

## Several Legal Issues Regarding Intellectual Property Appraisal Viewed from Theoretics to Reality and Completion Solution Therefor

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Using expert opinion as a basis for determining criminal, civil and administrative cases is an activity commonly conducted by judges in almost jurisdictions in support of the admissibility of evidence. Generally speaking, judges or other decision-making persons are solely knowledgeable of laws but of other fields such as technical, construction, finance, intellectual property (IP), etc., the presence of appraiser, therefore, who is capable of offering his or her expert opinion, whether in the form of either a demand for referendum by courts or proposal by litigants, in the criminal, civil or administrative proceedings is crucial so that the former makes judgment on the merits.

The term of expert opinion may exist inconsistently from country to country namely *expert witness*, *expert testimony*<sup>1</sup>, *judicial technical appraisal*, *neutral technical expert*<sup>2</sup>, *technical investigators*<sup>3</sup> or even simply *advice from expert*, but its connotation is basically the same in view of jurisprudence. No *expert opinion* per se terminology in the form of admissible evidence source is available under the laws of Vietnam except for the current terms namely judicial appraisal, IP appraisal or appraiser. It is expected that this article may bring a comprehensive summary and analysis on the relationship between judicial appraisal and IP appraisal, the possibility of conflict between the 2012 Law on judicial appraisal (“LJA”) and the 2005 Law on IP as amended 2009 (“revised IP Law”), whether expertise opinion or appraisal conclusion is prevailed in

administrative, judiciary and criminal proceedings, and finally the author is striving to recommend a feasible solution enabling to intrinsically develop IP appraisal activities in Vietnam.

### Relationship between IP Appraisal and Judicial Appraisal

According to the well-respected late Prof. Nguyen Lan’s *Word and Phrase Vietnamese Dictionary*, appraisal or assessment that is a Sino-Vietnamese word means *something is considered to decide*<sup>4</sup>. As per the online Vietnamese-Vietnamese Dictionary, appraisal is defined that *looking into somethings for the purpose of determining what is present or absent*<sup>5</sup>. In the legal context, appraisal as an expertise activity are needed largely, especially in the judicial sector, means that the usage of

<sup>1</sup> Expert opinion or expert testimony is found in the *US Federal Rules of Evidence, Rule 702*

<sup>2</sup> Evidences in the form of judicial technical appraisal, neutral technical expert are regularly accepted by German courts. See: *The Improvement of Intellectual Property Arbitration, Mediation, and Court Procedures in the Shanghai Pilot Free Trade Zone*, Office for Harmonization in the Internal Market, page 21.

<sup>3</sup> In China, judicial technical appraisal, advice from experts, or hiring experts as judicial technical appraisers attending a hearing, or even technical investigators appointed as a group whose role are the same as clerk to the justices, is likely to be demanded by courts during the settlement of IP dispute. See: *The Improvement of Intellectual Property Arbitration, Mediation, and Court Procedures in the Shanghai Pilot Free Trade Zone*, Office for Harmonization in the Internal Market, page 21

<sup>4</sup> See *Word and Phrase Vietnamese Dictionary*, page 745

<sup>5</sup> See <http://www.informatik.uni-leipzig.de/~duc/Dict/>

knowledge, equipment, scientific method, technical, expertise is to conclude a particular and relevant expertise issue in criminal, civil or administrative cases<sup>6</sup>.

There are an average of 32,000 cases are annually received and appraised by forensic medicine agencies while criminal scientific assessment activities since 2005 to now has recorded an enormous number of 379,659 cases. During the last 5 years, financial assessment reports are issued against more 13,538 cases<sup>7</sup>. For IP sector, during more than 10 years since 2005 IP Law has come into effect, Vietnam merely granted 4 IP appraiser certificates in an exceptional manner and only one accredited IPR appraisal organization established and existing up to now is Vietnam Intellectual Property Research Institute (VIPRI). Amongst these 4 certificates, only one certificate is in use while other three ones are not actually used. According to VIPRI, between September 2009 and September 2016 all appraisal conclusions had been issued in the name of VIPRI instead of personally appraiser. VIPRI said that it received a total of 713 cases in 2015 and it concluded 481 cases for 9 months of 2016. Assessment regime mentioned in LJA signifies

