

ARTICLE

Soviet Legacy of Vietnam's Intellectual Property Law: Big Brother is (No Longer) Watching You

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(Received 24 October 2022; revised 24 April 2023; accepted 6 June 2023; first published online 23 October 2023)

Abstract

How did intellectual property (IP), a private right born out of European Enlightenment ideals, take root in Vietnam's socialist legal framework, and what influence does Vietnam's Soviet legacy still have on its IP law? The clandestine triumph of IP rights in Vietnam is remarkable, given the system's former propensity for collective ownership and limited private property rights. Vietnam's approach to IP rights has changed with economic liberalisation: while external pressure prompted the initial adoption of IP laws, national interest and global reputation enhancement are now driving the effort. At the height of communism in the 1980s and under Soviet domination, IP laws reflected socialist ideology and the characteristics of a command economy. Amid Vietnam's quest for technological advancement, the importance of patents has grown. However, public perceptions of the unreliability of the legal system to resolve IP disputes persist, pushing civil disputes towards the government rather than the judiciary. As Vietnam opened economically, its IP regime moved away from overt communism, but communist values are still implicitly incorporated in general principles. Today, adherence to free trade agreements, which require robust IP protection, is driving the modernisation of Vietnam's IP infrastructure.

Introduction

'Why Does Trump Like Communist Vietnam? Because It's Capitalist.'¹ This headline may raise the eyebrows of those who remember Vietnam only as an adjective for a war that is not only considered one of the most controversial in American history, but in which the US struggle against communism clearly failed.² Even three decades after the Soviet Union collapsed and the Eastern bloc disintegrated, Vietnam continues to swim against the tide and perseveres its commitment to socialism. This is in stark contrast to the views of its people, with 95% of respondents to a 2014 survey declaring to cherish the free market system (or capitalism for short).³ The figure is the highest of all

*This article was first presented at the 'Modern Challenges of IP Law' conference in memory of Professor William Cornish, held in Warsaw in September 2022. The author would like to thank Sy Nguyen Luong for his help in finding Vietnamese cases, Dr Pratyush Nath Upreti for his feedback on an earlier draft, Professor Martin Adelman for the encouragement to write this article, and two anonymous reviewers for their insightful comments.

¹Mark Karlin, 'Why Does Trump Like Communist Vietnam? Because It's Capitalist' (Truthout, 8 May 2019) <<https://truthout.org/articles/why-does-trump-like-communist-vietnam-because-its-capitalist/>> accessed 12 Jul 2022.

²Jennifer D Keene, Saul Cornell & Edward T O'Donnell, *Visions of America: A History of the United States* (vol 2, 3rd edn, Pearson 2019).

³Richard Wilke, Katie Simmons & Russ Oates, 'Emerging and Developing Economies Much More Optimistic than Rich Countries about the Future: Education, Hard Work Considered Keys to Success, but Inequality Still a Challenge' (Pew Research Centre, 2014) <<https://www.pewresearch.org/global/2014/10/09/emerging-and-developing-economies-much-more-optimistic-than-rich-countries-about-the-future/>> accessed 5 Apr 2022.

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twenty-five countries included in the survey; quite remarkably, only 70% of respondents from the US – the spiritual home of capitalism – shared the same sentiment.

At the heart of this article is a simple question: How did intellectual property (IP) – a private right⁴ and the brainchild of the European Enlightenment⁵ – take root in Vietnam's socialist legal framework, and what influence does Vietnam's Soviet legacy still have on its IP law? The clandestine triumph of IP rights in Vietnam is astonishing, given that it occurred in a system that had traditionally championed collective ownership while suppressing private property rights.

While much has been written about the lingering Soviet legacy in various areas of Vietnamese law, such as the constitution, the judiciary, and commercial law,⁶ IP law remains uncharted territory. It has been observed that Vietnam differs from other developing countries in that its current IP institutions have no historical ties to any Western or other developed country, such as Japan,⁷ but were built on the 'institutional blueprint'⁸ of the Soviet Union. Vietnam moved away from its command-and-control approach in 1986, accelerated market opening in the mid-1990s, and culminated in its race to join global trade through WTO membership in 2007. Economically, the country has long since divorced itself from its Soviet model and married into the Western system. But echoing Joseph Stalin's alleged saying, '[i]n the Soviet Union army, it takes more courage to retreat than to advance', the Soviet past also refused to retreat in Vietnam and instead lingers on, inflicting long-lasting damage on its IP system.

Since the end of the Cold War, socialist law has been declared 'dead and buried'⁹ and even erased from comparative law textbooks.¹⁰ As the world moves towards a knowledge-based economy, where IP rights serve as a driving force for national development, a few questions arise: does Vietnam's path dependency¹¹ restrain its ability to transplant IP rights? What is left of communism, and how deeply is it embedded in the country's IP system? Is the Soviet era really over?

To answer these questions, I will first sketch out private property from a communist's point of view to highlight the conflict between IP rights and communism. Subsequently, I will describe Vietnam's history, focusing on pivotal events that have shaped the economy and shepherded the evolution of IP rights. Against this background, I will then outline the four key periods in the evolution of Vietnam's IP law: pre-1981, with 1981 marking the first IP text passed after the Vietnam War; 1981–1995, with the *Civil Code* enacted in 1995; 1995–2005, with the first *IP Law* adopted in 2005; and post-2005. Such a sketch will give colour to how a legal regime born on socialist soil has been transplanted into a liberal market economy and flourished there.

Thereafter, I will examine the Soviet legacy of Vietnam's IP law by analysing three key facets: first, how has copyright been weaponised to safeguard 'socialist legality'? Second, how has the concept of collective ownership sabotaged the patent system? (This is particularly noteworthy

⁴Marrakesh Agreement Establishing the World Trade Organization, Annex 1C ('Agreement on Trade-Related Aspects of Intellectual Property Rights' (TRIPS)), 15 Apr 1994, preamble.

⁵Carla Hesse, 'The Rise of Intellectual Property, 700 B.C.–A.D. 2000: An Idea in the Balance' (2002) 131 *Daedalus* 26.

⁶John Gillespie, *Transplanting Commercial Law Reform. Developing a 'Rule of Law' in Vietnam* (Routledge 2006); Ngoc Son Bui, 'The Socialist Precedent' (2019) 52 *Cornell International Law Journal* 421; Duy Nghia Pham & Hai Ha Do, 'The Soviet Legacy and Its Impact on Contemporary Vietnam', in Hualing Fu et al (eds), *Socialist Law in Socialist East Asia* (Cambridge University Press 2018) 97.

⁷Peter Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (2002) 5 *The Journal of World Intellectual Property* 765, 766.

⁸Tim Reiffenstein & Ha Thanh Nguyen, 'The international developmental state: The Japanese intellectual property system in Vietnam' (2011) 42 *Geoforum* 462, 465.

⁹Hein Kotz, 'Preface to the Third Edition', in Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford Clarendon Press 1998) i, v.

¹⁰*ibid.*

¹¹Jaakko Husa, 'Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law' (2018) 6 *The Chinese Journal of Comparative Law* 129, 130. Path dependency is a concept that highlights how past occurrences or choices can shape and restrict future occurrences or choices.

as the Communist Party has historically prioritised the realms of economy, politics, and culture as pivotal revolutionary fronts. As a result, copyright and patents fell under substantial Soviet influence, with trademarks assuming a diminished significance in comparison.)¹² And finally, how has a socialist bureaucracy shaped the public's sentiment toward court procedures in matters of IP law?

Private Property: Communism's Nemesis

Communism, a political and economic ideology, endorses a stateless, classless society through the abolition of private property and the nationalisation of the means of production. This ideology, conceived by Karl Marx and Friedrich Engels in 1848 in the famous pamphlet *The Manifesto of the Communist Party*,¹³ spread to the Soviet Union and its satellites, China, North Korea, Cuba, Vietnam, and other countries. In the Soviet bloc, Vladimir Lenin polished Marxism into 'Marxism-Leninism', which remains the official ideology in several communist states, including Vietnam.

Under communism, private property is that part of the property that neither belongs to the state (state property) nor to individuals for their personal use (personal property).¹⁴ Personal property encompasses things and possessions that fulfil 'material and cultural needs', such as 'consumer goods and property items produced, bought, inherited, won or given.'¹⁵ Personal property mutates into private property when the boundary of personal needs is entrenched in order to indulge in enrichment. In a strictly communist land, one could not transform one's house into an Airbnb or one's car into an Uber, as they would cease to serve material needs and become a means of production. To guarantee that everyone receives an equitable share of the benefits, socialist regimes will intervene in almost everything that involves more than one person. In short, things belong to an invisible owner – the public, also termed 'the People'.

To this end, communists long to abolish private property in favour of public ownership. Marx's view of private property and communism cannot be mistaken: '[c]ommunism is the positive expression of annulled private property'.¹⁶ As he declared in his *Communist Manifesto*, '[t]he theory of the Communists may be summed up in the single sentence: [a]bolition of private property.'¹⁷ Marx criticised modern capitalism for exploiting wage labourers (or the proletariat) to the point that they 'merely suffice to prolong and reproduce a bare existence.'¹⁸ He idealised a vision of a communist land where power and monopolies such as banking, communications and transport are centralised in the hands of the state: private ownership does no longer exist – land, factories, and other means of production have become common property – because everyone owns everything collectively; class struggles have vanished. All people will eventually live in social equilibrium, devoid of class distinctions, family structures, religion, or property. The society, as Marx fantasied, would collect and redistribute goods, capital, and services 'from each according to his ability, to each according to his needs'.¹⁹

¹²Truong Chinh, 'Đề cương văn hóa Việt Nam [Outline of Vietnamese Culture]' (Central Committee of the Communist Party of Vietnam 1943).

¹³Karl Marx & Friedrich Engels, *The Manifesto of the Communist Party* (German Workers' Educational Society 1848).

¹⁴AG Chloros, 'Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought' (1978) 9 *Cambrian Law Review* 11, 21.

¹⁵Paul Betts, 'Private Property and Public Culture: A Forgotten Chapter of East European Communist Life' (2009) 7 *Histoire@Politique* 2.

¹⁶Karl Marx, *Economic and Philosophic Manuscripts of 1844* (3rd manuscript, 1932).

¹⁷Marx & Engels, *Communist Manifesto* (n 13) ch 2.

¹⁸*ibid.*

¹⁹This slogan, in its German version ('*Jeder nach seinen Fähigkeiten, jedem nach seinen Bedürfnissen*'), first appeared in Karl Marx's 1875 study *Critique of the Gotha Programme*. Prior to that, it had already been used by Louis Blanc in his 1851 writing *Plus de Girondins* ('*De chacun selon ses facultés, à chacun selon ses besoins*'). See Mihály Ficsor, 'The

Marxist theory clashes with the natural rights thesis of the prominent English philosopher John Locke: '[e]very man has a property in his person. This nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his.'²⁰ Although Locke based his theory on tangible property, the natural rights thesis has become one of the most powerful arguments for protecting IP rights.²¹

Further, while Locke saw private property as an expression of individual liberty, Marx saw it as a source of alienation and a substantial hindrance to achieving personal freedom. Their contrasting views – liberalism and communism – were largely shaped by the zeitgeist of their respective eras. Locke lived during the Age of Enlightenment, when reason and science were valued over superstition and blind faith, and people dared to challenge established structures. They came to believe that knowledge came from the human intellect rather than from divine revelation, and that human beings existed as more than carriers of eternal truths.²² Meanwhile, Marx witnessed the spread of the capitalist economy after the Industrial Revolution, where workers had to sell their labour to capitalists for less than the full value of the commodities produced with their sweat.

According to Locke, the world's resources initially belong to everyone in common, but everyone has the right to usurp some common property and claim it as their own:

Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, hath by this labour something annexed to it, that excludes the common right of other Men.²³

A Marxist would disagree, believing that anyone who creates or builds on common property benefits from the state of the art in that field, which has been granted to them by the wider society – and for which they shall remain indebted.²⁴

Marxism undoubtedly alludes to tangible property rather than abstract objects such as ideas. The gist remains the same when applied to intangible (or intellectual) property.

When I am active scientifically, etc. – an activity which I can seldom perform in direct community with others – then my activity is social because I perform it as a man. Not only is the material of my activity given to me as a social product (as is even the language in which the thinker is active): my own existence is social activity, and therefore that which I make of myself, I make of myself for society and with the consciousness of myself as a social being.²⁵

As we shall see, Vietnam's communists, reflecting Marxism, designed IP laws to inhibit creators from enriching themselves and privatising their intangible property. To fully understand this complex area, however, it is crucial to delve into Vietnam's history. By doing so, we can gain valuable insights into the factors that have shaped the country's approach to IP and grasp the broader context in which these laws were created.

Emergence and Development of Intellectual Property Law in Central and Eastern Europe', in Rochelle Dreyfuss & Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press 2017) 323.

²⁰John Locke, *Two Treatises of Government* (Peter Laslett ed, vol 2, Cambridge 1988) 287–288.

²¹On Locke and IP rights, see generally Peter Drahos, *A Philosophy of Intellectual Property* (3rd edn, Australian National University Press 2016) 47–83.

