

## INTELLECTUAL PROPERTIES: BANGLADESH APPROACH

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### ABSTRACT

Intellectual property is the result of the creativity of human minds. It is the ideas of new thoughts, expression of thoughts, symbols, or signs. For the cultural, industrial and economical development of a country, intellectual property protection and its exploitation are essentials. Bangladesh is a developing country where IP (Intellectual Properties) protection and laws are not ensured and implemented at each case of intellectual property; but from the last decade, the development in case of industry and technology is markable. Private sector is now raising here. It claims better IP protection. In compliance with international treaties or agreements, Bangladesh approach has, therefore, also changed as regarding intellectual property though it is not enough. In this article it will be shown which intellectual properties have been developed here; how their protection is being ensured; what are the drawbacks of the existing laws; the paper also focuses on the ways which can remove the present problems to ensure better IP protection.

**KEYWORDS:** Copyright, Intellectual Property Protection, Registration Procedure of Intellectual Properties, Industrial Design, Patent, Trademark, etc

### INTRODUCTION

The cultural, industrial, and economical development of a country depends on the progress of intellectual properties. The smooth advancement of intellectual property needs statutory protection in utilizing them and excluding others from unauthorized using them. Bangladesh is a developing country. In order to turn her into developed one, intellectual property protection must be ensured by maintaining international standard. In the meantime, some of the existing intellectual property laws have been revised, modified and enacted with a view to ensuring international standard but absence of proper IP laws in all cases, lack of proper implementation procedure, lack of awareness and tendency of the people are playing key roles not ensuring the rights of the intellectual owners on their properties.

### DEFINITION OF INTELLECTUAL PROPERTY

Intellectual property is the things that are created by the human thought; it is the result of intellectual activities. Simply it refers copyright, trademark, patent design, trade secrets and geographical indications etc. Very broadly, it means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. The World Intellectual Property Organization (WIPO) Convention provides that “intellectual property shall include rights relating to:

1. Literary, artistic and scientific works,
2. Performances of performing artists, phonograms and broadcasts,
3. Inventions in all fields of human endeavor,
4. Scientific discoveries,

5. Industrial designs,
6. Trademarks, service marks and commercial names and designations,
7. Protection against unfair competition, and
8. All other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.<sup>1</sup>

The term “intellectual property” refers to all categories of intellectual property that are the subjects of Sections 1 through 7 of Part II<sup>2</sup>. The subjects of sections 1 through 7 of Part II are as follows which are treated as intellectual property:

1. Copyright and Related Rights,
2. Trademarks,
3. Geographical Indications,
4. Industrial Designs,
5. Patents,
6. Layout-Designs (Topographies) of Integrated Circuits,
7. Undisclosed information, and
8. Control of Anti-Competitive Practices in Contractual Licences.

In Bangladesh the scope of intellectual property covers copyright, trademark, patent and design etc. Other intellectual properties are not protected by statutory laws still today.

## **COPYRIGHT**

Copyright is one kind of intellectual property. It is a right given by the law to the creators of literary (including computer programs), dramatic, musical and artistic works and producers of cinematograph films and sound recordings.

Copyright protection covers expressions of ideas rather than the ideas themselves<sup>3</sup>. Under section 15 of the 2000 Act, copyright protection is conferred on original<sup>4</sup> literary works, dramatic works, musical works, artistic works, cinematograph films and sound recording. It extends to the computer program also.<sup>5</sup>

In Bangladesh in order to get copyright protection the owner of the work should register it under Copyright Register. It is pertinent that under the 2000 Act, registration is optional; not compulsory to get copyright protection. At the same time it is also true that copyright protection is legally ensured to the copyright owner by registration; certificate of registration of literary, dramatic or artistic work is considered as a prima facie evidence when any dispute arises<sup>6</sup>.

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<sup>1</sup> Art. 2(viii), The Convention Establishing the World Intellectual Property Organization (WIPO), 1967

<sup>2</sup> Art. 1(2), The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), 1994

<sup>3</sup> Article 9.2, the TRIPS Agreement, 1994

<sup>4</sup> Original means, that the work has not been copied from any other source.