judicial appraisal in nature while the same included in revised IP law is IP appraisal. According to LJA judicial assessment means *judicial appraiser utilizing his or her knowledge, scientific equipment, technical, expertise to conclude issues regarding the activities of investigation, prosecution, adjudication and criminal enforcement judgement, civil case handling, administrative case demanded for referendum by procedure-conducting bodies, procedure-conducting persons or proposed by assessment-asking persons*<sup>8</sup>. Under section 201 revised IP law, IP assessment is construed that *organization or individual uses his knowledge or expertise to determine or conclude issues merely relating to intellectual property*<sup>9</sup>. Therefore, judicial assessment and IP assessment, whether is demanded for referendum or proposed by litigants, has the same nature being all relating to the usage of knowledge or expertise to conclude an issue with respect to a civil or administrative trial. Nevertheless, as the scope of judicial assessment covers too broadly from investigation, prosecution, adjudication and criminal judgment enforcement activities to civil or administrative trial settlement while IP sector is a branch of law so IP assessment

shall be deemed as a subset inside judicial assessment category.

### **Is there a conflict between revised IP law and LJA in respect of IP assessment?**

Prior to the introduction of IP assessment to 2005 IP Law, cases concerning handling infringement of industrial property right or involving dispute of industrial property right, particularly trademark, industrial design and entitlement to IPR-related claim anti-unfair competition were delivered expert opinion made by National Office of Intellectual Property of Vietnam (NOIP), upon which IPR enforcement bodies such as Court, Economic Police, Market Management Bureau, Customs, Specialized Inspectorate or People's Committee which admitted the case handed down judgment or issued decision on settlement of that case. However, because NOIP only is a state authority having jurisdiction over grant of title of protection thus in some circumstances the provision of NOIP's expert opinion in reply to IPR enforcement bodies was dramatically criticized by the public due to non-objectivity otherwise NOIP shall be considered "*nemo iudex in causa sua*" (no one may be judge in his own cause).

<sup>6</sup> Section 2(1) LJA of 2012 taking effective since January 1, 2013

<sup>7</sup> See Summary Report No. 48/BC-TP dated March 25, 2011 by Ministry of Justice on the Five-year Implementation of Ordinance on Judicial Appraisal

<sup>8</sup> See Foote Note 6

<sup>9</sup> See Section 201(1) revised IP Law

A representative trial which both illustrated well the state *nemo judex in causa sua* and showed it is right that NOIP fell down the status “*between the devil and the deep blue sea*” was the dispute between Duy Loi Sole Proprietorship Enterprise, holder of registered patent for design hammock framework under patent no. 7173, filed a request with Sub-market management bureau of Ho Chi Minh city demanding to handle the lot of hammock framework produced and marketed by Truong Tho Company, alledged not to be substantially different from its patent. The problem took place when NOIP just received a request for provision of expert opinion not too long then it received application for invalidation of patent no. 7173 by reason of loss of novelty at the time of filing according to the arguments by Truong Tho Company<sup>10</sup>. Such event may be main reason leading to the fact IP Law of 2005 did not confer the power for IP assessment upon NOIP<sup>11</sup>. In accordance with Section 201 revised IP Law, assessment conclusion may be delivered on the basis either of request made by

one of IPR enforcement bodies or proactively provided by IPR holder or concerned parties. The connotation of such provision is narrower than that of prescribed items 1, 3 article 2 of LJA in terms of the aspect that IPR holders or concerned parties may proactively retain an appraisal body to supply assessment conclusion instead of just entitling to do so only where these persons already so requested but rejected by procedure-conducting bodies and procedure-conducting persons.