²²Hesse (n 5) 26.

²³Locke (n 20) 288.

²⁴Tao-Tai Hsia & Kathryn A Haun, 'Laws of the People's Republic of China on Industrial and Intellectual Property' (1973) 38(2) *Law and Contemporary Problems* 274, 277.

²⁵Marx, *Economic and Philosophic Manuscripts* (n 16).

Vietnam's History: A Troubled Past from Colony to Communism

Vietnam's legal system has been shaped by various influences, including Confucianism, Chinese legalism, French colonialism, socialist ideology, and international treaties. Under Chinese rule for over a millennium, Vietnam's culture, politics, and societal structure were heavily influenced by China and Confucianism, while other Southeast Asian nations drew inspiration from India.²⁶ In 1887, against its will, Vietnam became a confederated member of the Union of French Indochina until 1945, when the country declared independence. France's attempt to rebuild its colonial empire led to the nine-year First Indochina War (1946–1954). Although Vietnam's victory liberated the country from colonial tyranny, it turned into another tragedy: the nation was temporarily divided along the 17th parallel, pursuant to the 1954 *Geneva Accords*.²⁷

The communist regime took control of the North, while the South became the US-backed Republic of Vietnam. A nationwide election to unify Vietnam, scheduled for 1956, never took place, leaving tensions unresolved until both sides entered a volatile historical period that caused generational and institutional damage. In 1975, South Vietnam fell to a full-scale invasion by the North. The country was reunified a year later and renamed the Socialist Republic of Vietnam, with the Communist Party as the ruling party.

After 1975, North Vietnam transplanted to the South its comprehensive Soviet model of a centrally planned economy, a Leninist political system, and a socialist legal system.²⁸ Private businesses were outlawed. The government established large-scale state-owned industrial and commercial enterprises, high-level agricultural co-operatives, and a system of equal subsidies for education, healthcare, and employment to promote socialism. Three 'revolutions' targeted production, science and technology, and ideology and culture. Nonetheless, the Soviet regime's suppression of the market caused inflation to soar by around 500% between 1983 and 1985.²⁹ Vietnam relied heavily on the Soviet Union for necessities such as gasoline, flour, cotton, and fertiliser, but aid was reduced due to the Soviet Union's own economic crisis.

As Vietnam's domestic situation grew more precarious, its international relations also suffered. The nation's rapport with its fellow communist ally, China, soured due to a violent border dispute in early 1979. Furthermore, Vietnam faced challenges concerning its military presence in Cambodia. In the aftermath of the Communist triumph in 1975, the US imposed a complete trade embargo on Vietnam, prohibiting not only US companies but also their allies, including Japanese enterprises, from engaging in business with local firms. This embargo effectively cut off Vietnam from world trade, exacerbating the country's economic difficulties.

The collapse of the Soviet Union was the final nail in the coffin. Faced with a 'do or die' situation, Vietnam's Communist Party had no choice but to abandon the central planning style and embrace free trade. To keep the country's economy from free fall, in 1986, the ruling party launched a policy change known as *Đổi Mới* [Renovation] to remove self-imposed trade barriers. Vietnam gradually liberalised the market, encouraged foreign direct investment and the private sector, and reduced subsidies to state-owned enterprises. It described its model as a 'socialist-oriented market economy', suggesting a shift away from the centrally planned system. However, because Vietnam's party leaders never gave up on socialist objectives, the term 'socialist-oriented' was added to assuage the false concerns of stubborn communists who feared that the country had slipped into the hands of evil capitalists.³⁰

²⁶Charles F Keyes, *The Golden Peninsula: Culture and Adaptation in Mainland Southeast Asia* (University of Hawaii Press 1995) 181.

²⁷For a more detailed account of Vietnam's partition, see Gordon Kerr, *A Short History of the Vietnam War* (Oldcastle Books 2021) 48.

²⁸Pham & Do (n 6) 98.

²⁹Tri Hung Nguyen, 'The Inflation of Vietnam in Transition' (Centre for ASEAN Studies, Discussion paper No 22, 1999) 2 <<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.565.4348&rep=rep1&type=pdf>> accessed 9 Aug 2022.

³⁰Huy Duc, the author of *Bên thắng cuộc* [*The Winning Side*], a book that offers a detailed account of Vietnam after 1975, described how the term 'social orientation' had been added to Vietnam's economic model. Such an addition was not merely a

After a twenty-year interlude, then-US President Bill Clinton lifted the trade embargo on Vietnam in 1994 and normalised diplomatic relations with the country in 1995. In the same year, Vietnam joined the Association of Southeast Asian Nations (ASEAN) and signed the *Framework Cooperation Agreement* with the European Union (EU).³¹ Additionally, the comprehensive *Bilateral Trade Agreement* (BTA) with the US in 2000 brought Vietnam even closer to a market-based system. The BTA urged Vietnam to quickly fix its economic potholes, which accelerated its journey towards accession to the WTO, which the country successfully achieved in 2007.³²

While Vietnam's period of transition persists, it remains undeniable that 'global integration has been one of the key drivers of Vietnam's remarkable achievements.'³³ Over the last five years since 2018, Vietnam has joined a series of new free trade agreements (FTAs), including the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP),³⁴ the *European Union-Vietnam Free Trade Agreement* (EVFTA),³⁵ the *UK-Vietnam Free Trade Agreement* (UKVFTA),³⁶ and the *Regional Comprehensive Economic Partnership* (RCEP).³⁷ Apart from Singapore, Vietnam is the only ASEAN member to enjoy preferential market access to two major trading partners outside the region: the EU and the US. This not only strengthens the country's competitive edge over its neighbours, but also necessitates changes to Vietnam's IP law to meet the rigorous criteria of these FTAs.

IP Rights in Vietnam: A Long and Winding Road

The evolution of Vietnam's IP law has been shaped by a complex interplay of historical events and economic considerations. This journey can be divided into four periods, each corresponding to significant IP events. The first period, prior to 1981, saw IP law directly imposed by French colonial rules. The second period spanned from 1981, with the enactment of Vietnam's first patent law after unification, to 1995, when the country adopted its first Civil Code. During this time, Vietnam's legal system replicated that of the Soviet Union, including IP law. From 1995 to 2005, the third period was characterised by the country's concerted efforts to build its IP infrastructure to join the world trade club, culminating in the enactment of its first IP Law in 2005. The final period began in 2005 and continues to the present day. While Vietnam's international commitments have remained a driving force behind its legal development, its internal drive to strengthen the economy has also played a crucial role in shaping its IP landscape. [Figure 1](#) illustrates the chronology of events.

matter of wording but also signified the power struggle between conservatives and progressives to steer the country away from a planned economy. Although a somewhat ambivalent concept, the 'socialist-oriented market economy' served as a political stronghold that prevented the implementation of economic policies that could lead to market liberalisation. See Huy Duc, *Bên thắng cuộc [The Winning Side]* (vol 2, *Quyền bính [Power]*, OsinBook 2012) 494–496. A similar account is also reflected in Duy Nghia Pham, 'From Marx to Market: The Debates on the Economic System in Vietnam's Revised Constitution' (2016) 11 *Asian Journal of Comparative Law* 267.

³¹Cooperation Agreement between the European Community and the Socialist Republic of Vietnam (PRES/95/221, 17 Jul 2005) <https://ec.europa.eu/commission/presscorner/detail/en/PRES_95_221> accessed 24 Oct 2022.

³²Vietnam became a WTO member on 11 Jan 2007.

³³World Bank, 'Vietnam: Deepening International Integration and Implementing the EVFTA' (2020) <<https://openknowledge.worldbank.org/bitstream/handle/10986/33787/Vietnam-Deepening-International-Integration-and-Implementing-the-EVFTA.pdf>> accessed 26 Aug 2022.

³⁴Signed 8 Mar 2018. CPTPP evolved from the *Trans-Pacific Partnership* (TPP). It never entered into force due to the withdrawal of the United States on President Trump's first day in office in January 2017. See Letter from the United States Trade Representative to the TPP Depository (30 Jan 2017) <<https://ustr.gov/sites/default/files/files/Press/Releases/130-17%20USTR%20Letter%20to%20TPP%20Depository.pdf>> accessed 11 Feb 2022.

³⁵Entered into force 1 Aug 2020.

³⁶Entered into force 1 Jan 2021.

³⁷Entered into force 1 Jan 2022. The RCEP is a free trade agreement among fifteen Asia-Pacific nations. Ten of them are the members of ASEAN, and the other five are Australia, China, Japan, New Zealand, and the Republic of Korea.

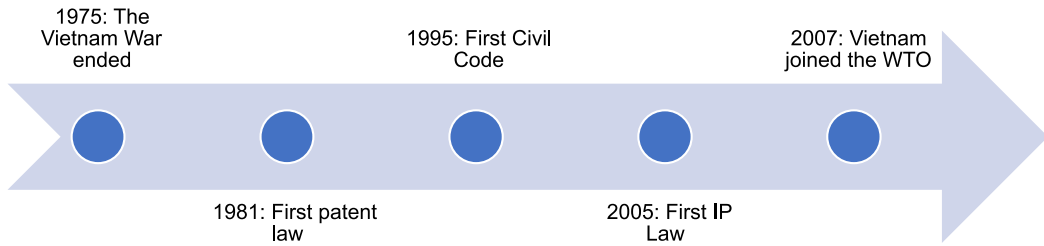


Figure 1. Chronology of Vietnam's IP law evolution

Pre-1981: From One to Zero

During colonisation, the French imposed their entire IP system on Vietnam through various decrees and conventions. The *Decree of 1887* demanded that French rules governing intellectual and artistic property be applied in the colonies.³⁸ Similarly, the *Decree of 1893* recognised French patents in Indochina.³⁹ In 1933, France ratified the *Berne Convention for the Protection of Literary and Artistic Works* on behalf of Vietnam.⁴⁰ However, this imperialist transplantation (or direct imposition) did not serve to establish local IP laws or allow the Vietnamese to benefit from their intellectual activities. Instead, its main purpose was to safeguard French property on colonial land and to transfer colonial capital to the 'mother country' by legal means.⁴¹

Although the French introduced a civil law system based on the French *Civil Code* to Vietnam, they paid little attention to IP law, unlike other areas such as matrimony law and labour law.⁴² This lack of focus may have been partly due to the French view that the colony's interest in IP was minimal. In addition, IP rights were alien to the locals, as the country had no indigenous system prior to French colonisation.

After declaring independence in 1945, the then Democratic Republic of Vietnam retained certain colonial and feudal laws as long as they did not conflict with the provisions of *Decree No 47*.⁴³ The purpose of this retention was to fill regulatory gaps in the 'embryonic legal system',⁴⁴ and to provide some continuity during the transition to self-government. Unfortunately, there are no historical records that clearly indicate how well the transplanted IP system was implemented during this period.

In the 1950s, however, North Vietnam buried its colonial past by repealing all pre-existing laws that were deemed incompatible with communist ideology and the socialist revolution.⁴⁵ As a result,

³⁸Décret du 29 octobre 1887 sur la propriété littéraire et artistique aux Colonies [Decree of 29 Oct 1887 on Literary and Artistic Property in the Colonies], art 1.

³⁹Décret rendant applicables en Indo-Chine les lois des 5 juillet 1844, 31 mai 1856 et 23 mai 1868, sur les brevets d'invention, du 24 juin 1893 [Decree Making Applicable in Indochina the Laws of 5 Jul 1844, 31 May 1856, and 23 May 1868, on Patents of Invention] (24 Jun 1893), art 1.

⁴⁰Décret 21 Décembre 1933 Rendue Applicables à L'Indochine Convention de Berne Protection des Oeuvres Littéraires et Artistiques, prom. 10 avr. 1934 [Decree of 21 Dec 1933 Making Applicable to Indochina the Berne Convention for the Protection of Literary and Artistic Works] (10 Apr 1934).

⁴¹For further discussion of imperialist transplantation, see Ruth L Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (2003) 7 *Singapore Journal of International & Comparative Law* 315. See also Pratyush Nath Upreti, 'A TWAIL Critique of Intellectual Property and Related Disputes in Investor-State Dispute Settlement' (2022) 25 *The Journal of World Intellectual Property* 220.

⁴²Detlef Briesen, 'The French "État legale" in Vietnam. Between Legal Pluralism and Police State', in Ulrich von Alemann, Detlef Briesen & Lai Quoc Khanh (eds), *The State of Law: Comparative Perspectives on the Rule of Law in Germany and Vietnam* (Düsseldorf University Press 2017) 67–93.

⁴³Decree No 47-SL of 1945 issued by President Ho Chi Minh.

⁴⁴Gillespie (n 6) 57.

⁴⁵Circular No 19/VHH-HS of the Ministry of Justice (30 Jun 1955); Directive No 772-TATC of the Supreme Court on the Termination of the Application of Colonial and Feudal Laws (10 Jul 1959).

