

Rights Relating to Intellectual Property and Its Protection: Bangladesh Perspective

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Abstract

Globalization has made the intellectual property rights an issue of international concern. 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. All nations who want to promote their developments 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 enacted intellectual property rights protection system. This article explores to seek how enforcement mechanisms in Bangladesh are intrinsically precious, effective and thenceforth, worth in protecting the rights of intellectual property holders. As an obvious flow of discussion, the paper reiterates to look beyond the constraint and formulation of a comprehensive legal framework for protection of intellectual property.

Keywords: Intellectual property, trademarks, copyrights, patents, enforcements, 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.¹ 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, political and

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¹ <http://www.wipo.int/about-ip/en/athome.html> retrieved on 1st Nov, 2015.

environmental concern.² Recent years have witnessed increased attention to intellectual property considerations in policy making mainstream at both national and international levels. At present, it is recognized fact that the strict enforcement of IP rights will obviously pave the way of human development. Countries generally have laws to protect intellectual property for two main 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.³ 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. Over time, rights on intellectual property are gaining recognition among numerous sections in Bangladesh.

Methodology

A brief overview on different legislations related to intellectual property and the organizational structure of the concerned departments are presented in this article. The study is actually 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 are extensively reviewed which have been gathered from relevant literatures, books, articles of resource persons on these fields published in well recognized journals, reputed 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 to time. Thus, this article was drafted and finally prepared.

Meaning of Intellectual Property Rights

Intellectual property as understood in the north and is being increasingly adopted by the south, denotes a particular resource that is intangible in nature. (*Maskus et al., 1998, Maskus et al., 1995*) 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 comprise 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 right in itself, which are enjoyed in the produce

² P.G.Mankind Secretary, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, India presented a paper on '*Bulding Synergies in the Modernization of Intellectual Property Administration, Development of skills and the teaching of Intellectual Property Rights*' at WIPO Sub –Regional Forum on Intellectual Property Cooperation among member states of the South Asian Association for Regional Cooperation, held on March 20 and 21, 2001 in Dhaka , Bangladesh.

³ Understanding Intellectual Property, World Intellectual Property Organization.

of mind, rather than upon the produce of it.⁴ In broad sense, intellectual property means the legal rights, *i.e.* literary, artistic or scientific works, performance 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.⁵ 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; phrases, words, symbols and designs.⁶ (*Mansfield et al., 1985*)

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. (*Gould et al., 1996*) In practice, intellectual property rights imply legal mechanisms that ensure that the products we buy are genuine.⁷ (*OECD, et al., 1998*)

Sectors/ fields where Intellectual Property Rights are applied⁸

Types of IPR	Subject	Sectors/fields
Patents	New, non-obvious, industrially applicable inventions	Chemicals, drugs, plastics, engines, turbines, electronics, industrial control and scientific equipment.
Trademarks	Signs or symbols to identify goods and services	All industries.
Copyright	Original work of authorship	Printing, entertainment (audio, video, motion pictures), software, broadcasting.
Integrated Circuits	Original layout designs	Micro-electronic designs
Trade secrets	Secret business information	All industries.
Geographical Indications	Geographical origin of goods and services	Wines, spirits, cheese, and other food products.
Industrial Designs	Ornamental designs	Clothing, automobiles, electronics, etc.

⁴ Jeremy Phillips and Alison Firth, *Introduction to Intellectual Property Law*, 3rd Edition, Butterworths, London, 1995.

⁵ Article 2(viii), The Convention establishing the World Intellectual Property Organization (WIPO), concluded in Stockholm on July 14, 1967.

⁶ http://en.wikipedia.org/wiki/intellectual_property retrieved on 10th Nov, 2015.

⁷ Moriarty, James, F., *Protecting Intellectual Property Rights: Challenges and Opportunities*, p.1

⁸ South Centre (2000), *The TRIPS Agreement: A guide for the South*.

Protection of the rights of IP holders in Bangladesh

Intellectual property has acquired an international 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.”⁹ 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 1886, The Paris Convention for the Protection of Industrial Property, 1883, The Universal Copyright Convention, 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 mechanism 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 infringement. (*Park, et al., 1997*) There are also other guidelines, i.e. fair and equitable enforcement, expedition’s 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 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 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.¹⁰ Bangladesh as a member state is not an exception to it. Several measures have been taken by the Government of Bangladesh to update the existing IP legislations to conform to the international standards to which Bangladesh is a signatory.

The Constitution of Bangladesh in its article 40 and 42 guaranteed the citizens’ 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.’¹¹ 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 –India¹² proves that the country has a long

⁹ Article 27(ii), The Universal Declaration of Human Rights (UDHR), 1948.

¹⁰ WIPO Intellectual Property Law Handbook: Policy, Law and Use, WIPO Publication No.489, p.214.

¹¹ Munim, F K M A, *Rights of the Citizen under the Constitution and Law*, Bangladesh Institute of Legal and International Affairs (BILIA), Dhaka, 1975.

¹² M Rahman, Mahbubur, *Intellectual Property Protection in Bangladesh: An overview, Department of Patents, Designs and Trademarks, Government of Bangladesh*, p.2.

history of IP protection. Bangladesh has few IP Laws inherited 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 Patent Law which does not specifically circumscribe the area of intellectual property.

