PROTECTING INTELLECTUAL PROPERTY RIGHTS IN BANGLADESH: AN OVERVIEW

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Abstract

In this era of globalization and rapid expansion of world economy, intellectual property and the corresponding rights over intellectual property are crucial to the economic, social and technological development of any country beyond doubt. Globalization also has made the Intellectual property rights a subject matter of international concern. All nations who want to promote and project their development in all aspects must protect the rights over intellectual property by granting legal veil through exclusive enactments. Realizing this fact, all industrialized nations and by now most developing countries of the world have enacted laws for the protection of ‘works of mind’. To comply with the international obligations Bangladesh also has introduced intellectual property rights protection system. This research paper explores to seek how enforcement mechanisms in Bangladesh are intrinsically precious, effective and thenceforth, worth in protecting the rights of IP holders. As an obvious flow of discussion the paper reiterates to look beyond the constraint and formulation of a comprehensive legal framework for IP protection.

Key Words: Intellectual property, trademarks, copyrights, patents, enforcement, globalization.

Introduction

In today’s world intellectual property surrounds us in nearly everything we do. No matter what we do, we are surrounded by the fruits of human creativity and invention. In the knowledge based new economy the intellectual property (hereinafter, IP) community has entered a new era characterized by the rapid expansion of demand for new forms of intellectual property protection, greater global coverage. As a result, IP is no longer to be perceived as a distinct or self-contained domain, rather as an important and efficient policy investment that is relevant to a wide range of socio-economic, technological and political, environmental concern. Recent years have witnessed increased attention to intellectual property considerations in policy making mainstream at both national and international levels. At present, it is a recognized fact that the strict enforcement of IP rights will obviously paves the way of human development. Countries generally have laws to protect intellectual property for two (2) main

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reasons. One is to give statutory expression to the moral and economic rights of the creators in their creations and to the rights of the public in accessing those creations. The second is to promote creativity and the dissemination and application of its results and to encourage fair trade which would contribute to economic and social development. Realizing this fact the government of Bangladesh has recognized the significance of IP due to its role in scientific and technological progress, economic growth and literacy, artistic and cultural creativity and adopted measures for the implementation of such realization. And day by day, rights over intellectual property are gaining recognition among numerous sections in Bangladesh.

Methodology

In this paper, a brief overview on various legislations on intellectual property and the organizational structure of the concerned departments are presented. The study is, specifically, literature based with an overall combination of analytical reasoning. It reflects a blender of information encompassing both primary and secondary sources so that the findings can get a multidimensional spectrum. Study materials were extensively reviewed which have been gathered from relevant literatures, books, articles of resource persons on these fields published in well-recognized journals, reported case decisions, statistical publications of relevant organizations, data analysis and web sites. Finally, the whole work went through editing and sorting from time to time. Thus, this research paper was drafted and finally prepared.

Result and Discussion

Intellectual property rights- the meaning

Intellectual property as understood in the north and is being increasingly adopted by the south, denotes a particular resource that is intangible in nature. According to Jeremy Phillips and Alison the term ‘Intellectual Property’ conveys two meanings with it- Firstly, the colloquial terminology of intellectual property suggests that IP simply comprises all those things, which emanate from the exercise of human brain, i.e. ideas, inventions, poems, designs, etc. Secondly, the legal nature denotes that intellectual property implies, in essence, the rights in itself, which are enjoyed in the produce of mind, rather than upon the produce of it. In broad terms, intellectual property means the legal rights, i.e. literary, artistic or scientific works, performances of performing artists, phonograms and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, commercial names and designations, protection against unfair competition which result from intellectual activity in the industrial, scientific, literary or artistic fields. Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs.

The core purpose of all intellectual properties is to ensure creative activity and the development of goods or knowledge to bring prosperity to the country.
In practice, intellectual property rights imply legal mechanisms that ensure that the products we buy are genuine.\(^8\) (OECD, et al., 1998)