French IP laws ceased to apply in the North, although there was no replacement system in place. At the time, North Vietnam's primary objective was to reunify the country, which had been divided under the Geneva Accords, and other aspects of life were largely neglected. Although the communist regime protected intellectual works, the regulations focused on establishing a royalty scheme for authors employed by the government, rather than addressing other general aspects of copyright law.⁴⁶ This meant that creators were essentially treated as wage earners.

After 1975, the government effectively ended colonial and feudal laws in the South. Colonial laws have all but disappeared. The removal of all vestiges has had far-reaching consequences for Vietnam. First and foremost, it shattered the country's legal frameworks and created voids that Vietnam had to fill later. Not only did the Communists wipe out the remnant of the previous regime, but they did so hastily and prematurely, especially given that Vietnam did not adopt any new laws to replace the old ones or, at the very least, assess which parts of the old rules should be retained.

Second, the Communist Party did not utilise the existing human resources trained under South Vietnam's government because they were seen as collaborators with the US puppet regime. Instead, the new Communist government imprisoned them, including intellectuals such as lawyers, scholars, journalists, and writers, in 're-education camps'.⁴⁷ After being subjected to forced indoctrination in these camps, many fled the country. Those who chose to stay faced social stigma. Vietnam's iron fist crushed its vast human capital. 'In the confusion of the exodus, a great many technicians and professionals that the country urgently needed for reconstruction had left', noted Gabriel García Márquez, author of *One Hundred Years of Solitude*, in a documentary made after his visit to Vietnam in 1979.⁴⁸

Third, Vietnam missed an opportunity to benefit from the well-established French IP system, which could have been leveraged and adapted to suit the needs of a war-torn country. This would have had many benefits, including increasing Vietnam's bargaining power in future trade negotiations and presenting itself as an IP expert. Vietnam's Supreme Court has acknowledged on multiple occasions that local lawyers and judges struggled with foreign concepts related to IP rights.⁴⁹

⁴⁶Decree 18-SL (31 Jan 1946), promulgated by President Ho Chi Minh, on Copyright Deposits; Decree 282-SL (14 Dec 1956) on the Journalistic Regime, promulgated by President Ho Chi Minh; Decree 168-CP (7 Dec 1967) of the Government Council on Amending the Principles for Paying Royalties to Literary, Artistic, Scientific and Technological Works Set out in Resolution 25-CP (24 Feb 1961); Resolution 25-CP (24 Feb 1961) of the Government Council on Royalty Regime to Literary, Artistic, Scientific and Technological Works; Resolution 125/CP (20 May 1974) of the Government Council on Royalty Regime to Literary, Artistic, Scientific and Technological Works; and Circular 114-VH/TT (20 Dec 1975) on Guiding the Implementation of Resolution 125-CP (20 May 1974) and Decision 113-VH/QD (20 Dec 1975) on Royalty Regime to Literary, Artistic, Scientific and Technological Works.

⁴⁷Ginetta Sagan & Stephen Denney, *Violations of Human Rights in the Socialist Republic of Vietnam. April 30, 1975 - April 30, 1983* (Aurora Foundation 1983) <<https://vva.vietnam.ttu.edu/images.php?img=/images/044/0440417001a.pdf>> accessed 30 Aug 2023. This study systematically interviewed some five hundred former prisoners of Vietnamese re-education camps. These included not only members of the former military and civilian regimes, but also journalists, writers, educators, doctors, lawyers, and students. The Vietnamese Heritage Museum, a non-profit organisation dedicated to preserving and exhibiting the heritage of Vietnamese refugees, also provided a detailed description of the people who were sent to the re-education camps. This group encompassed members of the executive, judicial, and legislative branches of the Republic of Vietnam (South Vietnam), including all elected members of the House of Representatives and Senate. See Vietnamese Heritage Museum, "Re-education" Camps' <<https://vietnamesemuseum.org/our-roots/re-education-camps/>> accessed 4 Sep 2023. An example of a prisoner of conscience is Vu Quoc Thong, the former Dean of the Faculty of Law at Saigon University, who was detained even though he had never held any public position in the previous administration. See Amnesty International, 'Report of an Amnesty International Mission to the Socialist Republic of Viet Nam' (Index No ASA 41/005/1981, 1 Jun 1981) 32 <<https://www.amnesty.org/en/documents/asa41/005/1981/en/>> accessed 4 Sep 2023.

⁴⁸Gabriel García Márquez, 'The Vietnam Wars' (Rolling Stone, 29 May 1980) <<https://www.rollingstone.com/culture/culture-news/the-vietnam-wars-100426/>> accessed 12 Sep 2022.

⁴⁹The Supreme People's Court (Chuyên đề khoa học xét xử), Official Letter No 97/KHXX (21 Aug 1997); The Supreme People's Court, Pháp luật về thủ tục giải quyết tranh chấp quyền sở hữu trí tuệ tại Tòa án nhân dân ngày [Law on Procedures for Settling IP Rights Disputes at the People's Courts] (10 Nov 2010).

In stark contrast with Vietnam, other colonies took a more pragmatic approach to their inherited IP laws. For example, after gaining independence from Britain in 1947, India did not immediately repeal its colonial-era *Patent Act* of 1911. Instead, it set up two committees to examine the patent system. The Ayyangar Committee was particularly influential, recommending changes to Indian patent law that would benefit the country. Although they acknowledged that the patent system neither stimulated nor encouraged new inventions, they did not call for its abolition because patents had been used in India for over a century as the most popular means of promoting and rewarding ideas.⁵⁰ In 1970, more than two decades after achieving its independence, India approved a new *Patents Act* based on the British model, with substantial reforms.⁵¹ The most notable change was to allow the patenting of pharmaceutical methods rather than pharmaceutical products. India's flexible strategy, which allowed local firms to legally replicate drugs patented elsewhere, has fuelled the rise of its generic sector to global prominence. By contrast, Vietnam's emotionally charged stance against capitalism and imperialism⁵² led the state to hastily abolish the colonial IP laws, even though it had no plans to replace the rules that had endured for almost a century. As I will show, Vietnam fomented the communist revolution not only politically but also legally and culturally, setting the country back decades.

1981–1995: Beating around the Bush

At the peak of communism in Vietnam, the country voluntarily adopted many of its laws, including those on IP, from its communist ally, the Soviet Union, with little regard for local conditions. In 1981, Vietnam passed its first IP legislation, known as *Decree 31-CP*,⁵³ which faithfully followed the Soviet model. The language of Decree 31-CP mimicked the Soviet *Statute of 5 March 1941*, which also covered inventions, technical improvements, and production rationalisation.⁵⁴ A year later, Vietnam established the Inventions Office, which eventually became the current National Office of IP (NOIP), modelled on the Soviet Union's Committee for Inventions and Discoveries, which in turn became the Russian State Academy of IP. Vietnam's voluntary transplant⁵⁵ served as a 'cost-saving'⁵⁶ measure for a war-torn country that did not have the resources to create its own laws. Following Decree 31-CP, Vietnam issued a series of laws to regulate various IP matters:

- *Decree No 197/HDBT on Regulations on Trademarks* (1982),
- *Decree No 142/HDBT on the Protection of Copyright* (1986),
- *Decree No 85/HDBT on Regulations on Industrial Designs* (1988),
- *Decree No 200/HDBT on Regulations on Utility Solutions* (1988), and
- *Decree No 201/HDBT on Regulations on Licensing* (1988).

⁵⁰N Rajagopala Ayyangar, *Report on the Revision of the Patents Law* (Government of India 1959) 13, 19–20.

⁵¹Van Anh Le, *Compulsory Patent Licensing and Access to Medicines: A Silver Bullet Approach to Public Health?* (Palgrave Macmillan 2021) 83–87.

⁵²For further discussion of the lasting legacy of the Vietnam War, particularly regarding the previous regime (South Vietnam), see Quoc Tan Trung Nguyen, 'Backlash against K-pop star Hanni shows Vietnam still struggles with the legacy of the war' (The Conversation, 9 Mar 2023) <<https://theconversation.com/backlash-against-k-pop-star-hanni-shows-vietnam-still-struggles-with-the-legacy-of-the-war-200493>> accessed 4 Sep 2023.

⁵³Điều lệ về cải tiến kỹ thuật hợp lý hóa sản xuất và sáng chế [Decree on Innovation to Effect Technical Improvements and Rationalisations in Production and Invention] (23 Jan 1981) (hereinafter: Decree 31-CP).

⁵⁴USSR Laws 1941, text 150 (5 Mar 1941) (English translation contained in Vladimir Gsovski, *Soviet Civil Law* (vol 2, University of Michigan Law School 1949) 361). See also Bernie R Burrus, 'The Soviet Law of Inventions and Copyright. Part One: Soviet Law of Inventions' (1962) 30 *Fordham Law Review* 693, 699. In fact, not only Vietnam but also China replicated the 1941 Soviet statute, see Gene T Hsiao, *The Foreign Trade of China: Policy, Law, and Practice* (University of California Press 1977) 129–130.

⁵⁵On voluntary transplants, see Alan Watson, *Legal Transplants. An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 29–30.

⁵⁶Morin Jean-Frédéric & E Richard Gold, 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries' (2014) 58(4) *International Studies Quarterly* 782.

Several aspects of Vietnam's legal system in the 1980s stand out. First, Vietnam's regulatory procedure reflected the command-and-control approach, with all Decrees drafted by the Inventions Office and approved by the Council of Ministers (ie, the government), which is also a replica of Soviet governance.⁵⁷ No other parties were involved in the decision-making process. In addition, many employees of the Inventions Office had links with the Soviet Union, where they were either educated or trained. In 1982, the Inventions Office hired thirty-three new employees, a significant increase from the previous year's twenty, twenty-two of whom had received their bachelor's degrees in the Soviet Union and were trained by the Committee for Inventions and Discoveries.⁵⁸ The Soviet influence on Vietnam's IP regime was thus to a considerable extent a matter of the education of its architects.

Second, all the above-mentioned decrees were in fact guidelines, a regulatory tool that remains an essential component of the country's legal structure to this day. While the *Constitution* and any statutes enacted by the National Assembly are laws, 'sub-law' documents – such as decrees, decisions and circulars issued by the government, relevant ministries or state agencies – serve to clarify the content of a law. Although they carry less legal weight than laws, guidelines are indispensable, and no legislation in Vietnam can function without them.

Third, the period between 1975 and 1992 witnessed a 'legislative standstill' when the National Assembly passed only forty-two statutes. However, the number of laws ratified subsequently increased to 395 between 1992 and 2001, as Vietnam loosened state control to free up the economy and prepare for WTO accession. Rather than addressing social relations, legislation during the Communist era consolidated state power and accelerated the country's path to socialism. It is impossible to say where the law ended and the Party's political desires began. As two Vietnamese scholars have rightly pointed out, socialist laws served as a tool for party leadership and state governance rather than for the protection of citizens' rights.⁵⁹

Fourth, because the communist regime allowed only state and collective ownership, individual legal rights were obliterated. The government favoured bureaucratic orders because they were quick to grant. Civil matters, including IP rights, were ignored or dealt with through administrative channels, as evidenced by 188 guideline texts published between 1975 and 1992. This has left an indelible mark on the public's mind, to the extent that people still avoid going to court to resolve IP disputes, preferring administrative measures.⁶⁰

Fifth, another socialist concept that undermines a creator's identity and individuality, and thus potentially claims to IP, is the concept of 'the People's art' (*văn hóa quần chúng*) or 'the People's artists' (*nghệ sĩ nhân dân*). This highest recognition for artists, originally introduced in the Soviet Union and still present in Vietnam and Russia, reinforces the idea that art is a common property. In Vietnam, the People's Artists Award has existed since 1984.

Finally, the shortcomings of the Communists' drafting abilities were exposed by their piecemeal approach to lawmaking, particularly when grappling with the intricacies of IP rights. Rather than embracing established terminology like 'industrial property' or 'intellectual property', the drafters opted for alternatives such as 'inventors' rights', 'authors' rights', or 'the person entitled to the use'. This choice reflected a certain 'linguistic inertia'⁶¹ that mirrored their aversion to private ownership, coupled with an ideological resistance to imported private rights. The socialist IP law adhered to Marxist ideology and granted creators a degree of compensation for their contributions, but the law was confined to personal property and satisfied only cultural needs. Most notably, the

⁵⁷ IP Office of Vietnam (*Cục Sở hữu trí tuệ*), *40 năm xây dựng và phát triển* [40 Years of Establishment and Development] (Ministry of Science and Technology 2022) 12–14.

⁵⁸ *ibid* 14.

⁵⁹ Pham & Do (n 6) 105.

⁶⁰ This point will be discussed further in the sub-chapter 'The Nation of Judicial Sceptics'.

⁶¹ Ficsor (n 19) 323.

compensation could not be transformed into a source of private property as it symbolised the creators' contributions to the 'common good'.