It pays to note that only minor difference may result in the conflict between IP Law and LJA particularly relating to evidence and evidence admissibility<sup>12</sup>, for example plaintiff or defendant in a civil case involving an IP dispute may protest an assessment conclusion given by the other party and request the court not to recognize it as admissible proof because such assessment had been conducted in contrast with the rule set out by LJA although it is in conformity with revised IP Law. Hence in such circumstance, a unanswered question is that whether the court would rely on which law to determine? It is of

course submitted that as per widely accepted general principle in many jurisdictions including Vietnam for settling the phenomenon of law conflict is that in case of law conflict specialized law would be prevailed<sup>13</sup>. However, the principle has relative characteristic since a subject matter may be sometimes regulated by both of specialized laws, leading to the fact that the conflict is not exhaustively dealt with makes the provision of this law is denied by the other law<sup>14</sup>. One practical instance helped us view most clearly during last years was the drastic debate between Ministry of Science and Technology (MoST) and Ministry of Information and Communications (MIT), according to which MoST contended that the act of registering, possessing the right to use or using domain names that are identical or confusingly similar with trademark, tradename which are protected in the name of others laid down in item d clause 1 section 130 of IP Law of 2005 shall be subject to administrative penalty attaching to the application of consequence remedy

<sup>10</sup> See <http://kinhdoanh.vnexpress.net/tin-tuc/vi-mo/cuc-so-huu-tri-tue-so-vua-da-bong-vua-thoi-coi-2684221.html>

<sup>11</sup> Additionally view <http://kinhdoanh.vnexpress.net/tin-tuc/vi-mo/cuc-so-huu-tri-tue-se-thoi-giam-dinh-tranh-chap-2686166.html>

<sup>12</sup> As per Section 95(6) Civil Proceedings Code of 2015, *assessment conclusion may be considered as evidence only where it is conducted in accordance with due procedure provided by the laws.*

<sup>13</sup> Section 5(2) IP Law of 2005 evoking the rule for application of specialized laws provides for that *in case of discrepancy between intellectual property-related provisions of this Law and that of other laws then this Law shall be prevailed.*

<sup>14</sup> Section 3(1) Law on Information Technology of 2006 set forth *where there is a difference between provisions of this law and other law in terms of the same matter relating to the utilization and development of information technology then this law shall be prioritized.*

namely to forcibly change or transfer domain name<sup>15</sup>. Nevertheless, MIT assumed that the presence of section 76 Law on information technology of 2006 that provides for only three alternative dispute resolutions in respect of domain name .VN comprising conciliation, arbitration or initiating a lawsuit before a court cannot be applicable.

**Should expert opinion or assessment conclusion be accepted as evidence?**

As analysed above, the nature of IP assessment or judicial assessment is that those persons, who are admitted and bestowed IP appraiser certificates under the IP legislation or appointed as judicial appraiser, whose expert opinion addressing to court either in the form of oral one at the hearing or of written one (ie. assessment conclusion). Yet it is noted that expert opinion, whether it is regarded as a source of evidence upon which judges rely to determine the case on the merits, is not always admitted as legitimate evidence. It is a lawful evidence only where it concurrently contains 3 attributes<sup>16</sup>: (a) objectivity (those are the truth), (b) relevance (used as a basis for deciding claim or

counter-claim by litigants is grounded and lawful or not including other particulars necessary in support of the settlement of civil case on the merits), and (c) legality (delivered or submitted by litigants or collected by court in accordance with the procedure and process set out by Civil Proceedings Code)

Civil Proceedings Code of 2004 as amended in 2011, Civil Proceedings Code of 2015 and Law on Administrative Procedure of 2010 provide for no definition on expert opinion as one of source of evidence but mention only “assessment conclusion” may be accepted as a source of evidence. The concept assessment conclusion, as a source of evidence, becomes continuously narrower when the law requires such assessment be conducted in conformity with the procedure laid down by the legislation<sup>17</sup>. Now we look back a lawsuit “a red cup”<sup>18</sup> that happened in 2006 between Société des Produits Nestlé S.A. (“Nestlé”) and Gold Roast Viet Nam Co., Ltd (“Gold Roast”) to comment how assessment evidence included in the case was determined. The case originated from international registration no. 824804 filed by Nestlé seeking protection in Vietnam,

amongst other countries, of a mark containing a device of red cup (no verbal element is included in the mark) used for coffee in class 30. The mark is initially rejected by NOIP by reason of lack of distinctive characters but the rejection was subsequently withdrawn upon appeal by applicant together with the proof of acquiring secondary meaning.

