

Protection of Intellectual Property Rights in View of International Treaties: Bangladesh Perspective

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Abstract

With the advancement of science, technology, global business and economy, intellectual property rights (IPRs) are signifying their prominence in the whole world including developing countries. A comparative study of IPRs in international treaties and in national legislation of a developing country is nothing but a re-examination of the myth that developing countries are reluctant in protecting intellectual property (IP) in their domestic domain. This article therefore traces the basis and safeguards of IPRs at international level and explores the reflection of the same in national legislation of Bangladesh, a developing country. It positively concludes that triumphing over past paradoxes and deficiencies and also prevalent obstacles, Bangladesh is approaching towards an effective legal regime for better and efficient IPRs' protection like other progressive developing countries.

Keywords: Intellectual Property Right, International treaties, National legislation, Developing country

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Introduction

In the earlier period, references to property rights, at least in developing economic areas, were limited to land and other tangible assets (Rapp and Rozek, 1990: 78). In the contemporary world, however, state-created legal rights in knowledge, technology and innovation, generally referred to as 'intellectual property' (IP), are also to some extent a focal point of debate (Acharya, 1991: 81). Today the general belief is that IP is crucial to the economic, social and technological development of a country and in this new millennium, the IP community has entered a new era characterized by the rapid expansion of demand for new forms of protection, greater global coverage and unprecedented growth in the exploitation and use of intellectual property rights (Zaman, 2005: 109). Significantly, in the knowledge-based new economy, IP is no longer to be perceived as a distinct or self-contained domain, but rather as an important and efficient policy investment that is relevant to a wide range of socio-economic, technological and political concern (Mankind, 2001). Modern economists have been increasingly inclined to recognize IPRs as a tool capable of stimulating economic growth when tailored to the particular needs of a country (Mascus, 2000: 2221-22). As a part of ensuring economic benefits to innovators, the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) obliges its members, irrespective of their level of development, to offer strict IPRs protection in knowledge, goods, including comprehensive control on technology diffusion. In theory at least, such protection aims to foster beneficial technological development furthering innovation and increasing economic growth (Gancia and Zilibotti, 2009: 93). Hence recent years have witnessed increased attention to intellectual property considerations in the policy making mainstream at both international and national levels, in a wide range of legal, technological, economic, commercial and social fields and developments in these fields increasingly effect international co-operation in intellectual property, which can no longer be viewed as a distinct or self-contained domain (Zaman, 2005: 109). In economic growth and development, the power of the knowledge has come into sharp focus since the days of industrial revolution and more recently with the advancement in science and technology, IPRs have usually been seen from economic and legal perspective as the ownership rights for the exclusive use of innovation and creative work (Hossain and Lasker,

2010: 43-46). This article will, therefore, explore the legal regime for the protection of IPRs at the international level and simultaneously, will focus on the relevant issues of such protection in the context of a developing country like Bangladesh.

2. Intellectual Property: Conceptual Analysis

As a concept, IP has been defined in varied forms. In broad sense, IP means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields (WIPO, 2004: 3). According to Philips and Firth (1995), IP has two meanings, one colloquial and other legal. The colloquial description of IP is that it simply comprises all those things, which emanate from the exercise of human brain, such as ideas, inventions, poems, designs etc. and the legal description of IP differs from colloquial one and it focuses on the rights, which are enjoyed in the produce of mind, rather than upon that produce it (Philips and Firth, 1995: 3). For example, we call a piece of land or a motor car 'property' not because it is solid, but because individuals or legal entities such as companies can assert a right in it against other persons (Zaman, 2005: 109).

Article 2(viii) of the Convention Establishing the World Intellectual Property Organization (WIPO), 1967, provides that, “intellectual property shall include rights relating to literary, artistic and scientific works; performances of performing artists, phonograms and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields”.

1.0 Research Questions And Objective Of The Study

As per Article 1.2 of the TRIPS Agreement, the term “intellectual property” refers to all categories of IP that are the subject of sections 1 through 7 of Part II i.e. copyright and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuit layout-designs and protection of undisclosed information. Therefore,

IPRs may be defined as legal devices, which guarantee the exclusive right to exploit for a period of time “a prescribed body of knowledge, signs or symbols” (TCMD, 1993: 8). IPRs is a broad term used to cover patents, trademarks, plant breeders rights, copyright, trade secrets and other types of rights that the law gives for the protection of investment in creative effort and knowledge creation (Maredia, 2001: 14). Thus IPRs protect new and useful products and processes, valuable and relative secret business information, original intellectual works, and names and symbols utilized to identify and distinguish commercial goods.

However, IPRs protection remains a highly contentious issue in international relations between the North and the South, because many developing countries believe that the TRIPs agreement was forced upon them by their economically more powerful trading partners and that this move toward harmonization of patent policies serves the interests of the North at the expense of those of the South (Grossman and Lai, 2002). It is often suggested that, were it not for strategic reactions or pressures from the North, the southern developing countries would have little incentive to protect IPRs. Bangladesh being a developing country, a little discussion on the perspective of developing countries on the protection of IPRs would not be out of the place.

