmental survey activities in respect of seas, industrial waste air and radioactivity; and technic – economic norms of environmental survey activities with regard to land, underground water and acid rains.
- Circular No. 81/2011/TT-BTC dated June 9, 2011 of the Ministry of Finance providing guidelines for the implementation of a number of provisions of the Regulation on finance serving the relocation of establishments causing environmental pollution and establishments, which must be removed in accordance with the urban construction planning accompanying Decision No.86/2010/QĐ-TTg dated December 22, 2010 of the Prime Minister.
- On June 8, 2011, the Ministry of Natural Resources and Environment issued Circular No. 18/2011/TT-BTNMT providing for technic - economic norms of elaboration of environment maps (air, continental surface water and sea water) set up by method of using maps based on geological foundation in combination with measurement and survey for addition with afield data.
- Circular No. 17/2011/TT-BTNMT dated June 8, 2011 of the Ministry of Natural Resources and Environment providing for the technical process of setting up environment maps (air, continental surface water and sea water).

Science – Technology

- On June 29, 2011, the Prime Minister stipulated Decision No. 37/2011/QD-TTg on the support mechanism for the development of projects on wind electricity in Vietnam.
- Decision No. 890/QD-TTg dated June 8, 2011 of the Prime Minister on the establishment of Department for Development of Market and Scientific and Technological Enterprises directly under the Ministry of Science and Technology.
- On June 1, 2011, the Prime Minister issued Decision No. 842/QD-TTg approving "Development plan for a number of high-tech industries until 2020".

Information - Communications

- Decree No. 50/2011/ND-CP dated June 24, 2011 on the amendment to Decree No. 187/2007/ND-CP dated December 25, 2007 providing for the functions, duties, authority and organizational structure of the Ministry of Information and Communications.
- On June 17, 2011, the Government stipulated Decree No. 47/2011/ND-CP detailing the implementation of a number of contents in Law on Posts.
- Decision No. 35/2011/QD-TTg dated June 27, 2011 of the Prime Minister providing for the functions, duties, authority and organizational structure of Department of Telecommunications directly under the Ministry of Information and Communications.
- On June 30, 2011, the Ministry of Information and Communications issued Circular No. 18/2011/TT-BTTTT promulgating the process of verification of public-use terrestrial cell phone base stations.
- Circular No. 17/2011/TT-BTTTT dated June 30, 2011 of the Ministry of Information and Communications promulgating the list of telecommunications equipment and radio stations subject to verification.
- On June 30, 2011, the Ministry of Information and Communications stipulated Circular No. 16/2011/TT-BTTTT providing the verification of telecommunications equipment and radio stations.
- Circular No. 15/2011/TT-BTTTT dated June 28, 2011 of the Ministry of Information and Communications providing for the management of postal services' quality.
- On June 7, 2011, the Ministry of Information and Communications issued Circular No. 14/2011/TT-BTTTT detailing the implementation of Decree No.12/2006/ND-CP dated January 23, 2006 on goods subject to sectorial management of the Ministry of Information and Communications.

Administration - Judiciary

- Decree No. 43/2011/ND-CP dated June 13, 2011 providing for the on-line provision of information and public services on websites or electronic portals of State agencies.
- On June 20, 2011, the Prime Minister stipulated Decision No. 945/QĐ-TTg on the assignment of tasks to ministries, branches and localities to implement Resolution No. 57/2010/QH12 on the results of supervising the implementation of reforming administrative procedures in a number of fields directly related to the receipt of citizens and enterprises in accordance with the programme of State's overall administrative reform for the period from 2001 to 2010.
- Circular No. 12/2011/TT-BTP dated June 27, 2011 of the Ministry of Justice promulgating and providing guidelines for the recording, storage and use of standard forms for adoption.
- On June 27, 2011, the Ministry of Justice issued Circular No. 11/2011/TT-BTP providing guidelines for the implementation of a number of contents on notary public, notary organization and operation, State management on notary.
- Inter-ministerial Circular No. 10/2011/TTLT-BTP-TTCTP dated June 6, 2011 of the Ministry of Justice and the Government Inspectorate providing guidelines for the implementation of legal assistance in claiming against administrative decisions or acts.
- On June 3, 2011, the Ministry of Home Affairs stipulated Circular No.09/2011/TT-BNV providing for the term for preservation of dossiers and documents popularly generated in activities of agencies and organizations.
- Circular No. 08/2011/TT-BNV dated June 2, 2011 of the Ministry of Home Affairs providing guidelines for a number of articles of Decree No. 06/2010/ND-CP dated January 25, 2010 detailing who are public officials.
- On June 1, 2011, the Ministry of National Defence issued Circular No.80/2011/TT-BQP providing for the process of inspection and control on sea by Vietnam marine police force.