The term 'industrial property' made its initial appearance in Vietnam in the *Ordinance on the Protection of Industrial Property* (1989), which consolidated all industrial property into a single law, coinciding with Vietnam's policy reforms. Nevertheless, the leaders delayed embracing the term 'intellectual property' for irrational fears that it implied a link between 'knowledge' and 'ownership'.⁶² The primary objective of the 1989 Ordinance and subsequent decrees was to attract foreign investment by providing adequate protection for IP rights, rather than to demonstrate Vietnam's changing attitude towards IP rights *per se*.⁶³ In fact, it was never the legislators' intention to 'promote the progress of science and useful arts', as in the US,⁶⁴ or to promote learning, as the full title of the UK's *Statute of Anne* (1710) declares.⁶⁵

Despite Vietnam's policy reforms, the Soviet legacy remained prevalent in the 1989 Ordinance, as evidenced by the continued use of a paternalistic tone. Articles 5 to 7 of the 1989 Ordinance empowered political organisations such as the Labour Confederation, the Ho Chi Minh Communist Youth Union, and state-owned enterprises to create 'favourable conditions' for creativity and to protect the rights of authors and inventors. However, it would be futile to expect these organisations to incentivise research and development.

When collectivism took centre stage in Soviet-style IP law, it marginalised creators and rights holders. The law did not refer to 'owners' but only to 'certificate holders'. Because industrial property was considered a 'common good', its exploitation was the responsibility of the state, state-owned enterprises, and other political and social organisations, leaving the concept of ownership blurred.

Although the language of the 1989 Ordinance was ideological and discursive, it marked a departure from the blatant communist tone of previous decrees. Rather than relying solely on administrative measures, the Ordinance allowed 'persons entitled to use' to protect their industrial property through legal proceedings.⁶⁶ However, in an environment where private property did not exist, it was difficult to imagine anyone taking legal action. Nevertheless, the 1989 Ordinance held a higher legal status than its predecessors and demonstrated Vietnam's aspirations to welcome foreign trade after years of isolation. Although there was still some scepticism, it hinted at the relatively important role of IP rights to the public.

The First Civil Code of 1995: Calling a Spade a Spade

Vietnam's economic reform began in 1986 but did not gain momentum until the mid-1990s. 1995 marked a turning point, as the country re-established diplomatic ties with the US, joined ASEAN, signed the Framework Cooperation Agreement with the EU, and initiated the WTO accession process. Domestically, market liberalisation prompted regulatory reform. As the country moved towards a free market zone, bureaucratic orders anchored in a command economy had to be dismantled.

In the 1994 Government Report on the Civil Code Project, the then-Minister of Justice highlighted the need for a civil code.⁶⁷ The government argued that firstly, the 'socialist-oriented market

⁶²This view is based on insights from a conversation between the author and a former director of Vietnam's NOIP during the author's research trip in June 2022.

⁶³Vietnam also enacted its *Foreign Investment Law* in 1989.

⁶⁴United States Constitution, art I, s 8, cl 8.

⁶⁵An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned (Statute of Anne), 8 Ann c 19 (entered into force 10 Apr 1710).

⁶⁶1989 Ordinance, arts 28(3), 29.

⁶⁷Government of the Socialist Republic of Vietnam, 'Tờ trình của Chính phủ về dự án bộ luật Dân sự năm 1995 của nước cộng hòa xã hội chủ nghĩa Việt Nam tại kì họp thứ 5, Quốc hội khóa IX, ngày 7/6/1994 [The Government's Report on the Civil Code Project of the Socialist Republic of Vietnam at the 5th session, IX National Assembly]' (7 Jun 1994).

economy' would place citizens at the centre of the law and require recognition of the principles of equality and voluntary participation in civil relations.⁶⁸ This recognition could only be achieved through a civil code. Secondly, it was maintained that the absence of a civil code had led to numerous instances of the State failing to protect the legitimate interests of its citizens. Such failures had undermined trust in the government and caused misunderstandings about the regime.⁶⁹ And finally, the legal framework for foreign economic relations had fallen short of expectations, affecting the credibility of the investment environment.⁷⁰

It was not only the unleashing of the economy but also the need to protect the regime that gave rise to a procedural 'rule of law'. As such, a civil code was essential not only to ensure economic growth but also to safeguard the integrity of the regime. Recognising this need, the National Assembly enacted the Civil Code in 1995, marking a historic first for Vietnam twenty years after the end of the war. Although the drafting of the Code had begun in 1980,⁷¹ its enactment in 1995 was timely given Vietnam's application to join the WTO that year.

Following the application, the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) had to be incorporated into domestic law. The Civil Code codified all pre-existing IP ordinances under Chapter 6 ('IP Rights and Technology Transfer'). This separate IP section aimed to raise the profile of IP law and addressed foreign criticism that Vietnam did not adequately protect property rights.⁷² A spade was finally called a spade.

However, Soviet influence was evident in the inclusion of IP rights as a chapter in the Civil Code. In fact, Vietnam's first draft of the Code was modelled on the civil codes of the Eastern Bloc,⁷³ and although later drafts drew inspiration from other jurisdictions, such as Japan, China, and even France, an estimated seventy per cent of the articles in the 1995 Civil Code were directly or indirectly derived from the Soviet Civil Code.⁷⁴

Vietnam's first Civil Code corresponded to the ideological shift in its 1992 Constitution, which upheld 'socialist legality' as a core pillar⁷⁵ while also recognising authors' rights and industrial property rights as constitutional rights for the first time.⁷⁶ Eager to pursue its reform agenda, the Communist Party broadened its coalition of the working class and peasantry to include intelligentsias, whose creativity and energy were finally recognised by the state as a valuable resource.

By recognising IP rights as legal rights, the 1995 Civil Code placed them on an equal footing with other rights. However, a key tenet of 'socialist' IP law was that it was treated as part of civil law.⁷⁷ As a result, IP rights were governed by the Civil Code and forty guidelines⁷⁸ that often contradicted each other, leading to diverging interpretations and legal uncertainty. Moreover, Chapter 6 of the Civil Code lagged behind TRIPS standards, and it was not until ten years later that Vietnam recognised the need for specific IP legislation.

⁶⁸ibid.

⁶⁹ibid.

⁷⁰ibid.

⁷¹Decision of the Government Council No 350/CP (3 Nov 1980).

⁷²Gillespie (n 6) 146.

⁷³ibid.

⁷⁴ibid 162.

⁷⁵Constitution 1992, art 12.

⁷⁶ibid art 60.

⁷⁷Ficsor (n 19) 319.

⁷⁸Examples of these guidelines are Decree 63/CP (24 Oct 1996) on Industrial Property; Decree 76/CP (29 Nov 1996) on Copyright; Circular 3055/TT-SHCN (31 Dec 1996) of the Ministry of Science, Technology and Environment guiding Decree 63/CP; Finance Ministry Circular 23-TC/TCT (9 May 1997) on Industrial Property Fees and Charges; and Finance Ministry Circular 166/1998/TT-TC (19 Dec 1998) on Copyright Registration Fees.

The First IP Law of 2005: Too Fast but Not Too Furious

In its 2004 *Report on IP Law*, the Vietnamese government considered that having an effective IP regime was necessary to fuel the country's economy and meet the external pressures of global trade.⁷⁹ The report concluded that the existing provisions in the Civil Code did not address the unique characteristics of IP rights related to trade, science, and technology.⁸⁰ Therefore, creating a specific IP law became an urgent and critical priority.

During this period, party-sponsored discourse began to give way to the 'rule of law' concept, including transparency and enforcement.⁸¹ Discussions about what the IP law should look like, and whether separate laws regulating different categories of IP or a single IP law would be more suitable for Vietnam, started to take shape.⁸² While relevant stakeholders and lawmakers recognised that many countries followed the former model, Vietnam decided to opt for the latter. Although there is no authoritative account that explains this all-in-one approach, some plausible explanations can be drawn from the legislative process.

First, the IP Law was drafted under the considerable time pressure of Vietnam's desired WTO accession in 2005. Despite missing the deadline, Vietnam moved at breakneck speed to modernise its complex IP web. The government report acknowledged that the IP Law was possibly the shortest legislative process in the history of the National Assembly, being researched, drafted, and reviewed in just eleven months.⁸³ The pace of drafting was so rapid that those responsible for the English translation struggled to keep up.⁸⁴ In contrast, India delayed adopting TRIPS for as long as possible, opting to amend the 1970 *Patents Act* incrementally in 1999, 2002, and 2005, rather than transposing all international legal obligations into domestic law at once.⁸⁵

Second, the time pressure placed Vietnamese drafters in a difficult position, as they were 'riding a tiger' with a lot of work remaining but very little time left.⁸⁶ However, the National Assembly's decision to put the IP Law on the agenda in late 2005 presented a significant opportunity, and failure to take advantage of it would have amounted to squandering a valuable chance.⁸⁷ As a result, the law-making process left little time for the government to develop separate laws for different categories of IP.

A decade after introducing its first Civil Code in 1995, Vietnam enacted its first comprehensive IP Law. This new legislation took an all-encompassing approach by covering all aspects of IP rights, such as copyrights, trademarks, geographical indications, and patents. The 2005 IP Law laid the foundation for the country's IP system and provided a detailed set of rules that meet minimum international standards.

However, Vietnam's new law did not come out of nowhere. Between the 1995 Civil Code and the 2005 IP Law, a significant event acted as a springboard: the conclusion of the *Copyright Agreement* with the US (1997), later incorporated into the US BTA (2000). These two agreements overhauled Vietnam's copyright landscape and brought it closer to the TRIPS rules, even though the country

⁷⁹Government of the Socialist Republic of Vietnam, The Government's Report on the IP Law Project of the Socialist Republic of Vietnam, No 41/CP-KTTH (11 Apr 2005).

⁸⁰ibid.

⁸¹Thanh Ha, 'Luật Sở hữu trí tuệ: Tấm áo choàng đủ rộng? [Intellectual Property Law: Is the Cloak Wide Enough?]' (Tia Sang Newspaper, Dec 2004) <https://vibonline.com.vn/bao_cao/luat-so-huu-tri-tue-tam-ao-choang-du-rong> accessed 14 Apr 2023.

⁸²Mai Thanh Le, 'Bàn về vấn đề bảo hộ quyền sở hữu trí tuệ trên cơ sở Bộ luật Dân sự và Luật Sở hữu trí tuệ [IP Rights Protection on the Basis of the Civil Code and the IP Law]' (2005) 3 State and Law Review 33.

⁸³The Government's Report on the IP Law Project of the Socialist Republic of Vietnam, No 202/BC-BVHTTDL (10 Dec 2008).

⁸⁴Chris Vale, 'Vietnam's IP modernization' (ManagingIP, 1 Mar 2006) <<https://www.managingip.com/article/2a5ckwa62ixf5kgvs7rpc/vietnams-ip-modernization>> accessed 6 Sep 2023.

⁸⁵Le, *Compulsory Patent Licensing* (n 51) 85.

⁸⁶Thanh Ha (n 81) quoting Tran Viet Hung, the then Deputy Director of IP Department (author's translation).

⁸⁷ibid, quoting Doan Nang, the then Director of the Legal Department of the Ministry of Science and Technology, and Tran Viet Hung, the then Deputy Director of the Ministry's IP Department.

was not yet a member of the WTO. In his memoirs, Joseph Damon, the US chief negotiator of the BTA, recounted why the US wanted to conclude the copyright agreement before the larger trade deal:

The small Vietnamese market itself, we learned, was not the primary concern. The fear was rather that Vietnam would become an international center for illegally copying (or “pirating” in the parlance of the industry) US works, and exporting them globally. US industries, with the help of the US government, were at the time engaged in a major battle to clamp down on piracy in Southern China, just over Vietnam’s northern border. They feared that as these efforts met with greater success, the global piracy would move to Vietnam, where making such copies was perfectly legal.⁸⁸

Opening the market meant being exposed to new trading concepts that puzzled many Vietnamese officials. For example, the principle of ‘national treatment’ – granting foreigners the same rights as the Vietnamese – initially baffled the negotiators. Nguyen Dinh Luong, former head of Vietnam’s BTA negotiating committee, recalled being taken aback by the term at first: ‘[t]his phrase did not exist in the Vietnamese dictionary and went against the views, policies, and laws of the country’s socialist economy.’⁸⁹ As a result, the term ended up as an alien in communist Vietnam. National treatment was incompatible with a command-and-control economy in which only a small number of state-owned enterprises, *not everyone*, enjoyed specific privileges. In other words, ‘national treatment’ asked Vietnam to do the almost impossible: to grant the US (and no other country) certain benefits that even an ordinary Vietnamese citizen could not have at the time.⁹⁰ The war was over, but the bleeding continued.

It is evident that legal transplants during the 2000s occurred through a process known as ‘contractualisation’,⁹¹ whereby Vietnam agreed to accept foreign laws in exchange for market access to other countries. While Vietnam’s bargaining power was not so different from that of the colonial or Soviet eras, it is true that Vietnam benefited from the voluntary transplantation of exogenous rules. Unlike France’s direct imposition of its laws, which left no room for modification, or the Soviet Union’s wholesale transfer of socialist law, Vietnam’s 2005 IP Law was largely modelled on TRIPS and incorporated the US BTA.

