

Legal news

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INTELLECTUAL PROPERTY LAW

Who owns an employee's invention: employer or employee?

By Nguyen Nguyet Dzung

As a matter of fact, a great number of inventions are not made by self-employed inventors, but by employees in the course of their employment. This might be a new drug formulation, a process of preparation of a compound, a method of control of a plant disease, or an article of manufacture. The question who owns these inventions: the inventor or his employer is of the same importance as the rules on allocation of employees' inventions and employer's rights and remuneration, since rules that unduly favor either side, employer or employee, may easily lead to disputes over social justice and technological competition. Answer to the above question varies from a country to a country and shall be discussed below.

Inventions are very often created by employees during their employment hours. As it can be seen from some court cases, if the rights of both employers and employees are not expressly pre-defined in some form of written or oral agreements, it can often lead to lengthy and costly legal disputes. Employees tend to argue that the patents for their inventions do not necessarily belong to the employers since they themselves, but not their employers, invented those inventions. Employers, on the other hand, may think that they are entitled to obtain patents for such inventions and shall be given an exclusive right over the patented invention because such inventions have been created by their employees in the course of their employment using their own facilities. So, what patent laws in different jurisdictions should do to ensure that employers and inventor-employees retain their portions of the rights to the invention?

Different approaches have been available worldwide. Under Australian law, an employer generally has rights over an invention created by an employee. Japan patent law, in contrast, gives the employees the ownership over inventions made in the course of employment. Employers shall obtain non-exclusive but transferable licenses subject to payment of a reasonable remuneration to the employees/licensees. German rules for employees' inventions have been known as favorable to the employees as well. Inventions belong to employees and employers shall merely have a right to use the service inventions that are made within the scope of business and duties by the employees upon payment of an equitable remuneration. The US approach to this kind of inventions is rather open since there is no strict federal law for remuneration of employees' inventions. Most companies have rules regarding compensation for employee inventions. There is, however, no statutory obligation to do so. It is generally presumed that patent rights automatically belong to employers via an implicit agreement with employees – or that any compensation terms for employees' inventions would have been worked out in advance with staff members during initial employment contract negotiations.

Shop right rule

Although the US patent law provides employers with a far more favorable situation than in Europe, employees may still avail themselves of a shop right limitation if

they are not specifically hired or employed to invent. Shop right are an employer's non-exclusive royalty-free right to use technology developed by employee while on the job using the employer's finance or work time. A shop right is generally implied when an employee, who is not specifically hired to invent, uses the employer's facilities to develop a new technology during the employment time. It is based on the employer's presumed contribution to the technology through his own materials, appliances, time and equipment. A shop right permits employer to use the invented technology, but not to sell it nor to prohibit others from using it. It is unfettered right to the manufacture, use and sale of the invented technology and without any requirement to reimburse the inventor. A shop right is like a license the invented technology to competitors and to receive royalties and the like.

Employees' inventions in Vietnam

Vietnam IP Law provides that the right to file patent applications with respect to employees' inventions belong to the entities or individuals who have provided finance and material facilities to the inventors through a job assignment or job hiring unless otherwise agreed by relevant parties. Thus, employers shall be entitled to obtain a patent for such invention and be given an exclusive right over the patented invention. Employees shall enjoy some moral rights over the invented technology to be named as inventor in relevant letters-patents as well as in any document in which the invented technology is published or introduced. Employees shall also enjoy some remuneration in accordance with the law.

However, it is rather obscure whether the situation remains the same if the employees are not specifically hired or employed to invent or if the invention is made outside the scope of business. In the former situation, should the employer establish an employer's royalty free, non-exclusive and non-transferable shop right based on his presumed material and time contribution instead of an exclusive right to such invention? Or should the rules on employee inventions be changed to be more favorable to employees? In Vietnam, the change of employment is not a common practice and has been regarded as a stigma rather than an advantage. It puts employed inventors in a disadvantageous position when negotiating with employers about remuneration as long as they still wish to stick to companies. The legislatures should make sure that employees are properly awarded for their inventive efforts but not at the expense of employers. It is a prerequisite to encourage employees' innovation while protecting legitimate rights of employers over employee inventions at the same time./.

Other Sectors

Finance - Banking

- On November 29, 2010, the State Bank of Vietnam stipulated Decision No.2868/QD-NHNN on the basic interest rate in Vietnamese Dong.
- Decision No. 2620/QD-NHNN dated November 5, 2010 of State Bank of Vietnam on refinancing interest rate, rediscount interest rate and overnight loan interest rate applicable to the inter-bank electronic payments and loans for making up capital deficit in the clearing payments of State Bank of Vietnam to other banks.
- On November 5, 2010, the State Bank of Vietnam issued Decision No. 2619/QD-NHNN on the basic interest rate in Vietnamese Dong.
- Circular No. 23/2010/TT-NHNN dated November 9, 2010 of the State Bank providing for the management, operation and use of interbank electronic payment system.