3. Protection of IPRs in Developing Countries: North-South Debate

IP protection has been an important policy issue in recent times with the developed countries, US in particular, insistent that developing countries adopt higher standard; the developing countries in turn resist such pressure seeing IP protection as largely leading to rent transfer to the high-income developed countries (Markusen, 1998). Hence the protection of IPRs in developing countries has been a much discussed and debated issue in recent years. This debate is often placed in a North–South framework, where the predominant view is that southern or developing countries tend to lose from protecting IPRs (Chen and Puttitanun, 2005). The static and partial equilibrium reason for this loss is that IPRs protection will strengthen the market power of northern innovating firms and raise prices in developing countries (See for details: Chin and Grossman, 1990). This view was widely accepted among

policy-makers in the 1970s and it was believed that since developing countries had little ability to create intellectual property, they had little to gain from IPRs that would mainly grant monopolies to foreign patentees (Primo, Fink and Paz Sepulveda, 2000). But even when dynamic and general equilibrium factors are accounted for, the South need not benefit from increasing IPRs, partly due to the adverse terms-of-trade effect and the possible slowing down of northern innovations over time (See for details, Helpman, 1993). In fact, Helpman (1993: 1274) concludes: "Who benefits from tight IPRs in less developed countries? My analysis suggests that if anyone benefits, it is not the South". Thus, there are several arguments of why developing countries need to increase their protections of IPRs (Chen and Puttitanun, 2005). First, northern and southern countries generally have different technology needs and, without the southern protection of IPRs, northern countries would not develop technologies largely needed by the South (Diwan and Rodrik, 1991). Second, northern firms may react to the lack of IPRs in the South by making their technologies more difficult to imitate, which can result in less efficient research technology and less northern innovation (See for details, Taylor, 1993; Taylor, 1994; Yand and Maskus, 2001). Third, even if greater protection of IPRs does not directly benefit the South, it could still increase world welfare; therefore, there are gains from international cooperation that tightens IPRs in developing countries (Chen and Puttitanun, 2005). In fact, issues on trade-related IPRs (TRIPS) have been a key element in the WTO negotiations, and strengthening of IPRs is often a condition for a developing country's entry to the WTO (Maskus, 2000). Therefore, compliance with the international standard of IPRs protection is crucial for Bangladesh.

4. Protection of IPRs in Compliance with International Standards: Bangladesh Perspective

There should be a remarkable amount of transnational uniformity in IPRs protection due to the international standards set by different international treaties and conventions. However, to what extent such standards are maintained in the national legal regime of developing countries remains a question of fact. For a better assessment of current status of IPRs protection in Bangladesh, it is therefore imperative to discuss in detail the national IP legislation of Bangladesh in view of

international legal regime regarding the fields of IP protection i.e. patents, copyright and related rights, trademarks, industrial designs and integrated circuits, geographical indications, and also the protection against unfair competition.

4.1 Patents

A patent is a document, issued, upon application, by a government office (or a regional office acting for several countries), which describes an invention and creates a legal situation in which the patented invention can normally only be exploited (manufactured, used, sold, imported) with the authorization of the owner of the patent (WIPO, 2004: 17). It is the right granted by the State to an inventor to exclude others from commercially exploiting the invention for a limited period, in return for the disclosure of the invention, so that others may gain the benefit of the invention (WIPO, 2004: 17). A patent operates as a reward in that it grants to an inventor of an invention certain legal rights against others who may seek to commercialize the results of the inventor's research without consent or approval (Mesevage, 1991: 446). An invention must meet several criteria if it is to be eligible for patent protection: a) the invention must consist of patentable subject matter, b) the invention must be industrially applicable (useful), c) it must be new (novel), it must exhibit a sufficient "inventive step" (be non-obvious), and d) the disclosure of the invention in the patent application must meet certain standards (WIPO, 2004: 17).

The Paris Convention for the Protection of Industrial Property, 1883, protects against patent infringement. It requires that each of the member countries accord national treatment to other member countries by treating its own citizens and the citizens of other member countries equally under its national intellectual property protection law (Article 2.1). For patents, the Convention compels member countries to accord priority to a patent applicant of another member country for patent applications that were initially filed abroad within the previous year (Article 4). Later, the Patent Cooperation Treaty, 1970, was concluded to complement the Paris Convention as regards patent.

However, for patents, TRIPS extends protection to all inventions that are new, that involve an inventive step and that are capable of industrial application (Homere, 2004: 282). In addition, depicting patent rights, Article 28.2 of the Agreement provides for a mechanism for rights holders to transfer their property for use by others: 'Patent owners shall also have the right to

assign, or transfer by succession, the patent and to conclude licensing contracts' (Islam, 2010: 24). In addition to the general objective of promoting innovation and the transfer and dissemination of new technology as referred to in Article 7, the TRIPS also contains some specific requirements for developed country members to provide incentives for technology transfer to least developed countries e.g. the 'disclosure requirement' of a patent application (Islam, 2010: 26). This provision helps for the transfer of and access to technology by providing information readily about from whom the technology can be obtained for the duration of the patent term or the information when the disclosed invention falls into the public domain and is freely available to all at the patent expiry or by enabling the experimental use of an invention in the name of 'limited exceptions' to the patent rights under Article 30 (Brenner, 1998: 25-6). The requirement of the minimum 20 years' patent protection from the filing date, as required by TRIPS, is a challenging novelty, especially for those developing countries that have never had any patent law (Lanoszka, 2003: 184). The issue of granting 'compulsory license', as was dealt with in Article 5A of the Paris Convention, was also addressed in the TRIPS Agreement; yet TRIPS sets out a long checklist of complicated procedures a government must follow before it can legally override a patent and issue a compulsory license (Article 31).