Although the IP Law already existed, the Civil Code of 2005, interestingly, still devoted a chapter to IP rights. There were two reasons for this. First, some drafters viewed IP rights to be part of civil relations and therefore required the Civil Code to govern them.⁹² Second, the government wanted to maintain consistency within the legal system by retaining the existing IP provisions.⁹³ However, with the introduction of the IP Law, the IP chapter in the 2005 Civil Code became obsolete, prompting the legislature to remove it from the 2015 Civil Code.

Since 2005, Vietnam has made significant progress in revising its IP Law, with three amendments to date. Rushing to meet the WTO deadline, drafters first fine-tuned the Law in 2009, two years after the country joined the WTO.⁹⁴ They then adjusted it in June 2019⁹⁵ to meet the standards

⁸⁸Joseph Damon, *Give Trade a Chance: Inside the Negotiation of the US – Vietnam Trade Agreement* (The Gioi Publisher 2013) 487.

⁸⁹Luong Dinh Nguyen, ‘Tôi thực sự choáng trước dự thảo “sắc mùi Mỹ” [I Am Really Shocked by the Strongly “American-Flavoured” Draft]’ (Vietnamnet, 2 Jul 2005) <<https://vietnamnet.vn/toi-thuc-su-choang-truoc-du-thao-sac-mui-muy-248084.html>> accessed 14 Apr 2023 (author’s translation).

⁹⁰Damon (n 88) 710.

⁹¹Jean-Frédéric & Richard Gold (n 56).

⁹²Government of the Socialist Republic of Vietnam, The Government’s Report on the IP Law Project of the Socialist Republic of Vietnam, No 41/CP-KTTH (11 Apr 2005)

⁹³ibid.

⁹⁴Law No 36/2009/QH12 (19 Jun 2009), amending and supplementing a number of Articles of the Law on Intellectual Property.

⁹⁵Law No 42/2019/QH14 (14 Jun 2019), amending the Law on Insurance Business and the Law on Intellectual Property. This amendment took effect retroactively from 14 Jan 2019, when the CPTPP entered into force in Vietnam.

of the CPTPP. Before the ink was dry, they issued the third amendment to fulfil the EVFTA and the RCEP in September 2020. The amended law came into force on 1 January 2023, demonstrating Vietnam's commitment to strengthening IP protection and enforcement.⁹⁶ It is striking how Vietnam, once a neophyte in the field, has caught up with TRIPS standards and made significant progress in less than two decades.

IP rights, once considered an unwelcome guest, have now found a permanent place in the country's legal system. This transformation is evident in the country's latest 2013 Constitution, which explicitly recognises IP rights.⁹⁷ The 2013 Constitution also extends to 'everyone'⁹⁸ 'the rights to carry out scientific and industrial research, engage in literary and artistic creation, and enjoy benefits from those activities', which were previously limited to 'citizens'⁹⁹. This change is more than a linguistic one; it reflects a shift in Vietnam's focus from inward to outward.

The Soviet Legacy in Vietnam's IP Law: A Long but Not Gone Past Copyright to Protect 'Socialist Legality'

On the surface, 'socialist legality' may appear akin to the 'rule of law', a principle that requires everyone to obey the law.¹⁰⁰ However, this concept differs from its Western equivalent in that it stems from the Marxist-Leninist interpretation of law as serving the dictatorship of the proletariat.¹⁰¹ Socialist legality was enshrined in Vietnam's 'class-based' Constitution of 1980, which excluded intellectuals from the fundamental alliance of the working class and peasants.¹⁰²

After 1975, Vietnam's most pressing objective was the transition to socialism – which became the goal of all laws and policies. Copyright, therefore, could not escape its sealed fate. Because it protects literature, theatrical works and films directly relevant to, and intended to support, Marxist-Leninist doctrine, 'socialist legality' was more important in copyright law than in industrial property rights.¹⁰³ Against this background, copyright law did not fully exist in Vietnam as understood in Western society.

In 1986, Vietnam issued its first copyright law through *Decree 142/HDBT*, implemented by *Circular 04/VH-TT* in 1987. When translated into Vietnamese, the term 'copyright' has lost its original meaning of a right to copy (ie, to duplicate), and instead encompasses both the author's entitlement (*quyền tác giả*) and the associated economic prerogatives – the 'copyright' in the narrow sense. This shift in meaning (a case of 'lost in translation') can be attributed to a process of legal transplantation where the new legal concept became entangled with the old French-imported idea of *droit d'auteur* [the author's right] during Vietnam's first encounter with copyright.

Although the Communists recognised copyright as a private right, they emphasised that it was an integral part of the socialist regime.¹⁰⁴ This emphasis was supported by a provision on censorship, which protected 'only works that served to build socialism and defend the socialist fatherland, ... [that created] a new culture, a new socialist man'.¹⁰⁵ Censorship, however, is not unique to socialist law, as it has a historical precedent in early copyright legislation in China, England, and France.¹⁰⁶

⁹⁶Law No 07/2022/QH15 (16 Jun 2022), amending and supplementing a number of Articles of the Law on Intellectual Property.

⁹⁷Constitution 2013, art 62(2).

⁹⁸ibid art 40.

⁹⁹Constitution 1992, art 60.

¹⁰⁰Pham & Do (n 6) 104.

¹⁰¹Constitution 1980, art 2.

¹⁰²ibid art 3.

¹⁰³Ficsor (n 19) 329.

¹⁰⁴Circular 04/VH-TT, art 2.

¹⁰⁵ibid art 1(b).

¹⁰⁶Jyh-An Lee & Yangzi Li, 'Internationally Driven, but Domestically Aware, Legislation in Troubled Times: The First Copyright Statute in China' (2023) 11 The Chinese Journal of Comparative Law 1, 22–23.

These governments used copyright to control the press and maintain regime stability by restricting the publication of certain works, as was the case in Vietnam.¹⁰⁷ However, Vietnam's Communist Party went further by imposing its political ideology on the author's creative process, as this section will demonstrate.

Cultural censorship had been widespread in Vietnam, even under the South's regime, which restricted press freedom until the regime ceased to exist in 1975.¹⁰⁸ However, censorship reached its peak only during the communist era and continues to this day. The Communist Party's cultural policy in the 1950s and 1960s, as advocated by ideologues such as Le Duan and Truong Chinh – two Party leaders – emphasised that the arts should serve the Party, the country, the socialist revolution, and the struggle to unify Vietnam.¹⁰⁹ By the early 1960s, the Communist Party had total control over all cultural aspects.¹¹⁰

Even former prime minister Vo Van Kiet – one of the most liberal Communists – succumbed to the lure of cultural control, declaring that 'we have identified five economic components, but there is only one culture: the national and socialist.' Unsurprisingly, Vietnam's approach to copyright was akin to that of Russia after the 1917 revolution and that of China after 1949,¹¹¹ in that it had chosen not to ratify international copyright treaties and had instead censored domestic publications.¹¹² Vietnam's hardcore attitude toward copyright stands in contrast to its more lenient approach to industrial property. During French colonisation, Vietnam joined the Berne Convention¹¹³ through the 'backdoor' of France's accession. During the country's partition, the South joined the *Paris Convention*¹¹⁴ and the *Madrid Agreement*, both of which regulate industrial property.¹¹⁵ However, while post-1975 Vietnam chose to tolerate industrial property by inheriting the membership of Paris and Madrid, it renounced Berne as it directly affected the country's cultural sphere, which was considered off-limits. It was only in 2004 that Vietnam rejoined Berne to prepare for the WTO.

Grounded in the socialist culture, concepts such as originality and the idea/expression dichotomy were never established in Vietnam. National law protected neither works based on the 'author's own intellectual creation'¹¹⁶ nor works that reflected the author's 'skills, labour, and judgments'.¹¹⁷ Copyright protection was guaranteed only to those who adhered to communism, praised the revolution, and professed the superiority of communism over capitalism. As a result, the law applauded authors as 'talented and intelligent'¹¹⁸ creators, a standard that did not exist in the Western copyright system. Intellectual dissidents who disagreed with the principles of 'socialist realism' or 'the Marxist perspective' faced repercussions.¹¹⁹

The *Outline of Vietnamese Culture*, a crucial document authored by the Communist Party in 1943, unequivocally sketched the Party's cultural objectives: 'to combat Classicism, Romanticism,

¹⁰⁷ibid.

¹⁰⁸Barley Norton, 'Music and Censorship in Vietnam since 1954', in Patricia Hall (ed), *The Oxford Handbook of Music Censorship* (Oxford University Press 2015) 303, 312–314.

¹⁰⁹Hồ Chí Minh et al, *Vẽ văn hóa nghệ thuật [On Art and Culture]* (Culture Publishing House 1976).

¹¹⁰Norton (n 108) 307.

¹¹¹Natasha Roit, 'Soviet and Chinese Copyright: Ideology Gives Way to Economic Necessity' (1986) 6 *Loyola of Los Angeles Entertainment Law Review* 53, 64–65.

¹¹²Circular 04/TT-VN, art 2.

¹¹³Berne Convention for the Protection of Literary and Artistic Works (signed 9 Sep 1886, entered into force 5 Dec 1887).

¹¹⁴Paris Convention for the Protection of Industrial Property (signed 20 Mar 1883, entered into force 7 Jul 1884).

¹¹⁵Madrid Agreement Concerning the International Registration of Marks (signed 14 Apr 1891).

¹¹⁶*Infopaq International A/S v Danske Dagblades Forening* C-5/08 [19 Jul 2009] ECR I-6569.

¹¹⁷*University of London Press Ltd v University Tutorial Press Ltd*, ChD 1916.

¹¹⁸Decree 142/NDBT, art 2.

¹¹⁹Huy Duc (n 30) 12.

Naturalism, and Symbolism in favour of Socialist Realism.’¹²⁰ Despite its brevity of only six pages, this document laid the foundation for Vietnam’s cultural revolution and served as a rallying point for the country’s intellectuals, writers, and artists to support the Party’s revolutionary movement. Consequently, works that deviated from the Party’s guidelines or were perceived as criticising the Party, no matter how ludicrous or far-fetched, were banned from publication.¹²¹ In essence, works created under the socialist umbrella served as a propaganda tool for the Communist Party.¹²²

Censorship was also concealed in the requirement to register one’s work with a state agency for permission to publish.¹²³ Authors had to use their real names or a pseudonym, and anonymous publication was not allowed, risking accusations of criticism against the State.¹²⁴ Compared to the Soviet model, which allowed the author’s name to be hidden if it posed no harm to Soviet society,¹²⁵ Vietnam’s rules were stricter. In this Orwellian state, creators had to either ‘conform to the party line or be incarcerated’.¹²⁶ In short, copyright law could not thrive on solid communist soil.

Although the 1995 Civil Code upheld state power over copyright, it shifted from a positive to a negative approach, ie, it changed from ‘citizens can do what the law allows’ to ‘citizens can do whatever the law does not exclude’. Article 749 of the Civil Code did not protect works that ‘oppose the Socialist Republic of Vietnam and ... harm the bloc of national unity’,¹²⁷ nor did it protect materials that ‘propagate reactionary ideologies and cultures, lustful and depraved lifestyle, criminal acts, social evils, superstition and other materials destructive to the fine customs and habits’,¹²⁸ and it also did not grant protection to any work that contributes to a distortion of history or a ‘repudiation of revolutionary achievements, disparagement of great persons and national heroes’ or the slander or denigration of ‘the reputation of an organization or the honour and dignity of an individual’.¹²⁹ All these abstract provisions provided the State with a potent weapon to reject protection of works that it found unpalatable. While Article 17 of the Berne Convention allows members to impose some controls on copyrighted works, these controls concern merely the format of the work,¹³⁰ but they do not allow signatories to deny copyright protection to works that appear inimical to state interests.¹³¹

Article 749 of the Civil Code became a source of discord during the Vietnam-US BTA discussions. While Vietnam was adamant about maintaining this provision, it ran counter to the US’s stance on freedom of the press and expression. At one point, the two sides appeared to be at an impasse, and the Agreement was on the verge of collapse.¹³² Ultimately, Vietnam’s limited bargaining power forced it to give in to the US demand.¹³³ As a result, censorship vanished from the country’s legal texts and has not reappeared in such an extreme form.

¹²⁰Truong Chinh (n 12).

¹²¹Norton (n 108) 307–308.

¹²²Constitution 1980, art 44.

¹²³Decree 142/HDBT, art 4.

¹²⁴Circular 04/VH-TT, art 1(a).

¹²⁵William Scott Goldman, ‘Berne-ing the Soviet Copyright Codes: Will the U.S.S.R. Alter Its Copyright Laws to Comply with the Berne Convention?’ (1990) 8 *Dickinson Journal of International Law* 395, 403.

¹²⁶Norton (n 108) 308.

¹²⁷Civil Code 1995, art 749(1)(a), as translated by the World Legal Information Institute <<http://www.worldlii.org/vn/legis/cc73/s749.html>> accessed 6 Sep 2023.

¹²⁸*ibid* art 749(1)(b).

¹²⁹*ibid* art 749(1)(d).

¹³⁰Than Nguyen Luu, ‘To Slay a Paper Tiger: Closing the Loopholes in Vietnam’s New Copyright Laws’ (1996) 47 *Hastings Law Journal* 821, 859.