**Main fields of application of Intellectual Property Rights**\(^9\)

<table>
<thead>
<tr>
<th>Types of IPR</th>
<th>Subject</th>
<th>Main Fields</th>
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<tbody>
<tr>
<td>Patents</td>
<td>New, non-obvious, industrially applicable inventions</td>
<td>Chemicals, drugs, plastics, engines, turbines, electronics, industrial control and scientific equipment.</td>
</tr>
<tr>
<td>Trade Marks</td>
<td>Signs or symbols to identify goods and services</td>
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<tr>
<td>Copyright</td>
<td>Original works of authorship</td>
<td>Printing, entertainment (audio, video, motion pictures), software, broadcasting</td>
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<tr>
<td>Integrated Circuits</td>
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<td>Micro-electronics industry</td>
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<tr>
<td>Breeder’s Rights</td>
<td>New, stable, homogenous, distinguishable varieties</td>
<td>All industries</td>
</tr>
<tr>
<td>Trade Secrets Geographical indications</td>
<td>Secret business information Geographical origin of goods and services</td>
<td>Wines, sprits, cheese and other food products</td>
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<td>Industrial designs</td>
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<td>Clothing, automobiles, electronics, etc.</td>
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**Why Bangladesh should protect the rights of IP holders**

Intellectual property has acquired an internationally recognized character. Now it is regarded as “one of the most fundamental sectors” of international law, having its source in different international conventions. The Universal Declaration of Human Rights (UDHR) 1948 says “Everyone has the right to the protection of moral and material interests resulting from scientific, literary or artistic production of which he is the author.”\(^10\) In addition, the international character and emergence of Intellectual property is positively affirmed in numerous international conventions, i.e. –The Berne Convention for the Protection of Literary and Artistic Works 1971, The Paris Convention for the Protection of Industrial Property 1883, The Universal Copyright Convention (UCC) 1952, The Patent Cooperation Treaty 1970, The Agreement on Trade Related Aspects and Intellectual Property Rights (TRIPS) 1995. These documents also provide for the guidelines of enforcement mechanisms by the state parties. For example, Part III of the TRIPS agreement in its article 41 to 61 denotes on the enforcement provisions for intellectual property rights. Article 41 of the reiterates that effective action against any act of the infringement of intellectual property rights. It prescribes such remedies as may act as a deterrent to further infringements. (Park, et al., 1997) There are also other guidelines, i.e. - fair and equitable enforcement, expedition trial for offences, etc. Article 36(1) of the Berne Convention provides that “any country party to this convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this convention.” Paragraph 2 of the same article provides that “it is understood that, at the time a country

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\(^8\) Moriarty, James F., Protecting Intellectual Property Rights: Challenges and Opportunities, p.1.


\(^10\) Article 27(ii), The Universal Declaration of Human Rights (UDHR), 1948.
becomes bound by this convention, it will be in a position under its domestic law to give effect to the provisions of this convention.”

So, it is obvious that the above provisions cannot be respected and implemented without appropriate measures for the enforcement of rights provided under the national laws of the member states. Bangladesh as a member country is not an exception to it. Several steps have been taken by the government of Bangladesh to update the existing IP legislations to conform to the international standards (formulated by international treaties and conventions) to which Bangladesh is a signatory.

The Constitution of Bangladesh 1972 in its article 40 and 42 guaranteed the citizen’s right to property. And within the general definition of property, property produced through creative thoughts can also be included. To support this proposition it is better to argue that ‘the concept property has been expanded by courts to include practically all rights. Thus patents, licenses, trademarks and copyrights are held to be property distinct from physical or material property.’ Following this proposition it can be argued that, Constitution, the supreme law of the land gives recognition of the intellectual property rights in express terms.

The development of the IP system depends on the effective enforceability of IP rights. Historical context of Bangladesh reveals that the century to inherit old legal framework on intellectual property that dates back to British-India which proves that the country has a long history of IP protection. Bangladesh has few IP Laws which she inherits from British period. All these laws provide protection for both the citizens and foreigners who have filed an application for such protection. But one of the shortcomings of these laws is these laws; specifically the Patent Law doesn’t specifically circumscribe the area of intellectual property.

Enforcement mechanisms for protection of IP rights in Bangladesh

Trademarks

Under article 15 of the TRIPS Agreement any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. In fact, trademark is a visual symbol to indicate the origin of any specific goods as distinguished from similar goods maintained and manufactured by others.