The latest development regarding patent is the adoption of the Patent Law Treaty on June 1, 2000 at a Diplomatic Conference in Geneva to harmonize and streamline formal procedures in respect of national and regional patent applications and patents (WIPO, 2004: 301).

In Bangladesh, patent is dealt with under the provisions of the Patents and Designs Act, 1911. 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 under section 3 of the said Act. An application for registration of patent shall be filed in the prescribed form to the Patents and Designs Wing of the Department of Patent, Design and Trademark. After complying with a process provided in the Act, a patent is granted and sealed in favor of an eligible patentee under section 10 of the Act. Upon such sealing of patent, a patentee shall have the exclusive privilege of making, selling and using the invention throughout Bangladesh and of authorizing others so to do (section 12.1). Therefore, a patentee may use his rights himself or assign them or grant licenses (Farani, 2010: 182). If any person becomes entitled by way of assignment, transmission or other operation of law to a patent or any person becomes entitled as mortgagee, licensee or otherwise to any interest in a patent, that person must cause an entry to be made in the prescribed manner in the concerned register (section 63). Besides, the inventor of any improvement in

instruments or munitions of war may assign to the government all the benefits of the invention and of any patent obtained or to be obtained for the invention (section 21A). The Act also provides for provisions of granting compulsory license and revocation of a patent (see, sections 22, 23, 23A, 24 and 25). Generally term of a patent is sixteen years from its date (section 14.1). However, after expiry of the period upon application of a patentee and hearing of the patentee and others concerned (if any) if it appears to the government or the High Court Division of the Supreme Court of Bangladesh that the patent has not been sufficiently remunerative, the term may be extended for a further period of five years or ten years in exceptional cases (section 15). During continuance of a patent of an invention if any person makes, sells or uses the invention without the patentee's license or counterfeits or imitates the invention, a suit may be instituted by the patentee against the infringer (section 29). In such a suit for infringement, the Court may order for an injunction, inspection of account and impose such terms and give such directions, as the Court deems fit (section 31). Thus, the Act, though of 1911, is somehow granting protection to the 'patent' and 'patentees', though a revision to cope with the recent development regarding such protection is imperative.

4.2 Copyright and Related Rights

'Copyright' is the term used to describe the arena of intellectual property law that regulates the creation and use that is made of a range of cultural goods e.g. books, songs, films and computer programs (Bently and Sherman, 2009: 31). The intangible property protected by copyright law is distinctive in that it arises automatically and generally for the benefit of the author (Bently and Sherman, 2009: 31). In short, copyright is the right to prevent others from copying or reproducing the work of the author (Hart and Fazzani, 2004: 149). In the wider sense, copyright also includes 'related rights' or 'neighboring rights' and the TRIPS Agreement covers three categories of such related rights i.e. the rights of performers, producers of phonograms and broadcasting organizations (Article 14).

The Berne Convention for the Protection of Literary and Artistic Works, 1886, was the first and most important multinational copyright agreement. The Convention provides that copyrights protected in the member country of origin will be afforded protection in all other member-states according to their domestic laws (Dhilawala, 1985: 156). Nationals of non-member states may have access to the benefits of the Convention if they first publish in a member nation or publish simultaneously in the country of origin and a member-state (Article 3.1). The process, known as 'back-door to Berne' (Nimmer, 1992: 215), though specifically sanctioned in the Convention must nevertheless be

approved by the domestic judicial system. Implementation of this method by non-member states such as the United States is often the only manner in which copyright owners can gain access to member-nations' courts (Nimmer, 1992: 215). The Berne Convention contains two specific provisions on the enforcement of rights: on the one hand Articles 16.1 and 16.2 provide that infringing copies of a work are subject to seizure in any country of the Berne Union where the work enjoys protection, even when the copies come from a country where the work is not or no longer protected; and on the other hand Article 13.3 provides for seizure of copies of certain recordings of musical works imported without permission of the author or other owner of copyright in the country of importation. The TRIPS Agreement also contains provisions on copyright protection. It provides that member countries shall comply with Articles 1 to 21 of and with the Appendix to the 1971 Paris Act of the Berne Convention i.e. the substantive provisions of the Convention. The essential elements of the standards concerning the availability, scope and use of copyright and related rights were specifically dealt with in details in section 1 of part II of the TRIPS Agreement. In 1996 the WIPO Diplomatic Conference on Certain Copyright and Related Rights Questions in Geneva, Switzerland adopted two treaties: the WIPO Copyright Treaty (WCT), 1996, and the WIPO Performances and Phonograms Treaty (WPPT), 1996. Article 1.2 of the WCT Treaty contains a safeguard clause similar to the one included in Article 2.2 of the TRIPS Agreement. The other major multinational copyright treaty is the Universal Copyright Convention (UCC), 1952. The primary purpose of the UCC was to ease the copyright owner's burden of proving that his work is protected in the country of origin and thus entitled to protection in all member-states' courts (Dhilawala, 1985: 157). Under the UCC, if the work includes the universal copyright signal, the name of the copyright owner, and the year of first publication, any domestic evidentiary law pertaining to proof of ownership is satisfied (Dhilawala, 1985: 157). Apart from the agreements as aforementioned, there are three international conventions for protection of neighboring rights: a) the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1962; b) the International Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms of 1971; and c) the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite of 1974.