¹³¹*ibid*.

¹³²Damond (n 88) 912.

¹³³*ibid* 962.

Copyright or Moral Rights?

Echoes of socialist legality were also heard in the courtroom, as demonstrated in *Nguyễn Kim Ánh v Director Phạm Lộc and Film Production Studio Hanoi I*.¹³⁴ Notably, even though the essence of the case revolved around a copyright infringement, the Trial Panel¹³⁵ focused on moral rights¹³⁶ instead.

Nguyen Kim Anh, the screenplay author of *Marriage without Registration (Hôn Nhân Không Giấy Thù)*, sued director Pham Loc for violating his moral right: the right to the integrity of his work.¹³⁷ In adapting the script to the film of the same name, the director made a number of changes, including reducing the five unregistered marriages depicted in the original work to just one in the film, and allegedly distorting the features of Vietnamese pilots during the war. Nguyen, who did not wish to be associated with the film production, demanded that the film be withdrawn unless his name was removed from the credits and the title and character names were changed to be different from those in his work.

Two things should be kept in mind. First, the film was produced on a government-funded grant, which means that it belonged to the State. Second, the Ministry of Culture and Information allowed its public release, indicating that the film had passed State censorship before the dispute reached the court.

The Trial Panel reasoned that while unregistered marriages may have occurred in society at large, they were rare in the Vietnamese military.¹³⁸ The author certainly had the right to portray their existence, but he could have limited the portrayal to just a few cases.¹³⁹ While the script had been written with the intention of praising the soldiers, all the relationships depicted in it revolved around unregistered marriages – an unhealthy type of relationship that was viewed to not be morally or legally justified.¹⁴⁰ Hence, the director's decision to reduce the number of unregistered marriages to one was an appropriate means to convey the author's intended message.

Furthermore, while the Trial Panel appreciated the plot of an orphan youngster becoming a pilot in the screenplay, the author placed him in an environment where his existence would not be permitted: the Air Force.¹⁴¹ As a result of military regulations, Vietnamese Air Force at the time only recruited personnel with identified parentage. To the Panel, the original work was therefore not an accurate representation of reality.¹⁴²

The ruling revealed that the filmmaking process was vulnerable to state meddling and interference. The Ministry of Culture and Information and the Script Review Board demanded changes to the original work, particularly regarding the characters of the pilots. More seriously, the General Political Department of the People's Army would not allow filming at any airport unless the director adjusted the script.¹⁴³

¹³⁴Case No 41/DSST (1998).

¹³⁵Legal proceedings in Vietnam do not involve a jury panel, but instead rely on a trial panel. According to Article 63 of Vietnam's *Civil Procedure Law* (2015), a typical trial panel consists of one judge and two people's assessors. While this arrangement is intended to ensure an impartial and independent decision-making process through majority voting within the trial panel, in practice the people's assessors rarely express dissenting opinions to the judge. Consequently, the judge primarily influences the interpretation of the applicable law, the assessment of the facts and, ultimately, the resolution of the dispute.

¹³⁶Since copyright is primarily concerned with an author's relationship to their creative work rather than with ethical considerations, the term 'moral rights' may be confusing in this context. The term, as used here, is derived from its French counterpart, *droit moral*, as the English copyright system initially lacked a comparable concept. In essence, moral rights are a set of non-economic rights that emphasise the personal connection between an author and their creation. These rights grant authors certain privileges, such as the right to be recognised as the creator and the right to object to any modification or use of their work that might damage their reputation.

¹³⁷Civil Code 1995, art 752(1)(c).

¹³⁸Case No 41/DSST (1998) 22.

¹³⁹*ibid.*

¹⁴⁰*ibid.*

¹⁴¹*ibid* 22–23.

¹⁴²*ibid* 21.

¹⁴³*ibid* 21.

Instead of acting as judges, the Trial Panel took on the role of film critics and moral police, criticising the original work's depiction of real life, dismissing it as clichéd and cheesy, and concluding that the author was incompetent. As a result, the director was allowed to revise the screenplay. The Panel determined that the changes made to the film, which had been approved by the Script Review Board and authorised by the Ministry of Culture and Information, did not deviate significantly from the original script, and therefore rejected the author's claim of moral right infringement.¹⁴⁴

This case highlights how a court acted as a gatekeeper, preserving socialist beliefs and relying on political propaganda rather than the rule of law to reach a verdict. Instead of resolving disputes, the courtroom became a forum for upholding socialist morality and lecturing on whether a work adhered to such morals. Socialist courts, unfortunately, did not adjudicate disputes but reformed social behaviour.¹⁴⁵

The concept of 'socialist legality' disappeared from both the 2013 Constitution¹⁴⁶ and Vietnamese discourse.¹⁴⁷ Reflecting constitutional change, the current IP Law (as amended in 2022) contains a catch-all article denying protection to IP subjects 'contrary to *social ethics*', which is left undefined, leaving ample room for interpretation.¹⁴⁸ Although no copyright disputes have arisen over this concept, a patent example can be used to illustrate the point. The Vietnamese government's tough stance on gambling – it restricts gambling activities to foreigners and only to locals above a certain income threshold¹⁴⁹ – allows it to instruct patent examiners to reject applications for gambling machines on the grounds of social ethics.¹⁵⁰

On the cultural front, too, it becomes clear how the regime has tried to justify its hardline stance on pre-1975 songs from South Vietnam on ostensibly moral grounds. In 2017, the Department of Performing Arts banned the circulation of five pre-1975 songs, citing a violation of moral rights.¹⁵¹ They reasoned that the lyrics of some songs had been edited, and that the author of one song had been incorrectly named.¹⁵² In an interview with the newspaper *Tuoi tre*, Nguyen Dang Chuong, the Director of the Department of Performing Arts, asserted: '[t]he songs that were edited have no value, so they will certainly be banned from circulation forever for violating copyright and related rights.'¹⁵³

Notably, while moral rights are personal rights and any dispute should be initiated by the authors, the Department of Performing Arts was too eager to act. When asked about the Department's motivation for its action, and whether there were any problems with the content and ideology of the songs, Nguyen Thu Dong, also from the Department, simply replied with the counter-question, 'On what battlefield are you walking?', referring to a line from one of the banned songs, 'I walk on a battlefield'.¹⁵⁴ The ban provoked a public outcry, prompting Vietnam's Musicians Association to petition the Department of Performing Arts. Citing national reconciliation as a reason to revoke the ban, the Association asked relevant authorities to act carefully in the fields of literature and art to avoid

¹⁴⁴ibid 24–25.

¹⁴⁵Chloros (n 14) 20.

¹⁴⁶Constitution 2013, art 12.

¹⁴⁷Bui (n 6) 448–449.

¹⁴⁸IP Law 2005 (as amended in 2022), art 8.

¹⁴⁹Decree 03/2017/ND-CP on Casino Business.

¹⁵⁰Vietnam Regulation for Patent Examination 2010, art 5.8.1.1

¹⁵¹'Con đường xưa em đi 'sửa lời' sẽ bị cấm vĩnh viễn [The Song "The Old Path I Took", Whose Lyrics Have Been Edited, Will Be Banned Forever]' (*Tuoi tre*, 4 Apr 2017) <<https://tuoi-tre.vn/cam-vinh-vien-5-ca-kuoc-truoc-nam-1975-bi-sua-loi-1292087.htm>> accessed 22 Sep 2022.

¹⁵²'Hội nhạc sĩ Việt Nam: Cần cân nhắc trước các quyết định, tránh suy diễn [Vietnam's Musicians Association: It Is Necessary to Consider Decisions and to Avoid Deductions]' (Saigon Giai Phong, 14 Apr 2017) <<https://www.sggp.org.vn/hoi-nhac-si-viet-nam-can-can-nhac-truoc-cac-quyet-dinh-tranh-suy-dien-436968.html>> accessed 22 Sep 2022.

¹⁵³In this context, the term 'copyright' is understood as 'moral rights'. Such cases of 'lost in translation' have been discussed previously in this article. See *Tuoi tre*, 'The Old Path I Took' (n 151) (author's translation).

¹⁵⁴'Con đường xưa em đi': 'Chiến trường anh bước đi là chiến trường nào?' [The Old Path I Took: On What Battlefield Are You Walking?]' (*Tuoi tre*, 13 Mar 2017) <<https://tuoi-tre.vn/con-duong-xua-em-di-chien-truong-anh-buoc-di-la-chien-truong-nao-1279322.htm>> accessed 17 Apr 2023 (author's translation).

speculation.¹⁵⁵ The Minister of Culture, Sports, and Tourism also chimed in, ordering that the ban be lifted since it was ‘groundless, causing mixed responses in public’.¹⁵⁶ The Department of Performing Arts eventually gave in.

State censorship has led to an increase in the modification of pre-1975 works to make them politically correct for broadcast and performance on official channels. Many programme producers and artists have altered the lyrics to eliminate any reference to ‘battlefields’, ‘soldiers’, ‘watchtowers’, or ‘war’.¹⁵⁷ However, such changes may violate the author’s right to integrity. While Vietnam’s IP Law stipulates that the modification of a work must prejudice the author’s honour or reputation in order for this right to be established,¹⁵⁸ this requirement has not been widely discussed in Vietnam’s legal literature. However, there is a court ruling holding that changing a song’s title and a few words violates moral rights.¹⁵⁹ Based on the above analysis, it is safe to conclude that modifying lyrics could potentially violate moral rights in Vietnam, yet it is currently the only way to eschew State censorship. Ironically, the Soviet command-and-control style provides an effective antidote to the arbitrariness that is a by-product of its legal philosophy.

Patents and Collective Ownership

Marxist-Leninist ideology is centred around the eradication of private ownership. In line with this, Vietnam’s 1980 Constitution recognised state ownership (or, in the Constitution’s own terms, the property of the whole People) and collective ownership.¹⁶⁰ Vietnam’s first patent law of 1981, Decree 31-CP, closely reflects this ideology.

As I described above,¹⁶¹ because Vietnam did not have a functioning legislative process at the height of communism, decrees served as *de facto* law even though they were not *de jure* law. One might ask why Vietnam established a patent system that grants exclusivity to investors, which seems to contradict the basic premise of Communism that emphasises the primacy of the State over individual rights.¹⁶² The answer lies in Vietnam’s early patent structure in the 1960s. North Vietnamese Communists saw workers’ inventiveness as symbols of patriotism, and inventions and industrial improvements as part of collective leadership and mass mobilisation to win the war. The Party hence issued administrative orders to organise and lead the mass movement for technical advancement.

Decree 31-CP extended such wartime rules to the socialist peacetime era with heavily militarised language. Its objective was to ‘strengthen the organisation and management of invention activities, encourage all employees to promote scientific and technical creativity, strengthen the construction and development of the national economy, bolster national defence, and improve the social life’.¹⁶³ For this reason, Vietnam’s patent history differs significantly from that of the West, where patent acts were created to either give a monopoly to ‘the first and actual inventor’¹⁶⁴ or to ‘promote the progress of science and useful arts’.¹⁶⁵ By contrast, Vietnam’s Decree 31-CP fostered collective

¹⁵⁵Saigon Giai Phong, ‘Vietnam’s Musicians Association’ (n 152) (author’s translation).

¹⁵⁶Minister of Culture, Sports, and Tourism of the Socialist Republic of Vietnam, ‘Official Letter No 1575/BVHTTDL-VP’ (14 Apr 2017).

¹⁵⁷Tuan Viet Vu, ‘Những bài hát truân chuyên [Troubling Songs]’ (VnExpress, 24 Dec 2020) <<https://vnexpress.net/nhung-bai-hat-truan-chuyen-4211010.html>> accessed 10 Sep 2023 (author’s translation).

¹⁵⁸IP Law 2005, art 19.

¹⁵⁹Case 1549/2010/DS-KDTM-ST.

¹⁶⁰Constitution 1980, art 18.

¹⁶¹See supra the subchapter ‘1981–1995: Beating around the Bush’.

¹⁶²Rachel L Nass, ‘Trading Systems: Vietnam’s Creation of a New Intellectual Property Regime at the Inception of the Vietnam-United States Bilateral Trade Agreement’ (2001) 27 Brooklyn Journal of International Law 285, 304.

¹⁶³Decree 31-CP, preamble (author’s translation).

¹⁶⁴England Statue of Monopolies 1624, s 6.

¹⁶⁵United States Constitution, art I, s 8, cl 8.

ownership at the expense of sidestepping inventors' interests.¹⁶⁶ Collectivism rather than individualism dominated early regulations, as did societal rather than private interests. In line with socialist ideals, inventors' rights were not a private property for individual economic gain but existed for the benefit of society. To encourage learning, inventive ideas should be shared as widely as possible.

Socialists denounced capitalist patents as serving exploiters rather than inventors.¹⁶⁷ Granted, there is some truth in this view. To fix what was perceived as a flawed capitalist system, the Soviets invented an alternative to a patent title: the inventor's certificate. Although both instruments bear fruit in protecting an invention, they differ like apples and oranges.