Enforcement Mechanism for Protection of IP Rights in Bangladesh in case of 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.¹³

The present legal basis of trademark is based on The Trademarks 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 dies, block, machine, plate etc. Sections 73-91 of The Trademarks Act, 2009 are the relevant provision for criminal proceeding for trademarks right violation in Bangladesh. If anybody commits an offence as described in items (a) to (g) in section 73 shall be liable for the first offence to pay penalty of Tk. 2,00,000 (Two Lac) with sentence of two years and Tk. 3,00,000(Three Lac) and three years sentence for the second offence. The other sections are also open depending on the nature of violations. Contravention of exclusive rights in relation to a trademark (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 the offence is imprisonment of either description for a term not exceeding three 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 does not provide provision for the compulsory registration of trademarks. However, positively, the law prohibits that a trademark or a part of trademark which consist of or contains any scandalous design or any matter the use of which is likely to hurt the religious susceptibilities of any citizen or is contrary to any law or morality shall not be registered.

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

¹³ Economic Policy Paper on Trademark, Patent and Copyright Protection, Prepared under DCCI-CIPE ERRRA Project, Dhaka Chamber of Commerce and Industry(DCCI), 200, P.15.

step taken by the concerned authority to extend the protection to goods and services beyond class 34.

In addition, 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. As a result in every year more than five hundred applications are filed in the trademark office and it takes 2-3 years to get trademark registration which is not desirable.

Enforcement Mechanism for Protection of IP Rights in Bangladesh in case of Copyrights

Copyrights are the authors' rights to protect their own works (such works that fall with literary, scientific, artistic or musical domain that expression of thoughts or sentiments in a creative way) from being copied or altered without consent.¹⁴ The current Copyright Act of 2000 replaced the Copyright Ordinance of 1962. Subsequently, changes and amendments have been introduced to the Act under the name Copyright (amendments) Act, 2005. By dint of the Act, 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 years from the beginning of the calendar year next following the year in which the author dies. Copyright protection has also been extended 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) performance showing or playing to the public iv) the distribution of the 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.

According to the Act, the Government is under an obligation to establish a Copyright Board consisting of a 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 district judge or a civil servant having the status of Additional Secretary or a lawyer having the qualifications to become a justice 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 categorizes 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 owners or publishers 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 as the books by the translators.¹⁵

¹⁴ [http://www.meti.go.ip/policy/ipr/eng/overview/ipr system.html](http://www.meti.go.ip/policy/ipr/eng/overview/ipr%20system.html)

¹⁵ Ahmad, Mohiuddin, New Bangladesh Copyright Law and Scenario-Pertaining to Books and Publication, Chapter II, University Press Limited, p.47

Enforcement Mechanism for Protection of IP Rights in Bangladesh in case of 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.¹⁶ (*Ginarte, et al., 1997*) The existing law relating to patent and designs is regulated by the Patent and Designs Act, 1911. According to this 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 commission a suit against the person alleged in a district Judge Court having jurisdiction to try the suit. The remedy under the Act is available in the form of injunction, delivery up of infringed patented product, damages for an account of profits. Besides this civil remedies, certain act 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 Patent and Designs Act, 1911 does not provide any provision for injunction against importing 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 compulsory licenses are not detailed in the Act.

As to Design 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 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.

Role of Agencies for the Protection of Intellectual Property Rights

Besides, as mentioned 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 the rights granted by any Act. The Patents, Designs and Trademarks are quasi-judicial organizations. The Registrar of the Department act as Tribunal. Any Appeal against the decision of the Registrar lies to High Court Division. In case of Civil Proceedings, no suit of infringement of a trademark can be institute in any court inferior to District Judge Court of an Assistant Judge of 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 trademark 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 Session Judge.¹⁷ 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

¹⁶ Fields of Intellectual Property Protection, WIPO Publication No. 489, Chapter-II, P.17.

¹⁷ Ibid, p.10.

and cooperation from the aforesaid law enforcing 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 by the Trademarks Act lacks adequate manpower. As a result, every year more than five hundred applications are filed in the trademark office and it take 2-3 years to get trademark registration. The same condition is 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 explain such violations and also positively, steps taken by the concerned administration.

Case Study-I

Samsonite Corporation vs Moo n Light Travels.

The local agent of Samsonite Corporation initiated a criminal proceeding under the Penal Code 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 Biponi 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 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 ad equate compensation including undertaking for not trading anymore with counterfeit 'Samsonite' product. The matter was disposed of in February 2010 on the basis of out of court settlement.

Case Study-II

Kraft Foods Globe Brands LLC. Vs IBN Sin a Food Pro ducts 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 Banglad eshi small entity, Ibsina Food marketed preparations for soft drink under brand, Ibsina 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 application.

Drawbacks 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 irrelevant 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, specially 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 Trademark is not compulsory.

Fourthly: In Bangladesh, there are no laws 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 level.

Recommendations

In light of above discussions the following recommendations are proposed:

- Bangladesh should 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 act properly.
- Mechanisms must be developed to ensure speedy and cost effective resolution of disputes and litigations on intellectual property rights.
- Copyright law should provide the basis for the protection of software.
- 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.
- It is necessary to increase the number of manpower for smooth functioning of different IP related offices.
- Bangladesh possesses a prosperous wealth of intellectual property emanating from indigenous or traditional knowledge. It would be wise for the government to recognize their knowledge, practices, innovation and rights and bring them under the protection of Intellectual Property Law regime.

Conclusion

The development and protection of intellectual property rights largely depends on the effective law enforcement mechanism. Strong enforcement mechanism for the protection of intellectual property rights foster an environment in which creative and innovative industries can thrive and contribute to economic development. (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 if 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.¹⁸ In order to maximize exploitation of intellectual property rights there is no alternative to amending legislation in this area.¹⁹ But the most important subject is the awareness of people in general that can only stop 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 encourage people's consciousness.

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¹⁸ *The Role of Intellectual Property in Development and WIPO's Development Cooperation Program*, WIPO Publication No. 489, Chapter III, P.165.

¹⁹ *Ibid*, p.22.