The present legal basis of trademarks is based on The Trade Marks Act 2009. The Act specifically denotes the acts or omissions what constitute the infringement of trademarks. The proprietor or a registered user may bring an action for the infringement of trademark or for passing off and obtain relief in the form of damages, accounts of profits, delivery up of the infringing labels and marks for destruction or erasure, injunction, etc. Suits in this regard are required to be brought the courts of district judge. Criminal suit can also be filed for offences, i.e. - falsifying trademarks, making, possessing or disposing of any die, block, machine, plate, etc. Sections 73 - 91 of the Trademarks Act, 2009 are the relevant provisions for criminal proceeding for trademarks right violation in Bangladesh. If anybody commits an offense as described in items (a) to (g) in Section 73 shall be liable for the first offense to pay penalty of Tk. 200,000 with sentence of two years and Tk. 3,00,000 and three years sentence for the second offense. The other

12 F.K.M.A. Munim, Rights of the Citizen under the Constitution and Law, Bangladesh Institute of legal and International Affairs (BILLA), Dhaaka, 1975.
sections are also open depending on the nature of violations. Contravention of exclusive rights in relation to a trade mark (both registered and unregistered) constitutes criminal offences under the Penal Code 1860. The code circumscribes the offences in this context and provides punishments, i.e.- the Act says that making or possessing any instrument for the purpose of counterfeiting a trademark would constitute an offence and the punishment for this offence is imprisonment of either description for a term which may extend to three (3) years or with fine or with both. Besides, under the Customs Act 1969 importation of goods whether by air or land or sea having relation to trademarks and any goods that are imported in violation are detained and confiscated by the customs officials.

However, one limitation that can be pointed here is that the Act doesn’t provide provision for the compulsory registration of trade mark. However, positively, the law prohibits that a trade mark or a part of trade mark which consists of or contains any scandalous design, or any matter the use of which is likely to deceive or to cause confusion or is likely to hurt the religious susceptibilities of any citizen, or is contrary to any law or morality, shall not be registerable.

Although there is no direct relationship between information technology (hereinafter, IT) and functions of Trademark but from a commercial point of view Due to rapid growth of e-commerce trademark protection is very important for IT based business community. But in the present system of trademark protection there exists absence of legal framework in this regard. Such a lack has created an opportunity for unscrupulous business.

Another flaw of the current trademark regime is that under the Trademark Act protection is extended up to class 34 under international classification of goods. There has not been any step taken by the concerned authority to extend the protection to goods and services beyond class 34.

Again, enforcing agencies must be efficient to protect the rights granted by any Act. But the trademark office set up by the Trademarks Act lacks adequate manpower, i.e. - there is only one trademark registrar and assistant registrar for the whole country. Although provision is made for the post of four (4) trademark examiners but there is only one trademark examiner. Total number of staff including registrar to typist wouldn’t exist 40. As a result as in every year more than five hundred applications are filed in the trademark office it takes 3-4 years to get trademark registration.15

Copyright

Copyrights are the authors' rights to protect their own works (such works that fall with literary, scientific, artistic or musical domain that are expression of thoughts or sentiments in a creative way) from being copied or altered without consent.16 The current Copyright Act of 2000 replaced the Copyrights Ordinance of 1962. Subsequently, changes and amendments have been introduced to the Act under the name Copyright (amendments) Act 2005. By the Act gives full protection has been granted to all works which contain original literary, dramatic, musical or artistic contents. The term of protection for such work is sixty (60) years from the beginning of the calendar year next following the year in which the author dies. Copyright protection has also been provided to films, recordings and broadcasts.

This Act states that the copyright owner enjoys exclusive rights of controlling- i) reproduction in any material form ii) communication to the public iii)

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15 Ibid, pp. 15-16.
performance, showing or playing to the public iv) the distribution of copies to the public by sale v) transfer of ownership vi) commercial rental to the public. These exclusive rights imply the broad scope of copyright protection under the Act.

Under the Act the government is under an obligation to establish a Copyright Board consisting of Chairman and two or more, but not exceeding six, other members for dealing with copyright issues. The Chairman of the Board is either a present or former judge or a civil servant having the status of Additional Secretary or a lawyer having the qualification to become a judge of the High Court Division. As to enforcement measure, the Act provides punishment for the violation of copyright which may be either fine or imprisonment or both.

The backdrop of the Act can be detected from section 73. This section categories the act that shall not constitute an infringement of copyright under the Act. As a negative result, this provision gives wider license for reproduction that in consequence may bring bitter result in a society like ours. Because, the courtesy of obtaining permission from the original author or publisher is more or less absent here and in the vernacular press translators have made it their business to publish serialize translations of books which are later put out as the books by the translator.\(^\text{17}\)