<sup>5</sup> Before the enactment of the Copyright Act 2000 (herein referred to as the 2000 Act), copyright protection was not available to the computer program.

<sup>6</sup> Section 60, the 2000 Act

Copyright refers to a bundle of exclusive rights vested in the owner of copyright.<sup>7</sup> These rights can be exercised only by the owner of copyright or by any other person who is duly licensed in this regard by the owner of copyright. These rights include the right of adaptation<sup>8</sup>, right of reproduction, right of publication, right to make translations, communication to public etc.

A person, who creates a work<sup>9</sup> first, can generally, claim copyright. A person can also claim copyright by assignment and license under the 2000 Act. In Bangladesh, an author can enjoy copyright for his life time plus sixty years from the beginning of the calendar year next following the year in which the author dies.<sup>10</sup>

Bangladesh has been extending co-operation with the World Trade Organization (WTO), World Intellectual Property Organization (WIPO) and UNESCO for enriching her copyright system<sup>11</sup>. In Bangladesh the bases of present copyright protection are as follows:

1. The Copyright Act, 2000 (herein referred to as the 2000 Act)
2. The Copyright Rules, 2006
3. The Berne Convention for the Protection of Literary and Artistic Works, 1886 as revised up to 1971 since May 4, 1999
4. The Agreement on Trade-Related Aspects of intellectual Property Rights (herein referred to as TRIPS Agreement), 1994 since January 1995

### Copyright Registration Procedure

Chapter 10 of the Act, 2000 and chapter 2 of the Copyrights Rules 2006 set out the procedure for the registration of a work. In order to get copyright the owner has to show that the work is original; it is immaterial whether the work is wise or foolish, accurate or inaccurate or whether it has or has not any literary merit<sup>12</sup>. In order to get copyright registration, the author or publisher of, or the owner of, or other person interested in the copyright in any work can make an application to the Registrar of Copyright which is located at National Library Building (2<sup>nd</sup> Floor), 32, Justice S. M. Morshed Sarani, Agargaon, Sher-e-Bangla Nagar, Dhaka, for entering particulars of the work in the Register of Copyrights.<sup>13</sup> The other steps for the registration are as follows:

1. Application is to be made on Form II in triplicate as prescribed in the First Schedule of the 2000 Act;
2. Separate application is to be submitted for registration of each work;
3. Each application is to be accompanied by the prescribed fee mentioned in the Second Schedule of the Rules ;
4. The applications should be signed by the applicant or the advocate in whose favour a Vakalatnama or Power of Attorney has been executed.

<sup>7</sup> Section 14, *Ibid*

<sup>8</sup> Adaptation is generally understood as the modification of a work to create another work, for example, adapting a novel to make a film.

<sup>9</sup> Work means a literary, dramatic, musical, artistic work or cinematograph film or sound recording or broadcasting as per section 2(11), the 2000 Act.

<sup>10</sup> Section 24, the 2000 Act

<sup>11</sup> <http://www.copyrightofficebd.com>, Retrieved on 05.05.2012.

<sup>12</sup> Azam Mohammad Monirul (2008), Intellectual Property, WTO and Bangladesh, Dhaka: New Warsi Book Corporation, 1<sup>st</sup> edn, p. 193

<sup>13</sup> Section 56, the 2000 Act

5. To serve notice of concerned application to every person who has any interest in the subject matter of that application.
6. If the Registrar receives any objection, he may after holding such inquiry as he deems fit, enter such particulars of work in the Register of Copyrights, and issue a certificate of such registration to the applicant. If he refuses to enter, he has to record in writing the reasons of refusal.

### **Unauthorized Use and Piracy**

When any person, without a license from the owner of the copyright, or the Registrar of the copyright, or in contravention of the conditions of a license granted or any conditions imposed by a competent authority under Act, makes any copy or reproduces or reprints of the works for commercial purpose, it is piracy and an infringement of the Act. Importing into Bangladesh any infringing copies of the work is also an infringement.