Taxation

- On November 29, 2010, the National Assembly passed Law No. 57/2010/QH12 on Environmental Protection Tax.
- Decision No. 78/2010/QD-TTg dated November 30, 2010 of the Prime Minister on the value limit of tax-free goods imported via express delivery service.
- On November 19, 2010, the Prime Minister stipulated Decision No. 2117/QD-TTg approving the agreement between the Socialist Republic of Vietnam and the Government of the Republic of Mozambique for the avoidance of double taxation and prevention of evasion of taxes on incomes and assets.
- Decision No. 2245/QD-TCT dated November 8, 2010 of the General Department of Taxation providing for the functions and duties of print management division/bureau and supplementing functions and duties of Inspectorate of General Department of Taxation, tax inspection/examination bureau, inspection and tax examination team under tax authorities at different levels.
- On November 12, 2010, the Ministry of Finance issued Circular No.182/2010/TT-BTC amending preferential import tax rate applicable to gold item in Preferential Import Tariff.
- Circular No. 180/2010/TT-BTC dated November 10, 2010 of the Ministry of Finance providing guidelines for electronic transactions in the taxation field.
- On November 5, 2010, the Ministry of Finance stipulated Circular No.176/2010/TT-BTC providing guidelines for enterprise to previously deduct from costs when determining incomes subject to Corporate Income Tax in order

to create an assistance source for the poor districts in implementing Resolution No. 30a/2008/NQ-CP dated December 27, 2008 of the Government on rapid and sustainable poverty reduction support program for 61 poor districts.

- Circular No. 175/2010/TT-BTC dated November 5, 2010 of the Ministry of Finance amending and supplementing Circular No. 84/2008/TT-BTC dated September 30, 2008 of the Ministry of Finance providing guidelines for implementation of a number articles of Law on Personal Income Tax and of Decree No. 100/2008/ND-CP dated September 8, 2008 detailing a number articles of Law on Personal Income Tax.

Trade

- On November 17, 2010, the National Assembly passed Law No. 59/2010/QH12 on protecting interests of consumers.
- Decree No. 109/2010/ND-CP dated November 4, 2010 on business in rice export.
- On November 15, 2010, the Prime Minister issued Decision No. 72/2010/QD-TTG promulgating the Regulation on development, management and implementation of national trade promotion programs.
- Decision No. 2905/QD-BTC dated November 9, 2010 of the Ministry of Finance correcting Circular No. 153/2010/TT-BTC dated September 28, 2010 of the Ministry of Finance providing guidelines for the implementation of Decree No.51/2010/ND-CP dated May 14, 2010 providing for invoices of goods sales and service supplies.
- On November 5, 2010, the Prime Minister stipulated Decision No. 2011/QD-TTg on pilot implementation of export credit insurance.
- Circular No. 36/2010/TT-BCT dated November 15, 2010 of the Ministry of Industry and Trade implementing modified rules and procedures for issuance and inspection of origin and rules on specifying items according to the harmonized system version 2007 in Agreement on trade in goods under Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People's Republic of China.
- On November 2, 2010, the Ministry of Finance issued Circular No. 172/2010/TT-BTC providing guidelines for collection rates and regime of collection, payment, management and use of charges in customs field.
- Circular No. 165/2010/TT-BTC dated October 26, 2010 of the Ministry of Finance providing for customs procedures for export, import, temporary import for re-export, transshipment of gasoline and petroleum oils; import of raw materials for producing and blending gasoline and petroleum oils; import of raw materials for processing gasoline and petroleum oils to be exported.

Labour

- On November 29, 2010, the Prime Minister stipulated Decision No. 75/2010/QD-TTg on supporting organizations and units that use ethnic minority employees legally residing in the Central Highlands provinces.
- Circular No. 36/2010/TT-BLDTBXH dated November 18, 2010 of the Ministry of Labour, War Invalids and Social Affairs providing guidelines for implementation of regional minimum wages for employees working in companies, enterprises, cooperatives, unions of cooperatives, cooperative teams, farms, households, individuals and other Vietnamese organizations that hire labour.

Health

- On November 30, 2010, the Prime Minister issued Decision No. 2166/QD-TTg promulgating the Government's action plan on development of Vietnamese traditional medicine and drugs up to 2020.
- Circular No. 40/2010/TT-BYT dated November 5, 2010 of the Ministry of Health providing for the organization and operation of Professional Advisory Council evaluating application dossiers for issuance of certificate of being exposed to HIV and certificate of being infected with HIV due to occupational accidents and risks.
- On November 1, 2010, the Ministry of Labour, War Invalids and Social Affairs stipulated Circular No. 33/2010/TT-BLDTBXH providing guidelines for a number articles of Decree No. 94/2009/ND-CP dated October 26, 2009 detailing the implementation of Law amending and supplementing a number of articles of Law on Anti-drug with respect to post-drug detoxification management on order and procedures for application of post-drug detoxification management measures.