In Bangladesh the Copyright Act, 2000 is the only law that exclusively deals with copyright and related rights. A person shall only be entitled to copyright or other similar rights in any work under and in accordance with section 13 of the Act. A detailed meaning of copyright is given in section 14 of the Act. There are certain categories of works to fall within and certain

conditions to be satisfied in order to be protected under section 15 of the Act. An author or publisher or owner or any other person interested in a copyright may apply in the prescribed manner to the Registrar of Copyrights for registration of the copyright and obtain a certificate thereby (section 56). To obtain copyright the owner is required to prove that the work is original and in this regard it is not considered whether the work is wise or foolish, accurate or inaccurate or whether it has or has not any literary merit (Azam, 2008: 193). A certificate of registration in a work shall be considered as the prima facie evidence that copyright subsists in a work and the person shown in the certificate as the owner of such copyright (section 60.2). Under section 14 of the Act copyright specifies certain exclusive rights vested in the person granted with copyright. Chapter IV of the Act exclusively deals with the ownership of copyright and the owner's different rights e.g. right to assign copyright, right to transmit of copyright in manuscript by testamentary disposition, right to relinquish copyright. In Bangladesh, an author can retain copyright of any literary, dramatic, musical or artistic work during his life time and for a further period of sixty years from the beginning of the calendar year next following the year in which the author dies (section 24). Apart from the rights granted to an author, the Act also clearly specifies some neighboring rights e.g. rights of broadcasting organizations and performers (see for details, chapter VI). The rights as granted in the Act are given protection through sanctions for infringement. Section 71 of the Act specifies in details the acts which tantamount to infringement of copyright whereas section 72 notes the exceptions thereon. For such infringement three kinds of remedies in compliance with the provisions of TRIPS Agreement are provided: a) civil, b) criminal and c) administrative. The civil remedies may be granted by way of injunction, damages, accounts and otherwise as are or may be conferred by law (section 76.1). Apart from availing civil remedy, an owner of a copyright may initiate criminal proceeding against the alleged infringer for his commission of any offence under the Act. Upon application of a person aggrieved an administrative action for infringement may be taken by the Registrar of Copyrights by imposing a ban on the import of infringing copies into Bangladesh, when the infringement is by way of such importation and by delivery of the confiscated infringing copies to the owner of the copyright after entering any ship, dock or premises where such copies may be found (section 74). Despite of having such protective measures the actual scenario in Bangladesh is that the courtesy of obtaining permission from the original author or publisher is more or less absent here and hence the incidents of infringement of copyright are rather increasing (Ahmad, 2007: 47).

4.3 Trademarks

A trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors (WIPO, 2004: 68). Trademarks provide exclusive rights to use distinctive, visible signs, such as brands, symbols, colours, letters, shapes or names to identify the producer of a product (Blakeney, 2010: 5). The Paris Convention is the most significant multilateral trademark convention (U.N., 1979: 4). The Paris Convention affords nationals of each member country the same trademark protection as nationals of the country in which the trademark owner registers (U.N., 1979: 4). Upon proper application, the foreign trademark owner is afforded the same access to remedies through domestic courts, in the same manner as are domestic nationals (U.N., 1979: 4). Apart from Paris Convention, TRIPS Agreement requires its member states for the institution of criminal procedures and penalties in the case of willful trademark counterfeiting or copyright piracy on a commercial scale (Article 61).

The Madrid Agreement Concerning the International Registration of Marks, 1891, and the Protocol relating to the Madrid Agreement, 1989, constitute the Madrid System and provide for the international registration of trademarks (WIPO, 2004: 287). The Madrid Agreement attempted to implement a simplified procedure by which trademark owners could protect their rights abroad. Under the Madrid Agreement, nationals of the Madrid Union's member states have a trademark protected under the laws of each contracting State through the registration of the mark in their home country. The Madrid Protocol makes the Madrid System more flexible. However, according to the TRIPS Agreement, any sign capable of distinguishing the goods or services of one undertaking from those of other undertakings (thus including service marks) shall be eligible for registration as a trademark (Article 15.1). Registrability may be conditional upon visual perceptibility or on distinctiveness acquired through use or upon use (Articles 15.1 and 15.3). The rights conferred by registration shall include the exclusive right to prevent third parties from using identical or similar signs for identical or similar goods or services, where such use would result in a likelihood of confusion, the latter to be presumed where the goods or services are identical, subject to certain allowable exceptions such as the fair use of descriptive terms (Articles 16.1 and 17). The term of initial registration and renewals shall be no less than seven years and the term is renewable indefinitely (Article 18). Trademarks may be assigned with or without the transfer of the business to which the trademark belongs, but compulsory licensing of trademarks is not permitted (Article 21). The Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957, sets up a classification system that comprises a List of Classes (34 classes for goods and 11 classes for services) and an Alphabetical List of Goods and Services, and is