Immigration

- Circular No. 90/2011/TT-BQP dated June 30, 2011 of the Ministry of National Defence on the amendment and supplement to Circular No. 181/2005/TT-BQP dated November 17, 2005 of the National Defence providing guidelines for the implementation of Decree No. 32/2005/ND-CP dated March 14, 2005 on the regulation on mainland border-gates and Circular No. 05/2010/TT-BQP dated January 18, 2010 of the Ministry of National Defence providing guidelines for

the implementation of Decree No. 50/2008/ND-CP dated April 21, 2008 on the management and protection of security and order at border-gates and sea ports.

- On June 29, 2011, the Ministry of Public Security stipulated Circular No.45/2011/TT-BCA providing guidelines for the issuance of entry and exit permits to foreigners who are residents in Vietnam and have not passports.
- Circular No. 44/2011/TT-BCA dated June 29, 2011 of the Ministry of Public Security providing guidelines for the issuance of permits for visits and tourist travels in Vietnam to foreigners in transit.
- On June 29, 2011, the Ministry of Public Security issued Circular No.43/2011/TT-BCA providing guidelines for the issuance of entry and exit laissez-passers to Vietnamese citizens crossing to China's frontier provinces and cities adjacent to Vietnam.
- Circular No. 42/2011/TT-BCA dated June 29, 2011 of the Ministry of Public Security providing guidelines for the issuance of Vietnam – Cambodia border laissez-passers to Vietnamese cadres, public servants and workers crossing to Cambodia.
- On June 29, 2011, the Ministry of Public Security stipulated Circular No.41/2011/TT-BCA providing guidelines for the issuance of border laissez-passers to Vietnamese citizens crossing to Laos and permits for going to Vietnam's provinces and cities to Laotian citizens.
- Circular No. 02/2011/TT-BNG dated June 27, 2011 of the Ministry of Foreign Affairs providing guidelines on procedures for registration of overseas Vietnamese citizens.

Agriculture

- On June 10, 2011, the People's Committee of Ho Chi Minh City issued Decision No. 36/2011/QD-UBND promulgating the regulations on policies to promote the transformation of agricultural structure toward urban agriculture in the area of Ho Chi Minh City for the period from 2011 and 2015.
- Decision No. 846/QD-TTg dated June 2, 2011 of the Prime Minister on the pilot implementation of ordering a number of scientific and technological products by the Ministry of Agriculture and Rural Development.
- On June 27, 2011, the Ministry of Agriculture and Rural Development stipulated Circular No. 46/2011/TT-BNNPTNT providing for the order to implement the approval and evaluation of activities related to dykes.
- Circular No. 41/2011/TT-BNNPTNT dated June 2, 2011 of the Ministry of Agriculture and Rural Development promulgating "the additional list of plant varieties permitted for production and business in Vietnam".

Miscellaneous

- On June 13, 2011, the Government issued Decree No. 42/2011/ND-CP providing for the citizens who are subject to military service but are exempted from conscription in the period of war.
- Decision No. 34/2011/QD-TTg dated June 24, 2011 of the Prime Minister on the amendment and supplement to a number of articles of the Regulation on management of forests accompanying Decision No. 186/2006/QD-TTg dated August 14, 2006 of the Prime Minister.
- On June 29, 2011, the Ministry of Culture, Sports and Tourism stipulated Circular No. 08/2011/TT-BVHTTDL on the amendment and supplement to a number of provisions of Circular No. 05/2007/TT-UBTDTT dated July 20, 2007 of the Committee of Physical Training and Sports providing guidelines for the implementation of a number of provisions of Decree No. 112/2007/ND-CP dated June 26, 2007 detailing and providing guidelines for a number of articles of Law on Physical Training and Sports.
- Circular No. 25/2011/TT-BYT dated June 23, 2011 of the Ministry of Health promulgating the list of anti-insect and antiseptic chemicals and finished products used in the field of household use and health, which are permitted for registration to be used, permitted for limited use, and prohibited from use in Vietnam.
- On June 17, 2011, the Ministry of Finance issued Circular No. 87/2011/TT-BTC providing guidelines for the inventory and re-evaluation of assets and capital of enterprises of which the whole charter capital is owned by the State at the point of time of 00:00 a.m. on July 1, 2011 in accordance with Decision No. 352/QD-TTg dated March 10, 2011 of the Prime Minister.
- Circular No. 13/2011/TT-BTTTT dated June 6, 2011 of the Ministry of Information and Communications providing for the representatives offices in Vietnam of foreign publishers and organizations issuing foreign publications.
- On June 1, 2011, the Ministry of Finance stipulated Circular No. 74/2011/TT-BTC providing guidelines for securities transactions.

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