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The Issue of Property Rights in International Trade: Evidence from Case Analysis of South Korea and Bangladesh

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Abstract

Secure property right is a necessary condition for economic prosperity of a country. It affects an economy in various ways one of which is the international trade. Country with high risk of right infringement cannot attract entrepreneurs to invest in that economy. The resulting decline in production hampers international trade. Lax enforcement of rights can ensue from various different sources including lack of sufficient rules and laws and also court's view in explaining these laws. The paper first, describes laws regulating intellectual property rights in Bangladesh and then analyses cases to show judicial interpretation of some laws. It then compares between South Korea and Bangladesh in respect of these two elements to figure out what is lacking in Bangladesh in protecting property rights. The paper finds that Bangladesh is lagging far behind than South Korea in terms of providing sufficient infrastructure to protect property rights. However, courts' view on the scope of some intellectual property rights is similar to a great extent in both countries, which helps to conclude that Bangladesh should concentrate on increasing infrastructure to reap the benefits of secure property rights.

1.0 Introduction

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The interdependence between and across countries is skyrocketing with the passage of time due to the resurgence of globalization the pace of which has further accelerated by the leapfrog development of technology. Penetration of technology in almost every sphere of economic activities has made international trade more dynamic and sophisticated. At the same time it has transformed cross border trade into an essential partner of economic development of countries. This has a great implication for the issue of property rights. For instance, producer of a technology or product requires assurance that the technology produced or transferred to other countries is protected from unauthorized reproduction. Thus, with the increased cross boarders trade and activities, the importance of trade-related aspects of intellectual property rights (TRIPs) including patent, trademark, and copyright has received utmost attention from all over the world. Countries that can provide enforceable assurance of protecting TRIPs are likely to experience increased trade with other countries and the vice versa.

The effect of intellectual property rights (IPRs) on international trade is well documented in the literature (see for example, Falvey et al 2009, and Stefanadis 2010). The analysis moreover, encompasses a wide range of countries as well as different points in time. For instance, Schneider (2004) analyzes a panel data of 47 developed and developing countries and concludes that protection of IPRs affects the innovation even though the influence is more significant in developed countries than developing countries. Taylor (1994) argues that failure to provide patent protection for foreign made innovation forces implies that innovators employ less than the best research technologies, reduces aggregate research and development activities worldwide and thereby reduce international trade. Similarly, Rafiquzzaman (2002) finds that Canadians tend to export more to those countries where there property rights are well guarded. Focusing on ASEAN countries Doanh (2007) concludes that stronger protection of property rights in ASEAN countries and the rest of the world increases trade in ASEAN and rest of the world countries. In the same token, Maskus and Penubarti (1995) find that increasing patent protection has a positive impact on bilateral manufacturing imports into both small and large developing economies. This postulates that there is a strong positive correlation between strong IPRs and international trade.

Developing countries are in need of various sophisticated technology from the developed world so that they can catch up industrial countries. Usually technology is induced through licensing of industrial property rights. Thus, license agreement needs to be strongly enforced or in other words strong protection of IPR is crucial for international trade (Mokyr, 2009). Albeit, in the

developing countries it is obvious that IPR is less protected (Benko 1987, and Helpman 1993, Lewis 2008) which may hinder prosperous international trade in these economies. Lax protection of IPR can be attributed along with other factors to insufficient legal infrastructure (UNCTAD, 2007) and inadequate knowledge to duly interpret TRIPs and other related laws (Arup, 2008). This paper first describes the state of international trade in Bangladesh linking it to poor protection of property rights of the country. Secondly, it aims at figuring out the reason for poor protection of rights concentrating on the aforementioned two aspects – laws regulating IPR and interpretation of these laws by the judiciary.

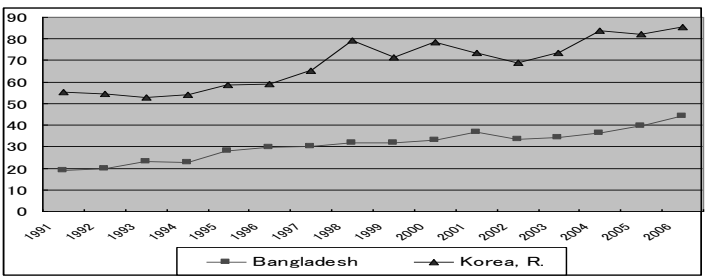
To make the analysis clear, a comparative study is done taking the example of South Korea. The choice about country is not arbitrary, however. The absolute GDP base of South Korea and Bangladesh were very similar if not at parity in 1950s. For example GNP per capita of South Korea in 1963 was US $143 (at current price) while for Bangladesh the average GDP per capita from 1961 to 1970 was US $163 (at 1985 price) (Kuznets, 1994). Over the years, the former has heralded its emergence as a prosperous nation joining the club of world rich, OECD in 1996. Of course there are several reasons to be attributed for this prosperity. External trade contributed substantially to the development of the country (Amsden, 1989). Strong protection of property rights has helped Korea to establish a confidence to both local and overseas entrepreneurs that their trade secrets are safe in the country and are not subject to unauthorized confiscation especially after the establishment of constitutional court. This is manifested by the fact that Korea has improved tremendously its property rights index over the last few years (Gwartney et al, 2010). This provides with a basic ground to analyze the available laws and other related infrastructure in Bangladesh and then rightly compare these situations to South Korea. We further illustrate legal cases from both countries to examine if there are any differences in views interpreting laws relating to IPRs.