now in its ninth version. This system has been referred to in the Trademark Law Treaty, 1994 e.g. in Article 3. Articles 3 and 6 of the Treaty restricts the use of formalistic administrative requirements of the national offices of signatory countries by establishing standards for registration, changes after registration and the renewal of trademarks, in an attempt to simplify and harmonize procedures. In particular, Article 8 of the Treaty specifies that attestation, notarization, authentication, legalization or certification of signatures is not required, except in the case of the surrender of a registration. Article 13 provides for duration of 10 years for the initial period of registration of the trademark with a possibility of renewal for further ten-year periods. The Treaty contains no obligations for a Contracting Party to be party to other international conventions, but Article 15 provides that Contracting Parties must comply with the provisions in the Paris Convention which concern marks. The Singapore Treaty on the Law of Trademarks, 2006 aims, following closely on the Trademark Law Treaty, at the adoption of a modernized framework for the harmonization of administrative trademark registration procedures, including registration of non-traditional marks.

Being a signatory of the Paris Convention and the TRIPS Agreement, Bangladesh has recently promulgated the Trademark Act of 2009, though Trademark Rules of 1963 is still in force. As per section 2.8 of the Trade Mark Act, 2009, trademark denotes 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 right, either as proprietor or as registered user, to use the mark and includes service mark too. One who had designed or used the trademark first is entitled to claim proprietorship thereof, unless subsequently he has abandoned the same and some other person has obtained rights to use the same. As per section 3(1) of the Act of 2009, a trademark shall be registered in the Trademark Registry Wing of the Department of Patents, Designs and Trademark. Any person claiming to be the proprietor of a trademark already in use or proposed to be used in Bangladesh may apply in writing for registration of a trademark in the manner prescribed in section 15 of the Act. Section 6 lays down certain prerequisites for registration of a trademark. The proprietor of a registered trademark will enjoy exclusive rights to use the trademark in relation to the goods for which it is registered and the registration of trademark enables a proprietor to file a suit for infringement of his right and obtain injunction, damages and other reliefs against an infringer (section 25). If a trademark is not registered by a person entitled, he will not be entitled to institute any proceeding to prevent or to recover damages for the infringement of the same (section 24.1). As per section 22, a trademark once registered shall be valid for an initial period of seven years and is renewable

from time to time for further periods of ten years. It is possible under the Act to transfer a trademark by way of assignment and transmission. Besides, licensing of registered or unregistered trademark is allowed under chapter VI of the Act. Except a proprietor and any duly authorized person uses any trademark illegally, it will be an infringement and such events of infringement are specified in section 26 of the Act. If any of such events or event of 'action of passing off' occurs, an aggrieved person may seek for civil remedy by way of damages or an account of profits together with or without any order for the delivery of the infringing labels and marks for destruction or erasure (section 97). Moreover, an aggrieved person may initiate criminal proceeding against the infringer for any of the offences as committed under chapter X of the Act. Bangladesh being a signatory to the Paris Convention and TRIPS Agreement, international priority is available here and that must be claimed at the time of filing the application for registration. Besides, the principle of 'national treatment' is followed here and equal protection is provided to the international company as regards their trademarks even when they are not registered in Bangladesh. Thus, it appears that Bangladesh is determined to uphold the international standard on the protection of trademarks, but immediate steps should be taken to promulgate new rules to give effect to the new provisions of the Act of 2009.

4.4 Industrial Designs and Integrated Circuits

Industrial design denotes the professional service of creating and developing concepts and specification that optimize the function, value and appearance of products and systems for the mutual benefit of user and manufacturer (Woodring, 1996: 309). The layout-designs (topographies) of integrated circuits are creations of the human mind and usually the result of an enormous investment, both in terms of the time of highly qualified experts, and financially (WIPO, 2004: 118). As per Article 2(ii) of the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC), 1989, a layout-design (topography) is the three-dimensional disposition, however expressed, of the elements at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture. 'Integrated circuit', as per Article 2(i), means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the inter-connections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function.

The TRIPS on industrial designs does not prescribe any formalities to be fulfilled before protection can be accorded to the right owner (Article 4). However, Article 62.1 of the TRIPS explicitly recognizes that Members may require compliance with reasonable procedures and formalities. The owner of a protected industrial design must have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes (Article 26.1). The duration of protection available to an industrial design is for at least 10 years (Article 26.3). As per Article 5B of the Paris Convention, the protection of industrial designs may not, under any circumstances, be subject to any measure of forfeiture as a sanction in cases of failure to work or where articles corresponding to those protected are imported.