**Patents and designs**

Patent is a document issued upon application by the government office which describes an invention and creates a legal situation in which patented invention can normally be exploited with the authorization of the owner of the patent.\(^\text{18}\) (Ginarte, et al. 1997) The existing law relating to patents and designs is regulated by the Patents and Designs Act 1911. Under the Act, infringement of patent occurs if any person makes, sells, or uses an invention without the license of the patentee, or counterfeits it, or imitates it. For infringement of patent the patentee may institute a suit against the person alleged in a district court having jurisdiction to try the suit. The remedy under the Act is available in the form of injunction, delivering up of infringed patented product, damages for an account of the profits. Besides these civil remedies, certain acts of infringements have been made punishable offences triable by the criminal courts. The procedures of investigation and trial of these offences are governed by the normal law of the land. However, the patents and designs Act 1911 doesn’t provide any provision for injunction against import of infringing goods in Bangladesh. The Act makes no difference between patentable and non patentable inventions and contains provisions regarding compulsory licenses of patent rights but the terms and conditions of conditions of compulsory licenses are not detailed in the Act.

As to design, the Act of 1911 provides that design of an article may be registered if the shape, configuration, pattern or ornament given to it by any industrial process or means is new or original. In the case of registration of design for five (5) years which may be extended for a minimum period of five years if the proprietor of the design makes an application before the expiration of the period. The Act provides civil remedies for the infringement of the copyright of a registered design.

**Agencies for the protection of intellectual property rights**

Besides, as pointed earlier, the abovementioned laws the government has set up numerous agencies both special and regular authorizing to protect or limit the violations of IP rights. Again, enforcing agencies must be efficient to protect

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17 Ahmad, Mohiuddin, New Bangladesh Copyright Law and Scenario- Pertaining to Books and Publication, Chapter II, University Press Limited, p.47.
18 Fields of Intellectual Property Protection, WIPO Publication No. 489, chapter 2, p.17
the rights granted by any Act. The Departments of Patents, Designs and Trademarks are quasi-judicial organizations. The registrar of the department acts as tribunal. Any appeal against the decision of the registrar lies to high court division. In case of civil proceedings, no suit of the infringement of a trade mark can be institute in any court inferior to district court of an assistant judge or joint district judge. As all criminal proceedings at the first place are entertained by the magistrate’s court thereby, criminal cases relating to false trademarks, counterfeiting of a trade mark, etc. are tried by a court of magistrate of the first class or second class, or in metropolitan area by a metropolitan magistrate. And any appeal against the decision of the magistrate court lies in the court of district Judge or Sessions Judge.19 The other current functional agencies are - Mobile Courts, Rapid Action Battalion (RAB) and the local Police. The agencies are working under different teams in different areas. The IP Right holders can take necessary assistance and co-operation from the aforesaid agencies. This reflects a brief summary of the structure of enforcing agencies.

But an intrinsic analysis of the above laws and activities of the authorities reveals that the trademark office set up by the Trademarks Act lacks adequate manpower, i.e. - there is only one trademark registrar and assistant registrar for the whole country. Although provision is made for the post of 4 trademark examiners but there is only one trademark examiner. Total number of staff including registrar to typist wouldn’t exist 40. As a result as in every year more than five hundred applications are filed in the trademark office it takes 3-4 years to get trademark registration.20

The same is the condition with the Patent Office. Currently, it takes around 21 months to get patent registration. Such delay is due to inadequate office staff. Given the current boom in the field of IT and biotechnology there would be an influx of applications for patent registration.

Due to these flaws there exist frequent violations of the rights of the IP holders. The following two (2) case studies will make remarks on such violation and also positively, steps taken by the concerned administration.

Case study 1

Samsonite Corporation vs Moon Light Travels.

The local agent of Samsonite Corporation initiated a criminal proceeding under the Penal Provision against a trader who imported counterfeit ‘Samsonite’ product in the year 2008 for marketing in Bangladesh. The Agent investigated markets through their own investigator and found counterfeit product in a famous market, Shahbagh Bponi Bitan. Accordingly the Agent informed the same to Rapid Action Battalion (RAB-3). The Commanding Officer of RAB-3 entrusted the operation to one of its team leaders, Assistant Superintendent of Police. The team leader investigated the place and found the allegation true. The RAB Team conducted raid on February 27, 2008 and arrested three people with huge counterfeit ‘Samsonite’ product. The local police lodged criminal action under the penal provision. The infringers found no other alternative but to surrender with the local Agent and accordingly disclaimed entire seized items of 310 big suitcases in quantity in favor of the local agent and given adequate compensation including undertaking for not trading anymore with counterfeit ‘Samsonite’ product. The matter disposed of in February 2010 on the basis of out of court settlement.