In view of the use of a red cup on coffee package by Gold Roast, Nestlé filed a request with MoST’s Inspectorate for handling infringement of its trademark along with NOIP’s October 2006 expert opinion. MoST’s Inspectorate subsequently transmitted the case to Binh Duong province’s Department of Science and Technology’s Inspectorate (DoST) where Gold Roast’s principal address is based to be duly competent. March 6, 2008, DoST issued Decision 653/QD-XPHC imposing a sanction of VND100,000,000 (roughly \$6,200) against Gold Roast because of a violation of registered trademark and in the meantime forcing Gold Roast to remove infringing elements. Unsatisfied with the penalty, upon obtaining written appraisal by the Intellectual Property Research Institute (IPRI), a subsidiary under Vietnam Union of Science and Technology Associations (VUSTA), Gold Roast brought an administrative action before Binh Duong province’s People’s

<sup>15</sup> See Article 14(16)(a), (18)(c) Decree 99/2013/ND-CP

<sup>16</sup> Section 92 Civil Proceedings Code of 2015 coming into force since July 1, 2016

<sup>17</sup> Section 83(5) Civil Proceedings Code of 2004, Section 95(6) Civil Proceedings Code of 2015

<sup>18</sup> See more <http://nld.com.vn/phap-luat/binh-duong-tranh-chap-tach-va-coc-2009070308471794.htm>

Court against Decision 653/QĐ-XPHC arguing that the sanction based on NOIP's expert opinion is not accurate in nature as Gold Roast's appearance of red cup is different from that of Nestlé and more particularly Gold Roast also proves the product consisting of such red cup had been imported into Vietnam since 1996, until the establishment of its factory in Vietnam in 2001, it had continued using that product while Nestlé is just granted protection since 2004. The court held that both of NOIP's expert opinion and IPRI's appraisal conclusion were not assessment conclusion thus they are not accepted as evidence. Instead, the court by itself sought for expert opinion to Binh Duong Provincial Police's Criminal Technical Division but was rejected by it due to its absence of expertise. Next, Criminal Scientific Institute (under Ministry of Security) when being asked for the same, already refused because the subject matter is lack of its own expertise. No assessment bodies while the appraisal and expert opinion included in the dossier are contrary ultimately forced the court to affirm DoST's decision on Gold Roast's infringement of use of red cup and declined Gold Roast's lawsuit.

The above case reveals that the court's rejection of both appraisals is correct since even though appraisal conclusion is considered as one of nine sources of evidence by section Civil Proceedings Code of 2004 then one of them is admitted as evidence only where one of them is made in conformity with the procedure stipulated by the laws. At the time of dispute, IP Law of 2005 took effect from July 1, 2006, Ordinance on Judicial Assessment (OJA) came into effect from January 1, 2005, the judge hearing the case might have referred to OJA to seek expert opinion<sup>19</sup>. It is supposed that no assessment bodies with relevant expertise is the major cause making the court unwillingly choose one of two above assessment documents as a basis for hearing the case, and no body knows that is why the court finally utilize NOIP's expert opinion as a ground to dismiss Gold Roast's appeal. Some opined that the court's use of NOIP's expert opinion is proper as prior to November 2006, Decree 12/1999/ND-CP had been still valid, wherein article 13 stipulates that NOIP is liable for examination, delivering its expert