As regards integrated circuits, each Contracting Party of IPIC Treaty is obliged to secure, throughout its territory, intellectual property protection of layout-designs (topographies) of integrated circuits, whether or not the integrated circuit concerned is incorporated in an Article (WIPO, 2004: 119). The Contracting Parties must, as a minimum, consider the certain acts to be unlawful if performed without the authorization of the holder of the right i.e. the reproduction of the lay-out design, and the importation, sale or other distribution for commercial purposes of the layout-design or an integrated circuit in which the layout-design is incorporated (WIPO, 2004: 119). Notably, neither the TRIPS Agreement nor the incorporated provisions of the IPIC Treaty stipulate formality requirements for obtaining protection of a layout-design of integrated circuits, but members are free to prescribe such formalities or not in their law. As per Article 38 of the TRIPS Agreement, protection of a lay-out design is to last for a minimum of 10 years counted from either the date of filing an application for registration or from the first commercial exploitation wherever it occurs in the world. The owner of the layout-design has the exclusive right to authorize the reproduction and the commercial distribution of the protected layout-design itself, as well as of products incorporating such a design (Article 36).

In Bangladesh, designs are registered and governed under the provisions of the Patent and Designs Act, 1911. Any proprietor of a new or original design not previously published in Bangladesh may apply for its registration to the Registrar of Patents, Designs and Trademarks in the prescribed manner (section 43). Upon such registration a certificate of registration shall be granted to the proprietor by the Registrar (section 45). In the case of registration of a design, the registered proprietor will enjoy copyright in the design for a term of five years from the date of registration and such period is extendable for a

further period of ten years in two phases (section 47). If during the existence of such copyright any person uses or applies or fraudulently imitates the design without license or written consent of the registered proprietor, that will be considered as piracy of the registered design and the person will be liable for every contravention (section 53). The aggrieved proprietor in a civil suit may avail remedies by way of damages and injunction for an act of infringement of the copyright of a registered design (section 53). Thus the Act, though of 1911, somehow complies with the international standard set by the TRIPS. However, the government may consider the revision of this Act to put it in line with the recent development in terms of the definition of industrial designs and integrated circuits.

4.5 Geographical Indications

A Geographical Indication identifies a good as originating in a delimited territory or region where a noted quality, reputation or other characteristic of the good is essentially attributable to its geographical origin and/or the human or natural factors there (ITC, 2009: 5). Geographical Indications (GIs) are defined in TRIPS as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin” (Article 22.1). GIs are analogous to trademark except that geographical indications identify territories instead of companies or brands (Juma, 1999: 10). The recognition and concept of internationally protecting a GI as property goes back as far as the late 19th century. However, it is only in recent decades that more regulated and active forms of protection have been developed; and different countries and regions have different systems for GIs protection (ITC, 2009: 39). TRIPS Agreement provides the fundamental international regulatory framework for GIs. Article 22 outlines the basic definition and general standards of protection for GIs relating to all products including those of agricultural origin whereas Article 23 denotes the specific and additional protection that is available for the wine and spirits categories, as these make up the majority of registered GIs. Their protection goes beyond Article 22’s general coverage for unfair competition and consumer deception, and offers more outright protection to these GIs without requiring that either unfair competition or deception be demonstrated. Article 24 notes some important exceptions from protection and details for future negotiation. As the TRIPS Agreement only provides very minimum standards of protection for non-alcoholic GIs, it is likely that regional or bilateral agreements will remain important in this area since they can serve to more specifically protect GIs for broader categories of products (Sylvander, 2007). Three multilateral treaties administered by WIPO contain provisions for the protection of geographical

indications: the Paris Convention, 1883, the Madrid Agreement, 1891, and the Lisbon Agreement, 1958 (WIPO, 2004: 124).

Paris Convention enumerates certain remedies in respect of unlawful use of indications of source on goods, meaning that no indication of source may be used if it refers to a geographical area from which the products in question do not originate (Article 10.1). Article 11bis of the Convention gives the basis for protection against misleading indications of source, including appellations of origin. It obliges members to provide protection against unfair competition and contains a non-exhaustive list of acts, which are to be prohibited. The Paris Convention does not provide for any special remedies against infringement of this provision. The Paris Convention was the first multilateral agreement, which included “indications of source or appellations of origin” as objects of protection considering all appellations of to be indications of the source of goods (Articles 1.2 and 10). One of the distinctive features of the Paris Convention is that it allows the parties “to make ... between themselves special agreements for the protection of industrial property” (Article 10). Two such agreements of relevance to GIs were duly made. These are the Madrid Agreement and the Lisbon Agreement as mentioned earlier.

The Madrid Agreement did not append much to the protection already given by the Paris Convention, but it extended protection to ‘deceptive indications of source’, in addition to false indications. Article 1(1) of the Madrid Agreement provides that any product bearing a false or deceptive indication by which one of the States party to the Madrid Agreement or a place situated therein is directly or indirectly indicated as being the country or place of origin, must be seized on importation into any of the States party to the Madrid Agreement. Article 3bis obliges the States party to the Madrid Agreement to prohibit the use, in connection with the sale or display or offering for sale of any goods, of all indications capable of deceiving the public as to the source of the goods. Article 4 provides that the courts of each country have to decide what appellations, on account of their generic character, do not fall within the provisions of the Madrid Agreement.

The aim of the Lisbon Agreement for the Protection of Appellations of Origin, 1958, was to provide for the protection of appellations of origin. Article 5(1) and the corresponding provisions of the Regulations issued under the Lisbon Agreement define the procedure for international registration. In accordance with Articles 5(3) to (5), the Office of any State party to the Lisbon Agreement may, within a period of one year from the receipt of the notification of registration, declare that it cannot ensure the protection of a given appellation. An appellation which has been granted protection cannot be

deemed to have become generic, as long as it is protected as an appellation of origin in the country of origin (Article 6). The registration need not be renewed and is subject to payment of a single fee (Article 7). Hence the protection conferred by international registration is unlimited in time. With regard to the enforcement of the protection of an appellation of origin registered under the Lisbon Agreement, Article 8 refers to national legislation.