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19 Ibid, p. 10.
20 Ibid, pp. 15-16.

http://www.bdresearchpublications.com/journal/
Case Study 2

Kraft Foods Globe Brands LLC. vs IBN Sina Food Products Pvt. Ltd.

Kraft Foods Globe Brands LLC, a US company having the brand, ‘Tang’ is a popular name in concentrated form for preparing soft drinks product. Kraft has secured the IP rights in Bangladesh in the year 1987 and has business since long through its agent, Sajeeb Corporation. A Bangladeshi small entity, Ibn Sina Food marketed preparations for soft drink under brand, IbnSina Orange Tang. On an application with the local police station the enforcing agencies seized the items and put the people under trial. The District Court has also issued an ad-interim order restraining the Ibn Sina for not trading with the mark ‘Tang’.

Ibn Sina tried to obtain registration for the mark with suffix Tang but the Trademark Department has rejected all their applications.

Challenges in the way of enforcement:

The familiar apprehension stands in the way of enforcement before Bangladesh can be described through the following points—

Firstly, the technological efforts in Bangladesh are negligible, which signifies a strong backdrop in the implementation of Strong IP rights. Because, there exists a strong opinion that, if a country has no meaningful technological activity then for that country intellectual property rights are irreverent and will throw economic burden on the country.

Secondly, The IP laws in Bangladesh are in a very premature form and few in number. As a result, a vast area of IP rights cannot be protected. All these laws, specifically the patent law, don’t specifically describe the inventions that will be given protection.

Thirdly, implementation tools don’t seem to stand in a satisfactory level leaving the IP rights a poor protection. The registration of trade mark is not compulsory.

Fourthly, Bangladesh does not have any law on three subjects of Intellectual Property Rights, namely, geographical indications, layout designs of integrated circuits and plant variety protection.

Last but not the least, level of skill and awareness of public in general, government officials and profession regarding IP rights is at a marginal stand.

Conclusion

The development and protection of intellectual property rights largely depends on the effective enforcement mechanism. Strong enforcement mechanisms for the protection of intellectual property rights foster an environment in which creative and innovative industries can thrive and contribute to economic development.21 (Mansfield et al., 1994) Though the government has updated laws on the point but it is evident from the above discussion that the present legal framework as well as administrative set up is inadequate to provide expected protection of intellectual property for entrepreneurs who seek to protect their invention, trademark and other intangible business property. In any initiative for better protection and promotion of the rights of IP holders the significance of enhancing public awareness and skills of concerned officials of the authorized departments can hardly be exaggerated. An equitable,
modernized and protected IP rights regime provides recognition and material benefits to the inventor, constitutes incentives to the inventors and innovative activities.\textsuperscript{22} In order to maximize exploitation of intellectual property rights there is no alternative to amending legislation in this area.\textsuperscript{23} But the most important thing is the awareness of people in general that can only stop the rampant violation of intellectual property rights. Thereby, the government should not only formulate and reform the law on this context rather, should take all indispensable steps to make people conscious. Every people should know that they have right for everything both inside and outside.

**Recommendations**

In the light of the above discussions following recommendations are proposed—

- Bangladesh should immediately amend the laws on intellectual property to develop a harmonious system of IP rights protection.
- The organizational capacity and efficiency of the concerned administrative branch should be upgraded qualitatively and quantitatively so that they can function properly.
- Copyright law should provide the basis for the protection of software because absence of copyright protection of software is responsible for poor flow of foreign client and extremely low rate of export of software.
- Mechanisms must be developed to ensure speedy and cheap resolution of disputes and litigation on intellectual property rights.
- Rules annexed to every particular Acts on IP should be amended periodically to reflect the changes that have been taken place since enactment of any Act.
- For the sake of fair justice and scientific resolution, it is important that Bangladesh should immediately start Intellectual Property and Commercial Law Courts, at least, initially in Dhaka, Chittagong, Rajshahi and Khulna covering the whole of Bangladesh, particularly in consideration of increased number of Intellectual Property.
- Bangladesh possesses a prosperous wealth of Intellectual property emanating from indigenous or traditional knowledge. It would be shrewd for the government to recognize their knowledge, practices, innovation and rights and bring them under the protection of intellectual property law regime.

**References**


\textsuperscript{22} The Role of Intellectual Property in Development and WIPO’s Development Cooperation Program, WIPO Publication No. 489, chapter 3, p.165.

\textsuperscript{23} Ibid, p. 22.