opinion in reply to enterprises or state authorities in terms of whether or not act of infringement of IP rights and NOIP's expert opinion is one of evidence enabling competent bodies to rely upon against whoever is infringer. Notwithstanding, in our own opinion, regardless of the existence of article 13 Decree 12/1999/ND-CP, the fact the court admitted NOIP's expert opinion as evidence is not accurate because the procedure for issuance of assessment conclusion – a required condition to be accepted as evidence provided in section 82 Civil Proceedings Code of 2004 – is to comply with OJA but not Decree 12/1999/ND-CP – legal document whose legal validity is lower than<sup>20</sup> and in addition the above-indicated article 13-based legitimate evidence assumption is deemed contrary to IP Law of 2005 meaning NOIP is no longer competent to provide assessment conclusion since July 1, 2006. Another case shows how urgent the need for assessment conclusion is that duly derives from IPR enforcement agencies. A civil lawsuit brought by Cong ty van hoa Dong Tay (plaintiff) and

<sup>19</sup> See Sections 24, 27 & 28 Ordinance on Judicial Assessment of 2004

<sup>20</sup> According to Section 84(9) Constitution of 1992, *National Assembly has the duties and powers to abrogate texts adopted by the President the Standing Committee of the National Assembly, the Government, the Prime Minister of the Government, the Supreme People's Court and the People's Inspectorate General which are incompatible with the Constitution, the laws and resolutions of the National Assembly*; and as regards Section 91(5) *Standing Committee of the National Assembly shall have the duties and powers to supervise the implementation of the Constitution, laws and resolutions of the National Assembly, decrees and resolutions of the Standing Committee of the National Assembly, to supervise activities of the Government, the Supreme People's Court, the People's Inspectorate General; to suspend the implementation of texts adopted by the Government, the Prime Minister, the Supreme People's Court, the People's Inspectorate General which are incompatible with the Constitution, laws and resolutions of the National Assembly and submit to decision of the National Assembly recommendations on the abrogation of those texts, to abrogate texts adopted by the Government, the Prime Minister, the Supreme People's Court, the People's Inspectorate General, which are incompatible with decrees and resolutions of the Standing Committee of the National Assembly.*

Cong ty TNHH QGS (defendant) was heard first instance by Da Nang city's people's court in 2014<sup>21</sup> involved in contractual dispute and intellectual property right over software used for website, wherein plaintiff asked for refund of VND219,152,490 (approximately \$10,000) that is a part of paid amount in favor of defendant out of nearly VND700,000,000 (about \$33,000) because the service provided by defendant is unqualified. Nevertheless, defendant counter-claimed along with a request with the court for seeking expert opinion, alleging that plaintiff breached its contractual obligation, particularly using copyrighted software without his permission. In its response to the court's demand for introducing judicial appraiser in charge of copyright infringement assessment, Da Nang city's Department of Culture, Sports and Tourism (DoCST) proposed the court to liaise with Da Nang city's Representative Office of Copyright Office of Vietnam. 9 days later the court addressed official letter to Da Nang city's Department of Information and Communications (DIC) with the same demand. Instead of responding to the court, DIC sent its official letter to Ministry of Culture, Sports and Tourism (MCST) asking for guidance and was guided to refer to Circular

15/2012/TT-BVHTTDL of December 13, 2012. After that the court contacted Copyright Office of Vietnam (COV). In its response to the court, COV stated "*no copyright assessment organization has been established up to now*" and suggested the court should set up a council seeking expert opinion. Therefore, until the availability of expert opinion decided by the council, on May 23, 2014 the court was able to hand down its judgement whose total proceeding took nearly 2 years.

Even though industrial property assessment is deemed better than copyright assessment as it has been running since 2007 by only one industrial property assessment agency being VIPRI with four accredited appraisers but almost one of them is currently operable, there are still challenges for the activity in Vietnam. Firstly, the only existence of VIPRI is not sufficient to satisfy the demands coming from different types of subjects namely litigants, concerned parties because assuming that one of these subjects is supplied an appraisal conclusion on an IPR infringement or dispute, other subjects including court and IPR enforcement agencies could no longer seek VIPRI's assessment conclusion on the same matter. Such status leads to either standstill or lack of counterpoise

to make sure the case would be handled on the merits.