There are some countries where geographical indications could be only protected as trademarks. Therefore, the Madrid System for the International Registration of Marks is of relevance to the protection of GIs. This system gives a trademark owner the possibility of having his mark protected in several countries by simply filing one application with a single Trademark Office, in one language, with one set of fees in one currency.

The Geographical Indicative Products (Registration and Protection) Act, 2013, the first of its kind in Bangladesh, was enacted in compliance with Article 22 of the TRIPS Agreement to protect the patent rights of traditional products. Earlier, Geographical Indications of Goods (Registration and Protection) Ordinance 2008 identified 66 products as the country's GI products. A geographical indication unit under the Department of Patents, Designs and Trademarks shall perform all activities regarding geographical indicative products (section 4.1). The unit will conserve a detailed list of the GI products (section 6.4). Any association or organization, representing the producers of a GI product, or any government agency or authority may apply to the Registrar of Patents, Designs and Trademarks in the prescribed manner for registration of the product (section 9). Upon satisfaction with the compliance with the provisions of the Act, the Registrar shall register a product and the registration will be deemed to be effective from the date of application for registration (section 15). Such registration shall remain valid until being invalid or illegal under the Act (section 16.1). The registration of an authorized user of a GI product shall remain valid for an initial period of five years and may be renewed for further subsequent periods of three years (sections 16.2 and 16.3). Any right regarding a GI product cannot be transferred, licensed or mortgaged in any way (section 19.1). Certain acts infringing the GI products have been considered as offences and therefore penal sanctions have been imposed in the Act (chapter IX). However, the government should take steps to be a member of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, so that Bangladesh can place absolute claims to its products.

4.6 Protection against Unfair Competition

Protection against unfair competition has been recognized as forming part of industrial property protection for almost a century and in 1900, at the Brussels Diplomatic Conference for the Revision of the Paris Convention, this recognition was first manifested (WIPO, 2004: 130). The Paris Convention identified certain acts as acts of unfair competition in relation to industrial property: (a) all acts of such a nature as to create confusion with the establishment; (b) the goods or the industrial or commercial activities of a competitor, false allegations in the course of trade of such a nature as to discredit the establishment, the goods or the industrial or commercial activities of a competitor; and (c) indications or allegations, the use of which in the course of trade are liable to mislead the public as to the characteristics of certain goods (WIPO, 2004: 130). The Paris Convention requires its member countries to provide protection of industrial property against unfair competition that is contrary to honest practices in industry or commerce (Article 10bis). The Convention further provides for the obligation to ensure appropriate legal remedies (Article 10ter.1). Besides, the Paris Convention contains several provisions relevant to protection against acts of unfair competition in a broader sense, especially those concerning trademarks and trade names.

In June, 2012 the Bangladesh Parliament passed the Competition Act, 2012 introducing competition law in Bangladesh. The purpose of the Act is to prevent, control and eradicate collusion, monopoly and oligopoly, abuse of dominant position in the market, anti-competitive practices and to encourage and ensure competitive business environment to promote economic development of Bangladesh. The Act shall apply to all business organizations that are engaged in the business of buying and selling, manufacture, supply, distribution and storage of any product or service (section 3). The Act prohibits strictly anti-competitive agreements and enumerates in details the acts to be considered anti-competitive (section 15). It also provides provisions prohibiting abuses of a dominant position that has also been defied (section 16). Besides, combination i.e. formation of any syndicate to adversely affects any competition has been prohibited by the Act (section 21). Under the Act the government shall establish the Bangladesh Competition Commission for attaining the objectives of the Act (sections 5, 7 and 8). The Commission shall have the power to investigate into any matter regarding an anti-competitive agreement or using of dominant position hampering a healthy competition (section 18). If anyone contravenes any one of the provisions of the Act, he shall be responsible for commission of an offence under the Act and shall be triable by a criminal court proper jurisdiction upon written complaint filed by

the Competition Commission (sections 24 and 25). Thus, the adoption of this new Act is undoubtedly an important step towards maintaining the international standard set by the Paris Convention.