Copyright piracy is a great problem in Bangladesh. Here its rate is the highest amongst the world.<sup>14</sup> Most of the people do not realize that the copyright of a work (literary, artistic or dramatic) belongs to the creators; not to them; if they copy it without authorization, it constitutes an infringement or an offense.

### **Legal Action and Remedies**

In Bangladesh in compliance with the provisions of TRIPS Agreement, three kinds of remedies are ensured against infringement and piracy of copyright, namely a) civil, b) criminal and c) administrative. The owner of the copyright can bring civil action in the appropriate District Judge Court in which relieves such as Anton Pillar Order or (Search Order) injunction, accounts and damages can be sought .

The Act also declares certain acts as offences<sup>15</sup> (like willful infringing or abetting the infringement of the copyright in a work) against which criminal remedies are available like the imprisonment of the accused or imposition of fine or both, seizure of infringing copies etc. Imprisonment may extend for a period from six months to four years and a fine ranging from Tk. 50,000/- to Tk. 2,00,000/-.<sup>16</sup> In case of piracy of computer programs, the amount of fine is extended by an amendment to the Copyright Act on May 18, 2005, which is now minimum Tk 1, 00000 and maximum Tk. 4, 00000, if it is committed for commercial purpose.<sup>17</sup>

Administrative remedies consist of moving to the Registrar of copyrights to ban the import of infringing copies into Bangladesh, when the infringement is by way of such importation and the delivery of the confiscated infringing copies to the owner of the copyright.

### **TRADEMARK**

A trademark is a symbol, which is generally used to identify a particular product, which indicates its source. A trademark can be a combination of words, phrases, symbols, logos, designs, images or devices, used by an individual, legal entity or business organization to distinguish their products from that of others. Under the Trade Mark Act, 2009, "Trademark" means a registered trade mark or a mark used in relation to goods or service or a mark used or proposed to be used in relation to any service or goods indicating a connection in the course of trade between the goods and the person having the

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<sup>14</sup> International Intellectual Property Alliance (IIPA) 2009 Special Report on Copyright Protection and Enforcement

<sup>15</sup> Sections 82-84, *Ibid*

<sup>16</sup> Section 82, *Ibid*

<sup>17</sup> Section 84, *Ibid*

right, either as proprietor or as registered user, to use the mark.<sup>18</sup> In Bangladesh, the term 'trademark' includes service mark too.<sup>19</sup>

Since service marks are signs that are very similar in nature to trademarks, basically the same criteria can be applied for both of them; therefore, service mark protection has sometimes been introduced by a very short amendment to the existing trademark law, simply providing the application to service marks, *mutatis mutandis*, of the provisions on the protection of trademarks. In Bangladesh, a registered trademark or service mark owner can enjoy exclusive right upon his mark. By applying this right he can exclude others from using it; he can bring an action if any one uses his mark without his consent. At the same time he can use the mark with his goods or service; he has right to permit others to use the same, give a license to use or give up his rights in favour of any other person by way of an assignment.

The present legal basis of trade mark protection in Bangladesh is the Trademark Act of 2009 (herein referred to as the 2009 Act) and Trademark Rules 1963. Bangladesh is also a signatory to the following international agreements:

1. The World Intellectual Property Organization, since May 1985 (herein referred to as WIPO)
2. The Paris Convention for the Protection of Industrial Property, since March 1991 (herein referred to as Paris Convention)
3. The Agreement on Trade-Related Aspects of Intellectual Property Rights, since January 1995 (herein referred to as TRIPS Agreement)

### **Trademark Registration Procedure**

In Bangladesh in order to get registration one has to show that the mark has distinctiveness; it is not contrary to the law or public policy; it is not imitation of another registered or well-known mark or a mark which has cross-border reputation (like TATA). Any person claiming to be the proprietor of a Trade Mark or Service Mark used or proposed to be used by him or them, who desire to register, he shall apply in writing to the Registrar of the Department of Patents, Designs & Trademarks (DPDT, 91, Motijheel C/A(5<sup>th</sup> Floor), Dhaka-1000) for the registration of his trademark or service mark.<sup>20</sup> Separate application is required for every class of goods or services.<sup>21</sup>

Every application made under sub-section (1) of section 15 of the Act may be submitted to the Head Office of the Department or any branch of the Trademarks Registry having jurisdiction over the principal place of business in Bangladesh of the applicant or, in case of the joint applicants, the principal place of business in Bangladesh, whose name is first mentioned in the application, as having a place of business in Bangladesh is situated.