Transport

- Circular No. 35/2010/TT-BGTVT dated November 15, 2010 of the Ministry of Transport amending and supplementing a number articles of Decision No.02/2008/QD-BGTVT dated January 31, 2008 of the Minister of Transport approving standard forms of vehicle driving licenses.
- On November 10, 2010, the Ministry of Finance issued Circular No.179/2010/TT-BTC amending Circular No. 119/2010/TT-BTC dated August 10, 2010 of the Ministry of Finance providing guidelines for the collection, management, use of maritime guarantee fees and financial regime in the field of providing public services to ensure maritime safety.

- Circular No. 34/2010/TT-BGTVT dated November 8, 2010 of the Ministry of Transport providing for the organization and operation of inland waterway port authorities.
- On November 1, 2010, the Ministry of Finance stipulated Circular No.169/2010/TT-BTC providing for the collection rates and the regime of collection, management and use of fees and charges in the aviation domain.

Construction – Real Estate

- Decision No. 73/2010/QD-TTG dated November 16, 2010 of the Prime Minister promulgating the Regulation on construction investment management of silvicultural works.
- On November 19, 2010, the People’s Committee of Hanoi issued Decision No.54/2010/QD-UBND promulgating the regulations on measuring and mapping activities and use of measurement products and maps in the area of Hanoi.
- Decision No. 70/2010/QD-TTg dated November 5, 2010 of the Prime Minister amending and supplementing Article 4 of Decision No. 65/2009/QD-TTg dated April 24, 2009 of the Prime Minister on a number of mechanisms and policies on developing residential housing for lease to students of universities, colleges, and vocational and professional intermediate schools.
- On November 16, 2010, the Ministry of Construction stipulated Circular No.21/2010/TT-BXD providing guidelines for certification and publication of standard conformity in respect of products and goods of construction materials.
- Circular No. 20/2010/TT-BXD dated October 27, 2010 of the Ministry of Construction providing guidelines for pilot construction and publication of a number of evaluation indicators of real estate market.
- On October 22, 2010, the Ministry of Natural Resources and Environment issued Circular No. 20/2010/TT-BTNMT providing additional regulations on Certificate of land use rights and ownership over residential housing and other assets attached to land.

Natural Resources - Environment

- Law on Mineral No. 60/2010/QH12 dated November 30, 2010 of the National Assembly.
- On November 8, 2010, the Prime Minister stipulated Decision No. 2013/QD-TTg on the additional approval of a number of projects incorporated into the overall scheme of basic investigation and management of marine environment resources until 2010, with orientation to 2020.

- Circular No. 29/2010/TT-BTNMT dated November 22, 2010 of the Ministry of Natural Resources and Environment providing for standards of the position of Director of Department of Natural Resources and Environment.
- On November 18, 2010, the Ministry of Labour, War Invalids and Social Affairs and the Ministry of Natural Resources and Environment jointly issued Inter-ministerial Circular No. 35/2010/TTLT-BLDTBXH-BTNMT providing guidelines for environmental management and protection in establishments for managing drug addicts, prostitutes and post-detoxification people.
- Inter-ministerial Circular No. 26/2010/TTLT-BTNMT-BNV dated November 5, 2010 of the Ministry of Natural Resources and Environment and the Ministry of Home Affairs providing guidelines for the functions, duties, authority, organization and staffing of Division of Sea and Islands under provincial Department of Natural Resources and Environment.
- On October 26, 2010, the Ministry of Natural Resources and Environment stipulated Circular No. 22/2010/TT-BTNMT providing for synthetic survey techniques of marine natural resources and environment by sea-going vessels.

Communications

- Circular No. 189/2010/TT-BTC dated November 24, 2010 of the Ministry of Finance providing for the collection rates and the regime of collection, payment and use management of fees and charges in respect of national domain names and internet addresses of Vietnam.
- On November 15, 2010, the Ministry of Information and Communications issued Circular No. 25/2010/TT-BTTTT providing for the collection, use, share, safety assurance and protection of personal information on websites or electronic information portal of State agencies.
- Circular No. 174/2010/TT-BTC dated November 4, 2010 of the Ministry of Finance amending and supplementing the accounting regime of Vietnamese fund for public-use telecommunications services issued together with Decision No.74/2007/QĐ-BTC dated August 21, 2007 of the Minister of Finance.