5. Concluding Remarks

From the discussion aforementioned it is apparent that protection for IPRs in different international treaties is manifold and quite effective, but it needs to be kept in mind that if all the countries are not genial in implementing the same at national level through individual domestic legal regime, all the efforts at the international level will stand futile. On the other hand, it is also well documented that a developing country like Bangladesh is generally lenient regarding strong protection of IPRs notwithstanding the benefits and privileges of the same. Though the lack of IP protection historically has not always prevented foreign direct investments (FDI), the growing importance of IP protection is likely to influence investment in the future (Pfeil, 1999: 20). Developing countries with stronger IPRs regimes are in a better position to attract knowledge-related FDI flows (Maskus, 1998: 119). Besides, countries that increase IP protections can stimulate economic and technological development faster than comparative countries without strong IP regimes (Maskus, 2001: 459). However, enacting strong IP protections may initially slow a growing economy, as has been feared by many developing countries, but it is also evidently anticipated that over the long run it can produce a stronger, more robust economy (e.g. China). Besides, in this golden era of scientific and technological development, a functioning IPR system can stimulate domestic innovation, and as stated earlier, can significantly attract FDI which, in turn, can be a conduit for technology acquisition and economic development (Evenson, 2001: 188). Hence countries like Singapore, which implemented stringent IP protection systems, experienced a rising influx of foreign investment shortly after improving their IP enforcement (Homere, 2004: 284). Malaysia and Indonesia also leveraged IP protection in order to attract foreign investment and promote economic growth (Homere, 2004: 284). So Bangladesh should not lag behind in protecting IPRs effectively at the national level. It is praiseworthy that Bangladesh has reflected its strong will and future vision for the protection of IPRs in its initiatives to update prevalent domestic laws and most importantly, to introduce new laws on contemporary IPRs issues. This signifies that Bangladesh is determined to develop an effective legal regime for the better protection of IPRs and is not just inclining to some other developing countries against doing as such. It is better late and slow than never and hegemonic.

End Notes

¹ The potential breadth of the issue, at least in relation to economic development, can be appreciated by recognizing that patent rights in genetically engineered mice can be granted. .

² The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization signed in Marrakesh, Morocco, on 15 April, 1994.

³ Zigic (1998) contains interesting models in which strategic considerations by northern firms can provide incentives for the South to increase IPRs. Also see, Zigic (2000).

⁴ It was a special agreement concluded in Washington, DC, USA for international cooperation in the field of patents under the Paris Convention and was open only to states which are already party to the Paris Convention.

⁵ The requirement implies that an applicant should disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art.

⁶ A compulsory license is a license generally granted by a government, with or without the consent of the right owner, which permits a third party (a company, an organization, a government) other than the original owner of the rights to use a patent.

⁷ Article 1(1) of the WCT provides that "This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention." Article 1(4) of the Treaty establishes a further guarantee for fullest possible respect of the Berne Convention.

⁸ WPPT provides for protection of performing artists in audio contexts (not audiovisual performers), and also phonogram producers.

⁹ The scope of this safeguard clause differs from the parallel provision in the TRIPS Agreement. The TRIPS safeguard clause also has importance from the viewpoint of at least one article of the Berne Convention which contains substantive provisions — namely Article 6bis on moral rights — since that article is not included by reference in the TRIPS Agreement.

¹⁰ Apart from such rights an owner of a copyright has a right to grant license to any other person according to section 48 of the Act. Besides, the Copyright Board may also take measures to grant compulsory license under provisions as provided in sections 50 and 51 of the Act.

¹¹ A detailed list of different offences is provided in Chapter XV of the Copyright Act, 2000.

¹² The Madrid Agreement establishes a Special Union "consisting of those countries which have ratified or acceded to" the treaty.

¹³ For example, Madrid Protocol allows an application for international registration to be based upon a pending trademark application filed in the applicant's country of origin. Also, if the national application on which the international registration is based is refused, withdrawn or cancelled, the international registration may be converted into national applications without losing the original filing date or priority.

¹⁴ The classification entered into force on April 8, 1961 and was revised in Stockholm in 1967 and in Geneva in 1977, and was amended in 1979.

¹⁵ See, *Sunil Kumar Das Vs Canon Kabushiki Kaisha and Another*, 57 DLR, 2005, p. 93.

¹⁶ Action of passing off has been held by Abu Sayeed Ahammed, J. in the case of *Shah Quat Haider vs. M. Al-Amin* [1987 BLD (AD), p. 130] to be deception of possibility of deception. He further held, "If there is similarity between two names which is likely to create confusion in the minds of public that while they are doing business with one, they are in fact doing business with the other, then this comes within the ambit of passing off.

¹⁷ See for details 'Information about Trademarks in Bangladesh', available at <http://www.patentexpress.com/patents/international_country.aspx?cn=bangladesh> (last accessed on 01.06.2014)

¹⁸ 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.

¹⁹ See, *Sunil Kumar Das Vs Canon Kabushiki Kaisha and Another*, 57 DLR, 2005, pp. 93-100.

²⁰ The IPIC Treaty was adopted in 1989 at Washington, D.C. in a diplomatic conference. However, the Treaty is currently not in force, but was partially integrated to the TRIPS Agreement.

²¹ The exceptions include: (a) those who have already used geographical indications of wines and spirits for at least 10 years; (b) acquired rights on trademarks already "applied for or registered in good faith" or to marks "acquired through use in good faith"; and (c) geographical indications that have become generic or customary terms in member countries.

¹² A deceptive indication of source can be the true name of the place where the good originates from, but nevertheless confusing the purchaser in respect to the true origin and quality of the good.

²³ Only regional appellations concerning the source of products of the vine are excluded from the reservation inherent in the provision.

²⁴ Article 2(1) of the Lisbon Agreement defines appellations of origin as “the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographic environment, including natural and human factors”.

²⁵ This system can only be used by those countries that protect geographical indications via a certification trademark regime and do not have specific (*sui generis*) rules on the protection of geographical indications.

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