It is important to note that in case of filing of Trade Mark application in Bangladesh the following documents or information will be required<sup>22</sup>:-

1. Description of the Trademark or service mark and if it is a logo or device mark then 15 (fifteen) copies label or logo for each of the application.
2. Full Name, Street Address and Nationality of the applicant(s): In the case of a company, the country or state of incorporation and the address of the principle place of business should be given. In the case of a partnership firm, full names of all partners and the name of the partnership is required.

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<sup>18</sup> Section 2(8), The Trade Mark Act, 2009 (herein referred to as the 2009 Act)

<sup>19</sup> Section 2(8)(a)(ii), *Ibid*

<sup>20</sup> Section 15(1), the 2009 Act

<sup>21</sup> Section 15(2), *Ibid*

<sup>22</sup> <http://www.lextoria.com/trademark-registration-process-in-bangladesh.html>, (last visit: 09-03-12)

3. Status of the Applicant: Whether the applicant is a 'manufacturer' or 'merchant' or 'manufacturer & merchant' etc should be mentioned.
4. Description of goods or service for which the mark is to be registered.
5. The date of use of the Trademark in Bangladesh (if any), it may be used or proposed to be used also.
6. Whether the mark is being used in Bangladesh by the proprietors, or proposed to be used in Bangladesh by the proprietors, or proposed to be used by a body corporate to be constituted, or proposed to be used in Bangladesh by a registered user (in which case an application for registration of registered user must be filed simultaneously).
7. A duly executed Power of Attorney or authorization (Form TM-48): It should be signed by applicant (if individual) or by an officer of the applicant company, whose position in the company should be stated including the corporate seal. It is not necessary to notarize or legalize the authorization.
8. Prescribed application fee.

It is pertinent to mention that International priority is available in Bangladesh under the Paris Convention. It is possible to claim partial priority within Bangladesh. The Priority must be claimed at the time of filing the application for registration and the following must be provided<sup>23</sup>:

1. Name of the country from which the priority arises
2. Priority application number and date
3. A certified copy of the Convention Application from which the priority is claimed must be filed within a period of six (6) months of the filing date of the application in Bangladesh.<sup>24</sup>

Trademark protection is not limited in time.<sup>25</sup> In Bangladesh, the duration of the registration of a trademark or service mark is 7 (seven) years and it can be renewed for further period of every 10 (ten) years.

### **Trade Mark Protection to the International Company**

Bangladesh is a signatory to the Paris Convention and TRIPS Agreement. The principle of 'national treatment'<sup>26</sup> is strictly followed here. Equal protection is provided to the international company as regards their trademarks, registered or unregistered. Well-known international trademarks have been protected in Bangladesh even when they were not registered in Bangladesh. It was confirmed in the case of Sunil Kumar Das vs Canon kabushiki kasha, 57 DLR, 2005, pp 93-100.

### **Infringement and Legal Steps Against it**

Infringement means unauthorized use of a registered or unregistered trademark. Without the consent or authorization of the owner if any one uses the registered mark commits infringement. Further use of a similar mark to the registered mark does also constitute infringement of the registered mark.