First, unlike a patent, which acknowledges the inventor's ownership, an inventor's certificate confers only moral rights (such as the right to be named as the inventor) with limited scope for financial reward. The most lucrative aspect, ownership – the right to transfer, assign, and license an invention, to make money out of it – stayed with the State. In the intermediate period before the advent of 'pure Communism', the State remained the exclusive owner of inventions and technological advances that formed an essential constituent of the industrial complex.¹⁶⁸ The transfer of an exclusive right to the State through the inventor's certificate implemented the 'liability rule', meaning that the inventor could not prevent third parties from utilising the invention, but was entitled to compensation for its use.¹⁶⁹ In contrast, patents operate under the 'exclusivity rule', which allows patent owners to prevent anyone from using their invention.

Second, an inventor's certificate could be converted into a patent title, but it was not reversible. As I explained when separating the concept of personal property from private property,¹⁷⁰ the inventor's certificate preserved an invention as personal property but not as private property. Specifically, the inventor's certificate prevented inventors from turning the fruits of their labour into a source of revenue. In addition to their regular wages, inventors received a predetermined royalty from the State, as well as moral rewards such as medals and titles.¹⁷¹ Royalties were also subject to a cap,¹⁷² reflecting the principles of collectivism and equal distribution that were fundamental to a centrally planned economy. These principles were designed to reduce disparities in wealth. Soviet inventors, much like their counterparts in the realm of copyright, were essentially wage earners.

Third, while an inventor could choose between a patent and an inventor's certificate, only the latter was granted for inventions relating to national security, plant and animal varieties, and methods of treatment and diagnosis for humans, animals, and plants.¹⁷³ In addition, a patent would never be granted if the inventor came up with new ideas while working for, or receiving 'material aid' from, the State.¹⁷⁴ In a socialist country with no private sector, the government was the sole employer and, therefore, entitled to ownership. One way or another, an invention would eventually wind up in the leader's hands.

Lastly, Decree 31-CP abolished maintenance fees in order to encourage people to apply for the inventor's certificate. The rationale behind this policy was that since creators were already contributing to society by sharing their ideas in exchange for very limited financial rewards, they should not be burdened with additional fees. However, once someone started benefitting from the

¹⁶⁶Decree 31-CP, preamble.

¹⁶⁷*Inventions or Patents?* (Science and Technology Committee of Ho Chi Minh City, circa 1980s) 33.

¹⁶⁸Burrus (n 54) 694.

¹⁶⁹Svitlana Lebedenko, 'Russian Innovation in the Era of Patent Globalization' (2022) 53 *International Review of Intellectual Property and Competition Law* 173, 177.

¹⁷⁰See supra the chapter 'Private Property: Communism's Nemesis'.

¹⁷¹Decree 31-CP, arts 14(1), 40.

¹⁷²ibid art 40(2).

¹⁷³ibid art 15(1).

¹⁷⁴ibid art 15(1)(a).

commercialisation of a patent, they had to pay fees.¹⁷⁵ Although the waiver of the inventor's certificate fee was later abolished, the waiver scheme was reintroduced in the 2022 IP Law amendment as a form of compensation for pharmaceutical patent holders who experience delays in obtaining marketing authorisation.¹⁷⁶

Decree 31-CP reflected the principle of collectivism by emphasising the communal value of inventions. As they amounted to public goods and belonged to the State, anyone could use an invention granted under the certificate as long as they informed the National Committee of Science and Technology and compensated the inventor with a prescribed fee.¹⁷⁷ This allowed for a free flow of new ideas and knowledge. The Decree also established broad exceptions to patent rights, including the use of inventions for non-commercial purposes.¹⁷⁸ Given the Communists' abhorrence of capitalism as a social and moral Western decadence, however, it remained unthinkable for private companies to commercialise an inventive idea in a strictly communist country.

While obtaining a patent seemed theoretically feasible, the command-and-control economy would not tolerate it. The law allowed a patent owner to license, transfer, and assign his patent to a third party,¹⁷⁹ but this did not translate into reality. There were no private companies; export-import remained a state monopoly; and all organisations were state-owned, which meant that every inventor ultimately faced the same entity: the State.

In such circumstances, it would be nothing short of a miracle if patents had flourished in Vietnam in the 1980s. Between 1981 and 1989, the Patent Office issued 453 inventor's certificates but only seven patents, all to foreigners.¹⁸⁰ The meagre number of patents was due not only to the law's prejudice, but also to the US trade embargo, which prevented Vietnam from trading with other countries, leaving communist countries as its predominant trading partners. With almost two decades of the embargo in place (1975–1994), there was little foreign direct investment, resulting in fewer patent applications.¹⁸¹

The Soviet patent system was transplanted to Vietnam not only through legislation but also through the exchange of patent data. In the 1980s, the Vietnam Inventions Office needed patent information to support substantive examination, as well as research, development, production, and business activities in the country.¹⁸² However, importing such documents was challenging due to financial constraints, necessitating reliance on the Soviet Union. In 1982, the Inventions Office received 10,000 patent documents from the German Democratic Republic, and in 1985, it obtained millions of them from the USSR State Patent Committee.¹⁸³

By the mid-1980s, Soviet influence was waning, and Vietnam realised that it could no longer rely on Soviet financial aid. As external support dwindled, internal conditions deteriorated, leading to a lack of incentives to work in the highly centralised economy. Unfortunately, the inventor's certificate failed to motivate innovators who lost their reasons to innovate.

When Vietnam opened its economy in 1986, legislative changes followed. The first step was the abolition of the inventor's certificate through the 1989 Ordinance. Perhaps not surprisingly, the number of patent applications has soared since then. The country has evolved into a modern IP

¹⁷⁵ *ibid* art 21(1).

¹⁷⁶ Law No 07/2022/QH15 (16 Jun 2022), art 131A, amending and supplementing a number of Articles of the Law on Intellectual Property. For further discussion on Vietnam's Compensation, see Van Anh Le, "Second Medical Use Patents and Compensation for the Delay in Marketing Authorisations: The Curious Case of Vietnam" (2022) 71(11) *GRUR International* 1048, 1054–1055.

¹⁷⁷ Decree 31-CP, art 19.

¹⁷⁸ *ibid* art 17(1)(b).

¹⁷⁹ *ibid* art 22.

¹⁸⁰ Nick J Freeman, 'United States's Economic Sanctions Against Vietnam. International Business and Development Repercussions' (1993) *The Columbia Journal of World Business* 13, 17.

¹⁸¹ *ibid*.

¹⁸² IP Office of Vietnam (n 57) 20.

¹⁸³ *ibid*.

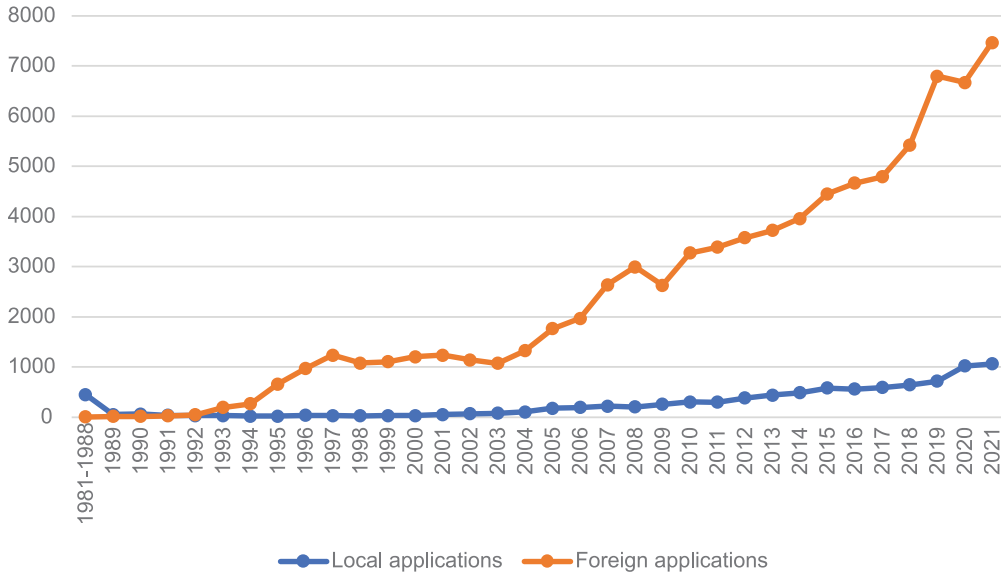


Figure 2. Annual number of patent applications in Vietnam (1981–2022)¹⁸⁴

framework, as exemplified by the 1995 Civil Code and the 2005 IP Law. As technology has grown more sophisticated, the underlying need for innovation has become more pressing, and the previous framework did not provide adequate protection.

As Vietnam's patent policy evolved, foreign patents flooded the NOIP. From only seven foreign patents granted between 1981 and 1988, international applications increased in 1995, skyrocketed in 2005, and have dominated the market ever since (see Figure 2).

Compared to copyright, the Soviet legacy has largely faded from Vietnam's patent system, although its effects can still be seen in how the NOIP interprets and applies the law.¹⁸⁵ The decreasing influence is due to the fact that patents in science and technology are much less subject to censorship because of their largely ideological neutrality, a significant difference from other creative works. As a result, the State cannot govern patents in the same way that it governs copyright, especially as Vietnam has long sought to industrialise its economy. Moreover, the government has recognised that patents have not yet made a significant contribution to the country's socio-economic development or to the promotion of science, technology, and innovation. There is a substantial disparity between domestic and international patent applications, which the government hopes to narrow. As a result, given the critical role of patents, Vietnam is reluctant to implement measures that could negatively impact the current situation.

In 2019, a significant milestone was reached in the field of IP when the Prime Minister of Vietnam for the first time set out a national IP Strategy for the next decade.¹⁸⁶ This strategy reiterates the significance of IP as a tool to promote innovation, enhance national competitiveness, and contribute to economic, cultural, and social development. Most importantly, the strategy targets an average annual increase of 16–18% in the number of patent applications and grants, the highest of any other IP category. This compares with an increase of 6–8% for industrial design applications, 8–10% for trademark applications, and 12–14% for plant varieties.

¹⁸⁴For the source of the data, see *ibid.*

¹⁸⁵Le, 'Second Medical Use Patents' (n 176) 6, where the Soviet legacy can be seen through the Patent Office's interpretation of second medical uses.

¹⁸⁶Vietnam Intellectual Property Strategy No 1068/QĐ-TTg (22 Aug 2019).

The strategy strongly emphasises the significance of updating the legal frameworks to address emerging issues in IP rights, in particular for those related to science and technology, and aims to ensure that protection measures reflect the civil nature of IP rights. This approach highlights the growing influence of legal, economic, and social perspectives, rather than the Party's ideology, in shaping patent policies.

The Nation of Judicial Sceptics

Vietnam (and other Asian countries) are known for their preference for non-adversarial methods of resolving disputes, which contrasts with the Western practice of using litigation.¹⁸⁷ The Vietnamese tend to favour less confrontational techniques, such as negotiation and mediation, and are less inclined to file a lawsuit to seek redress. A popular saying that reflects the Vietnamese public's attitude towards the courtroom is 'vô phúc đáo tụng đình', which can be roughly translated as 'only the unlucky and ignorant resort to lawsuits.' This aversion to the courtroom can be attributed to factors beyond Soviet influence, with deeper roots in Confucianism and feudalism. As briefly mentioned in my summary of the history of Vietnam, Vietnam's culture has evolved within the framework of Confucianism, which emphasises social harmony and prioritises 'sensibility' (or feeling) over 'sense' (or reason). Consequently, society has developed a culture of conflict resolution that prioritises saving the face of all parties involved, even if it does not fully uphold the letter of the law.

In 1942, Tran Thanh Mai, a literary critic, published a critique of the works of the late, highly respected poet Han Mac Tu. Quach Tan, authorised by Han before his death, filed a lawsuit against Tran, alleging that Tran had quoted too many poems and prose, sometimes copying entire poems. The judge, a prominent writer named Nguyen Tien Lang, ruled that while Quach's lawsuit was not about personal gain but the exclusive right to print Han's poetry, Tran had never intended to profit. The judge advised Tran to share the royalties with Han's family to settle the case.¹⁸⁸ This was the first copyright case that was publicly recorded in a Vietnamese newspaper when the concept of 'copyright' was still unknown. Although this may not be a typical example, the judge's verdict demonstrated the importance of saving face and maintaining social harmony in the courts.

Having lived under a feudal system, then colonialism, and then an Orwellian state, the public has nurtured a belief that courts serve the affluent, the colonisers, and the ruling party, rather than ordinary citizens. People perceive the law as an enemy, not as an essential instrument of impartiality. Going to court is seen as a harmful act that ruins one's reputation and causes emotional distress. A popular proverb captures this sentiment: 'một đời kiện chín đời thù [a lifetime of trial, nine lifetimes of hatred]'. These beliefs have been passed down through generations and continue to lead many to believe that private disputes are best resolved outside the court system, and that legal proceedings rarely result in a fair verdict. Accordingly, many people have little respect for the law and hesitate to take legal action.