Administrative - Judiciary

- On November 29, 2010, the National Assembly passed Law on Inspection No.56/2010/QH12.
- Decree No. 111/2010/ND-CP dated November 23, 2010 detailing and providing guidelines for the implementation of a number articles of Law on Judicial Records.
- On October 22, 2010, the Judges' Council of the Supreme People's Court stipulated Resolution No. 02/2010/NQ-HDTP supplementing a number of

guidelines of Resolution No. 01/2007/NQ-HDTP dated October 2, 2007 and Resolution No. 02/2007/NQ-HDTP dated October 2, 2010 of the Judges' Council of the Supreme People's Court.

- Resolution No. 01/2010/NQ-HDTP dated October 22, 2010 of the Judges' Council of the Supreme People's Court providing guidelines for application of some regulations of Articles 248 and 249 of Criminal Code.
- On November 22, 2010, the Prime Minister issued Decision No. 2135/QD-TTg promulgating a scheme on "Production and issuance of Vietnamese electronic passports".
- Decision No. 74/2010/QD-TTg dated November 22, 2010 of the Prime Minister providing for the functions, duties, authority and organizational structure of the Department of Administrative Procedures Control under the Government Office.
- On November 9, 2010, the People's Committee of Ho Chi Minh City stipulated Decision No. 77/2010/QD-UBND repealing documents of the People's Committee of Ho Chi Minh City providing for administrative procedures applied at district People's Committees in the field of development investment and State Budget allocation.
- Inter-ministerial Circular No. 19/2010/TTLT-BTP-BTC-TTCP dated November 26, 2010 of the Ministry of Justice, the Ministry of Finance and the Governmental Inspectorate providing guidelines for the implementation of State's compensation liability in administrative management operation.
- On November 8, 2010, the Ministry of Labour, War Invalids and Social Affairs issued Circular No. 34/2010/TT-BLDTBXH providing for professional standards of ranks of civil servants as social workers.
- Circular No. 177/2010/TT-BTC dated November 5, 2010 of the Ministry of Finance providing for financial management regime of Fund for Protection of Vietnamese citizens and legal entities abroad.
- On November 5, 2010, the Ministry of Justice stipulated Circular No.18/2010/TT-BTP providing for legal reporters.
- Circular No. 41/2010/TT-BCA dated November 4, 2010 of the Ministry of Public Security detailing the implementation of a number of articles of Decree No.70/2006/ND-CP dated July 24, 2006 and Decree No. 22/2009/ND-CP dated February 24, 2009 on the management of exhibits and facilities held in custody under administrative procedures in the People's Police.

Agriculture

- On November 3, 2010, the Prime Minister issued Decision No. 69/2010/QD-TTg providing for the authority, order and procedures for recognition of agricultural enterprises applying high technologies.

- Circular No. 67/2010/TT-BNNPTNT dated November 17, 2010 of the Ministry of Agriculture and Rural Development providing guidelines for the implementation of autonomy and self-responsibility regime of public scientific and technological organizations under the Ministry of Agriculture and Rural Development.
- On November 4, 2010, the Ministry of Agriculture and Rural Development stipulated Circular No. 64/2010/TT-BNNPTNT on the removal of trifluralin containing products from the list of products for treatment and improvement of the aquaculture environment, permitted to be marketed in Vietnam.

Enterprise

- Decision No. 77/2010/QD-TTg dated November 30, 2010 of the Prime Minister promulgating the grassroot statistical report regime applied to State-owned enterprises, and enterprises and projects with foreign direct investment capital.
- On November 9, 2010, the Prime Minister issued Decision No. 71/2010/QD-TTg promulgating the Regulation on pilot investment in the form of public - private partnership.
- Circular No. 186/2010/TT-BTC dated November 18, 2010 of the Ministry of Finance providing guidelines for the implementation of remittance of profits aboard by foreign organizations and individuals gaining profits from direct investment in Vietnam under the Law on Investment.

Miscellaneous

- On November 24, 2010, the National Assembly passed Law No. 62/2010/QH12 amending and supplementing a number of articles of the Law on Securities.
- Law No. 61/2010/QH12 dated November 24, 2010 of the National Assembly amending Law on Insurance Business.
- On November 9, 2010, the Government stipulated Decree No. 110/2010/ND-CP amending and supplementing a number of articles of Decree No. 111/2005/ND-CP dated August 26, 2005 detailing and providing guidelines for the implementation of a number of articles of Law on Publications amended and supplemented by Decree No. 11/2009/ND-CP dated February 10, 2009.
- Decision No. 76/2010/QD-TTg dated November 30, 2010 of the Prime Minister on the organization and management of international conferences and workshops in Vietnam.
- On November 1, 2010, the Prime Minister issued Decision No. 68/2010/QD-TTg providing for associations with particular characteristics.

- Decision No. 3858/QD-BVHTTDL dated November 2, 2010 of the Ministry of Culture, Sports and Tourism announcing the list of legal documents issued by the Ministry of Culture, Sports and Tourism, which are expired.

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