<sup>23</sup> [http://www.patentexpress.com/.../international\\_country.aspx?cn=banglades..](http://www.patentexpress.com/.../international_country.aspx?cn=banglades..) (last visit: 10.03.12)

<sup>24</sup> Section 120, the 2009 Act

<sup>25</sup> WIPO: *Background Material on Intellectual Property*, 1988, p 172

<sup>26</sup> National treatment means that, as regards the protection of industrial property, each country party to Paris Convention or TRIPS Agreement must grant the same protection to nationals of the other member countries as per Articles 2 and 3 of the Paris convention and article 3.1 of the TRIPS Agreement, 1994.

The 2009 Act gives the registered proprietor of a trademark in respect of any goods the exclusive right to the use of trademark in relation to those goods. That right is deemed to be infringed by any person who, not being the registered proprietor of the trademark or a registered user thereof using by way of permitted use. The Act also gives protection to the owner of unregistered trademark or service mark in case of passing off. In case of unauthorized use, both civil and criminal remedies are available under the 2009 Act. The relief which a court (appropriate District Judge Court) may grant in any suit for infringement and passing off<sup>27</sup>:

- (i) An injunction restraining further use of the infringing mark.
- (ii) Damages or an account of profits.
- (iii) An order for delivery-up of infringing labels and marks for destruction or erasure.

The criminal remedies may be imprisonment or fine or both. The punishment for the following offences is imprisonment for up to two years but not less than six months or a fine up to taka two lacs but not less than fifty thousand, or both.

The following are criminal offences punishable under the Act, 2009:

1. Applying a False Trademark so as to Mislead Consumers About the Origin of the Goods;
2. Counterfeiting a Trademark Without Assent of the Proprietor of the Trademark;
3. Making or Possessing Any Instrument for the Purposing of Counterfeiting a Trademark;
4. Selling, or Exposing or Possessing For Sale or Any Purpose of Trade or Manufacture any Goods Bearing a False Trade Mark or Description.

All the above mentioned offences shall be triable by the Metropolitan Magistrate or Magistrate of the first class.

## PATENT

Patent is a right of an inventor upon his new invented thing. It is a document issued by the Registrar of the Department of Patents, Designs and Trademarks to the inventor as regards his invented thing by which he can exclude others from unauthorized use. In order to make, use or sell anything, the owner of a patented invention must seek permission from the Department. The Patentee may use his rights himself or assign them or grant licenses<sup>28</sup>.

An invention must meet several criteria if it is to be eligible for patent protection. These, most significantly, that the invention must consist of patentable subject matter, the invention must be industrially applicable (useful), it must be new (novel), it must exhibit a sufficient “inventive step” (be non-obvious), and the disclosure of the invention in the patent application must meet certain standards. Any person, whether he or she is a citizen of Bangladesh or not, and either alone or jointly with any other person, may apply for a patent.<sup>29</sup> The protection conferred by the patent is limited in time (generally 20 years); but in Bangladesh it is 16 years<sup>30</sup>. The Patents and Designs Act, 1911, is the law in force in

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<sup>27</sup> Passing off occurs when one trader attempts to pass off his goods by misrepresenting them so as to make the consumers believe that his goods are the same as those of another trader. For example, using a mark ‘Rata’ on a shoe creates a belief that it is a ‘Bata’ one.

<sup>28</sup> Farani M., Manual of Trademarks, Merchandise Marks & Patents & Designs: Lahore Law Time Publications, Revised & Enlarged Edition, P. 182

<sup>29</sup> Section 3, the Patent and Design Act, 1911 (herein referred as to the 1911 Act)

<sup>30</sup> Section 14, *Ibid*

Bangladesh on patents and designs. Any person who is interested to get patent letter or patent protection he must make an application to the Patent Office by fulfilling the conditions of the Act, that is, an invention must have industrial applicability, novelty and non-obviousness (inventive step); it should not be contrary to law or morality.