Since the court system was reorganised on the Soviet model, judicial independence – the principle that courts and judges must perform their duties free from influence or control by other actors – remains limited. The public has little confidence in the rule of law. And one can hardly blame the public for that, considering that Vietnam's *Law on the Organisation of the People's Courts* authorises the court to safeguard 'the socialist regime'.¹⁸⁹

A guidebook for judges explicitly states:

As part of a communist society, the judicial culture must adhere to the Communist Party's guidelines ... Through legal proceedings, the Court reinforces socialist legality, fulfilling the

¹⁸⁷Robert E Lutz, 'Resolving trade disputes in Asia: An essay about the Laws, Institutions, and Cultures', in Christoph Antons (ed), *Law and Development in East and Southeast Asia* (Routledge 2005) 567.

¹⁸⁸Tien Lang Nguyen, 'Quyền của "Hàn Mặc Tử" của Trần Thanh Mai [Han Mac Tu's Rights of Tran Thanh Mai]' (Trang An Newspaper, 9 Jun 1942).

¹⁸⁹Law on the Organisation of the People's Courts 2014, art 2.

political obligations of the Party, the State and the People in building socialism and defending the socialist homeland. The political and legal significance of judicial activities determines the political and legal significance of a verdict.¹⁹⁰

Moreover, judges in Vietnam are only allowed to execute the law and must limit their interpretation of the law to a decoding of its ‘inherent’ meaning. Accordingly, ‘hyperpositivism’¹⁹¹ rather than a legal practice based on the rule of law is used to settle disputes. Moreover, laws are often vague and need to be amended right after they are passed. This is particularly true in the case of IP rights, where emerging technologies such as the internet, online intermediaries and AI continue to push the boundaries of the existing legal framework. Even the Supreme Court has acknowledged that judges lack a deep understanding of IP rights, making it difficult to determine whether an infringement has occurred.¹⁹²

As a result, the Court frequently relies on the findings of other state agencies, such as the NOIP, which oversees industrial property, and the Copyright Office, which administers copyrighted works, to assess whether an IP rights violation has occurred.¹⁹³ Such dependency creates a conflict of interest when these agencies become involved in an IP dispute. The Supreme Court admits that ‘while the law protects IP rights, they remain theoretical without effective enforcement, rendering them essentially “nil rights” [*hư quyền*].’¹⁹⁴

The public’s deep-rooted scepticism towards judicial institutions continues to have a significant impact on their attitudes. While amicable out-of-court settlements remain the preferred option, sometimes escalating a dispute through the legal system is the only recourse. Once the Rubicon has been crossed, IP disputes can get very ugly indeed. The Supreme Court summarised the problem as follows:

Due to the opposing parties’ aggressive attitudes, they often appeal against the first-instance court’s findings, seeking the appellate court’s intervention. The plaintiff often complains to the government, the National Assembly, and the press that the appellate court did not handle the matter correctly. In some instances, certain authorities have even urged the government to interfere in the judicial process.¹⁹⁵

The negative publicity and notoriety generated by litigation serve to further discourage people from participating in the legal process.

Another by-product of the public’s reluctance to use the judicial process is that few IP cases have reached the courtroom. IP precedents are a rare commodity in Vietnam’s legal system. While attempts have been made to ascertain the number of IP disputes that have been heard, concrete figures remain elusive.¹⁹⁶ Before the 1995 Civil Code, no IP cases were filed; between 1995 and 2000, only three lawsuits involving copyrights were brought to court.¹⁹⁷ Between 2000 and 2005, the court

¹⁹⁰Huu Thu Phan (ed), *Sổ Tay Thẩm Phán [Manual for Judges]* (People’s Public Security Publishing House 2002) 111–112 (author’s translation).

¹⁹¹Rafał Mańko, ‘Survival of the Socialist Legal Tradition? A Polish Perspective’ (2013) 4 *Comparative Law Review* 1, 6.

¹⁹²The Supreme People’s Court (Chuyên đề khoa học xét xử), *Pháp luật về thủ tục giải quyết tranh chấp quyền sở hữu trí tuệ tại Tòa án nhân dân ngày 10/11/2010* [Law on Procedures for Settling IP Rights Disputes at the People’s Courts] (10 Nov 2010) 48.

¹⁹³Case No 1892/2011/KDTM-ST (24 Oct 2011); Case No 03/2013/HCST (29 Mar 2013).

¹⁹⁴The Supreme People’s Court (Chuyên đề khoa học xét xử), *Pháp luật về thủ tục giải quyết tranh chấp quyền sở hữu trí tuệ tại Tòa án nhân dân ngày 10/11/2010* [Law on Procedures for Settling IP Rights Disputes at the People’s Courts] (10 Nov 2010) (author’s translation).

¹⁹⁵*ibid* 46–47 (author’s translation).

¹⁹⁶Thanh Thi Kieu, ‘Implementing the Agreement on Trade-Related Aspects of Intellectual Property Rights in Vietnam’ (PhD thesis, Victoria University 2019) ch 8.

¹⁹⁷Kieu (n 196) 367.

received ninety-three complaints, but only thirty-three of them were heard, with eleven related to copyright and related rights.¹⁹⁸ The remaining cases were either withdrawn or settled. From 2006 to 2009, 108 lawsuits were filed, with ninety related to copyrights.¹⁹⁹ No further updates have been made available since then. The scarcity of legal precedents, coupled with the inconsistent publication of court rulings, has impeded scholarly research on Vietnam's IP system.

Public acceptance of the paternalistic role of the State, a legacy inherited from long-lasting Soviet influence, has led to a mindset that encourages government interference in purely civil relationships. This approach also discourages people from engaging in the often adversarial legal process of resolving private disputes, instead leading them to seek State intervention. This assertion is not an overstatement; rather, it can be substantiated by the following case studies.

Bureaucratic Directive from the State to the Citizen

In a football match between Vietnam and Laos in December 2021, the YouTube channel Next Sports muted the national anthem 'Tiến Quân Ca [Moving Forward]' during the flag-raising ceremony, citing copyright issues.²⁰⁰ The channel's decision was met with strong criticism from the public.

'Moving Forward', composed by Văn Cao (1923–1995), has been the national anthem since 1946. In 2010, the late musician's widow gifted the work to the public, allowing anyone to use it free of charge. However, her gift did not waive the rights of those who record, perform, or broadcast the song, which fall under 'neighbouring (or related) rights'.

Marco Polo Records, a US company, owns the exclusive rights to the recording of 'Moving Forward' performed during the football match. Anyone wishing to use their track must obtain permission, typically through a royalty payment. In order to avoid paying Marco Polo Records for the rights to broadcast the music, Next Sports chose to mute the recording during the flag-raising ceremony.

In November 2021, FPT, another YouTube channel, lost all of its revenue from broadcasting a football match between Vietnam and Saudi Arabia because the organisers of the match used Marco Polo's recording without the company's consent.²⁰¹ Immediately after the incident, the spokesperson for Vietnam's Ministry of Foreign Affairs ordered all individuals and organisations not to interfere with the performance of the national anthem, but made no reference to any specific law.²⁰² And just by that, the song was not hushed anymore. While this top-down order provided a swift solution, it exemplifies the leadership's disregard for legal norms.

Citizens Seek Parental Help from the State

Sconnect, a Vietnamese animation studio, owns the popular cartoon character Woolfoo, which is streamed globally on various online platforms. In 2022, EO, the owner of Peppa Pig, filed a claim against Sconnect in Russia and the United Kingdom, alleging multiple IP infringements.²⁰³

¹⁹⁸The Supreme People's Court (Chuyên để khoa học xét xử), Pháp luật về thủ tục giải quyết tranh chấp quyền sở hữu trí tuệ tại Tòa án nhân dân ngày 10/11/2010 [Law on Procedures for Settling IP Rights Disputes at the People's Courts] (10 Nov 2010) 46.

¹⁹⁹ibid.

²⁰⁰'Vietnam's national anthem muted in football match aired on YouTube over copyright concerns' (Tuoi Tre News, 7 Dec 2021) <<https://tuoitrenews.vn/news/sports/20211207/vietnams-national-anthem-muted-in-football-match-aired-on-youtube-over-copyright-concerns/64597.html>> accessed 14 Sep 2022.

²⁰¹ibid.

²⁰²Minh Vu, 'No activities preventing Vietnamese anthem allowed, Hanoi says' (Hanoi Times, 10 Dec 2021) <<https://hanoitimes.vn/no-activities-preventing-vietnam-anthem-allowed-hanoi-says-319505.html>> accessed 14 Sep 2022.

²⁰³While EO withdrew its complaint in Russia in Dec 2022, a day before Christmas, the UK High Court ruled that the UK had jurisdiction over the dispute. See *Entertainment One UK Ltd v Công Ty TNHH Đầu Tư Công Nghệ và Dịch Vụ Sconnect Vietnam and ors* [2022] EWHC 3295 (Ch).

In Vietnam, Sconnect took pre-emptive action by filing a lawsuit against EO for the unauthorised use of trademarks and images of Wolfoo characters. However, during the legal process, the company also resorted to asking the Vietnamese government for parental-like intervention.²⁰⁴ In September 2022, it submitted written petitions to four Ministries seeking their assistance. Specifically, Sconnect requested the Ministry of Information and Communications to compel EO to cease its ‘unfair competition activities’ and to prevent online platforms from accepting EO’s copyright claims until the UK High Court had delivered the judgment. Sconnect also asked the same Ministry to work with other state agencies to expedite the company’s complaint to Vietnam’s National Competition Commission.

Sconnect further appealed to the Ministry of Culture, Sports, and Tourism and suggested that it file petitions with the People’s Court of Hanoi (which is currently handling the dispute), the National Competition Commission, and the Department of Competition and Consumer Protection to quickly resolve its trademark infringement claims.

Furthermore, the company approached the Ministry of Industry and Trade to demand that EO cease its alleged unfair competition practices and that the National Competition Commission expedite Sconnect’s enforcement efforts.

Finally, the company asked the Ministry of Science and Technology to demand that EO respect Vietnam’s IP laws and Sconnect’s IP rights.

To summarise, Sconnect’s relentless efforts involve leveraging various state agencies to pressure a foreign company to withdraw from the dispute. Such behaviour underlines the overprotective role of the State and shows that Sconnect favours a command-and-control approach, which contradicts the desired shift towards a more rule-based society.

Conclusion

This article has examined the influence of Soviet IP law on Vietnam’s IP regime, highlighting that the transplantation of socialist IP law was done with little regard for local circumstances. Nevertheless, the close link between the economies and political models of the Soviet Union and Vietnam facilitated the transfer of the former’s IP system to the latter. During the heyday of communism, Soviet influence was strong. The resulting IP laws were imbued with a socialist ethos and typical features of a command economy shaped by the political ideology of the Communist Party.

The article has also suggested that although the Soviet IP system treated inventors and creators as wage earners, its influence was more evident in copyright than in patent-related areas. Under the Soviet system, copyright was granted only for works that conformed to socialist ideals and Party doctrine. Although this requirement no longer exists, copyright remains vulnerable to State censorship due to its expressive elements, which not only give protection to a work but also make it an easy target for outright banning.

As for patents, Vietnam had originally replicated the Soviet Union’s approach of using the inventor’s certificate to reward inventive activity, leaving only the inventor’s name as recognition, while transferring ownership to the State. Since the abolition of the inventor’s certificate in 1989, patents have been largely free of Communist influence. However, foreign patentees have dominated the market, and Vietnam is trying to encourage more domestic patent applications in order to reduce the gap between international and local patent holders. Although Vietnam has set out its IP Strategy up to 2030, the success of this initiative remains uncertain.

One of the enduring legacies of the Soviet era is the perception that the legal system is inadequate to resolve disputes, leading people to turn to the government for help, or to use the administrative route, instead of going to court. These challenges are deeply ingrained in the legal system and extend

²⁰⁴‘Sconnect gửi đơn đến 4 Bộ nhờ bảo vệ trong vụ việc với chủ sở hữu Peppa Pig [Sconnect Asking Four Ministries for Protection in the Case with Peppa Pig Owner]’ (The Saigon Times, 8 Sep 2022) <<https://thesaigontimes.vn/sconnect-gui-don-den-4-bo-nho-bao-ve-trong-vu-viec-voi-chu-so-huu-peppa-pig/>> accessed 22 Sep 2022.

beyond IP rights issues. However, the lack of established case law in the relatively new field of IP rights exacerbates the problem, hampering scholarly research and creating uncertainty about how the courts will approach specific IP cases.

Since the conclusion of the US BTA and its accession to the WTO, Vietnam has undergone a significant transformation, moving from a centrally planned economy to a market-based trading structure. The enactment of Vietnam's first IP Law in 2005 marked a further shift, with communist values no longer enshrined in specific rules, but protected in practice by general principles and laws. Subsequent FTAs, which require greater IP rights protection, have prompted the country to modernise its IP infrastructure. While foreign pressure may have played a role in Vietnam's initial adoption of IP laws, the government's strategic development continues to be driven by national interests and a desire to raise its international profile.