Secondly, regardless of availability of assessment conclusion that is admitted as evidence since it is conducted in accordance with due procedure provided by the laws either by IPR holder or concerned parties, the popular state of reliance upon NOIP's expert opinion by IPR enforcement bodies as a ground for determining an infringement or dispute is problematic and tottering. On the one hand, judgement or administrative decision in settlement of IPR infringement or dispute heard or decided on the basis of NOIP's expert opinion is vulnerable to be revoked by higher court or Supreme Court. In the other hand, such status has in reality been causing the IPR assessment provisions set out in revised IP Law to become deactivated

### **Which is feasible solution for development of IPR assessment activities?**

Section 201 of revised IP Law refers to 4 subjects namely enterprise, cooperative, non-business units or law-practising organization are entitled to provide IPR assessment service. Thus, looking at the practice with the only existence of VIPRI, we realize that there is one and only subject amongst 4 subjects

<sup>21</sup> See more: <http://vksdanang.gov.vn/index.php?language=vi&nv=news&op=tintuckhac/NHUNG-BAT-CAP-TRONG-CONG-TAC-GIAM-DINH-SO-HUU-TRI-TUE-1842>

is granted and now running while the other permissible subjects are still sleeping. According to Article 44(3)(a) Decree 105/2006/ND-CP as amended by Decree 119/2010/ND-CP, an appraiser may operate in the name of an assessment organization or conduct independently, by which the independent character herein shall be construed that he or she may independently deliver his or her assessment conclusion and shall be liable for that conclusion. The author assumes that such good provision may pave the way for making our proposal come true. In particular, one or two non-business units should be set up by MoST and MCST and each of the units holds responsible for conducting and providing industrial property assessment, and copyright and related right appraisal services respectively. These units may be running almost the same as commercial arbitration centers<sup>22</sup> that are regulated under Law on Commercial Arbitration of 2010 because Section 201(3) revised IP Law does not limit the status that cadres and civil servants or public employees wish to be granted appraiser certificate unless they are satisfied 4 conditions: a) *being a Vietnamese citizen and having full civil act capacity*, (b) *permanently residing in Vietnam*, (c) *possessing good ethical qualities*, (d) *possessing a university or higher degree in*

*a profession relevant to domains in which an assessor card is applied for, having conducted professional activities in these domains for five or more years and passed a professional assessment examination.* Hence, by doing so we think that it is possible to mobilize and encourage a great deal of individuals those who are well-trained, highly-experienced, profoundly knowledgeable in terms of different technicals or sectors including those working for institutes, NOIP, universities or other education units in addition to a group of engineers, lawyers and IP practitioners those are practicing in Vietnam to attend and take national examination for getting assessor certificates. If the solution becomes true, on the one hand it will be easy for courts and IPR enforcement bodies to seek expert opinion (ie. in the form of assessment conclusion) from an abundant source of accredited assessors and in the other hand their expert opinion will be expressly in conformity with the laws to be admissible as evidence during the legal proceedings including administrative settlement process.

<sup>22</sup> According to the link <http://btp.moj.gov.vn/qt/tintuc/Pages/trong-tai-thuong-mai.aspx?ItemID=53> up to July 31, 2015 there have been 12 commercial arbitration centers with a total of 350 arbitrators



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*Under the authorization of the International Trademark Association (INTA), Mr. Vinh, on behalf Bross & Partners, successfully moderated a roundtable conference titled "Overlapping Protection of 3D Marks, Industrial Design and Copyrights" held in Hanoi, Vietnam on April 10, 2014 with the participation of the representatives of the National Office of Intellectual Property (NOIP), the Copyright Office of Vietnam (COV), the academia coming from the Hanoi University of Law, the National Economics University, the Foreign Trade University and a number of IP practitioners working for international IP law firms and local IP law firms. He is also a regular contributor to the World Trademark Review commenting on the practical and statutory issues regarding trademark enforcement and anti-counterfeit goods in Vietnam.*

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