If any person makes, sells or uses an invention without the license of patentee, or counterfeits it, or imitates it is an infringement of a patent<sup>31</sup>. If there is an infringement of a patent by any person, the patentee may institute a suit against the person in a District Court having jurisdiction to try the suit.<sup>32</sup>

The legislation provides remedies for any infringement of a patent. The remedy is civil in nature, and includes both interim and final remedies. The interim or preliminary remedies include an order for an injunction, inspection or account while final remedies include financial compensation.<sup>33</sup>

## INDUSTRIAL DESIGN

Industrial design, in a lay or general sense, refers to the creative activity of achieving a formal or ornamental appearance for mass-produced items that, within the available cost constraints, satisfies both the need for the item to appeal visually to potential consumers, and the need for the item to perform its intended function efficiently. In a legal sense, industrial design refers to the right granted in many countries, pursuant to a registration system, to protect the original ornamental and non-functional features of an industrial article or product that result from design activity.

In Bangladesh, designs are registered and governed according to the provisions of the Patent and Designs Act, 1911. The 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 it is not previously in Bangladesh.<sup>34</sup> The principle or the mode of construction of the articles, or mere mechanical contrivances can not be registered as a design under the Act. Trademarks, trade names and mere pictures or photographs can not be registered as designs. In the case of registration of a design, the applicant is granted copyright<sup>35</sup> in the design for a term of five years in the first instance.<sup>36</sup>

Any person who uses or apply or imitate the design without the consent of the registered proprietor which deceive the consumers he infringes the provisions of the 1911 Act.<sup>37</sup> The Act provides a couple of civil remedies such as compensation, damages and injunction for an act of infringement of the copyright of a registered design. Suits for infringement of industrial designs are instituted before the District Court.

## FINDINGS AND RECOMMENDATION

Intellectual properties laws in Bangladesh are not very rich. Some of them are not compatible with international treaties and conventions. Some of them are not maintainable with the digital based society. We have no laws on trade secrets, unfair competition, geographical indication and lay out design (topographies) of integrated circuits still today. Administrative capacity of DPDT (Department of Patents, Designs and Trademarks) and Copyright Office are very poor due to manual system, shortage of number of officers and staff, expert on intellectual property. Besides, here awareness

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<sup>31</sup> Section 29, *Ibid*

<sup>32</sup> *Ibid*

<sup>33</sup> Section 31, *Ibid*

<sup>34</sup> Section 43, *Ibid*

<sup>35</sup> "copyright" means the exclusive right to apply a design to any article in any class in which the design is registered (section 2(4) of the Patent Act, 1911)

<sup>36</sup> Section 47, the Patent and Design Act, 1911

<sup>37</sup> Section 53, *Ibid*



among the people is very little. Copyright piracy is very frequent; here its rate is the highest amongst the world. Under the above circumstances, the following steps should be taken:

1. Introducing basic concept on IP laws to the undergraduates and post graduates courses in colleges and universities;
2. Creating awareness through seminar, symposiums and national workshops among the all classes educated people of the country;
3. Establishing IP Protection courts, at least, in the divisional level and training the judges and advocates and thus making the experts;
4. Developing mechanism to ensure speedy and cheap resolution of disputes and litigation by infringement;
5. Employing special teams of the members of law forces for the implementation of the IP laws and training them.
6. Introducing new laws on trade secrets, unfair competition, geographical indication and lay out design (topographies) of integrated circuits;
7. Updating or introducing a new Patents and Designs Act; as the 1911 Act is not compatible with international treaties and convention;
8. Updating Trademark Rules; because Trademark Rules 1963 are unable to meet the IP demand of 2012. Besides, under the 2009 Act, new provision of collective mark has been inserted but the procedure of registration of it has not been mentioned in the Act, 2009. The procedure of publication of trademark journal is not specified in the present law; it should be determined by the new rules. Different forms of trademark, service mark, certification mark or collective mark should be updated to maintain the consistency of the digital based society. So, the replacement of 1963 Rules with a new one is a must; and,
9. Recruiting necessary officers and staff for the DPDT and Copyright office and training them on IP laws at home and abroad.

## CONCLUSIONS

Bangladesh is a developing country; in order to turn her into mid-developed one, there is no alternative to give priority on IP and its laws. By removing the present problems which have been shown in the paper, better IP Protection can be ensured to the entrepreneurs who can turn Bangladesh into an industrial developed country.

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