The structure of this paper is: section two briefly describes the state of trade and associated barriers in Bangladesh and Korea. Section three takes into account the general structure of intellectual property rights, related laws and regulations and their administrative bodies in these two countries. Section four enumerates legal lawsuit concerning the stated issues one from each country. We then summarize the findings from the verdicts of these lawsuits for a discussion. A brief concision is drawn finally in section five.

2.0 Trade and Trade Barriers in Bangladesh and Korea

Figure 1 shows the trade turnover (export + import) of Bangladesh and Korea from 1991 to 2006[1]. It is clear from the figure that the overall trade in Bangladesh is less than half of the Korea over the study period. Both are rising as a percentage of GDP. Since GDP growth rate in Korea has been higher than that of Bangladesh over the years, it is observable that in an absolute term international trade in Korea has been increasing at a faster rate than Bangladesh. As late as 2006, international trade in Korea accounted for 85 percent of GDP which is only 44 percent in Bangladesh, merely a half. This proves that Bangladesh is still far behind than Korea in terms of international trade flow.

Figure 1: Trade as a Percentage of GDP



Source: World Development Indicators (World Bank)

Various reasons have been identified for depressed international trade in some countries and flourishing trading sector in others. They are classified as tariff and non-tariff barriers. Tariff barriers include various kinds of quantitative restrictions on imports of commodities into a country or region. This is one of the most widely used and oldest forms of government intervention in international trade (Harrigan 1993, Hummels 1999). Non-tariff barriers can take various forms such as domestic content regulations which typically specify the percentage of a product's total value that must be produced domestically, license requirements, quota restrictions, other technical rules including special requirements about packaging, product definitions, labeling etc. Lee and Swagel, (1997) show that tariffs are used in conjunction with non-tariff barriers rather than as a substitute means of protection. There are however, other informal trade barriers which include transport costs, cumbersome customs practices, bureaucracy, regulations, and corruption. These barriers are relevant because they hinder trade (Porto, 2005).

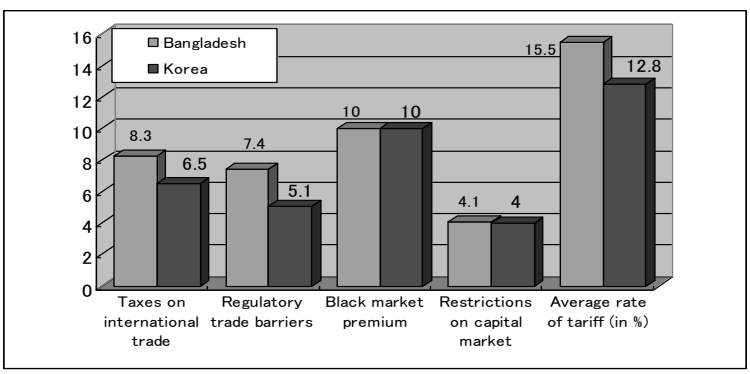
It is however, difficult to compare between countries in terms of non-tariff barriers because they differ widely across countries. Thus, in our present

[1] A point to note here is that trade-turnover does not reflect trade related solely to intellectual property. Since the segregation is very blurred we have taken here total trade of both countries for comparison of intensity of trade

case we can compare only tariff-barriers to trade in Bangladesh and Korea to examine the magnitude of these barriers. [2] This implies that trading is not barred by distorted exchange rate. Though there are restrictions on capital flight, the magnitude does not differ much between Bangladesh and Korea. However, they differ in terms of tax and egulatory trade barriers. Since 1990, Bangladesh has gradually abolished a restrictive trade regime and took further steps to dismantle trade barriers.

These steps included reducing tariffs and eliminating some quantitative restrictions on imports (Daly et al. 2001). In 2005, average tariff rate in Bangladesh was 12.8 percent, and in Korea 15.5 percent. This is the basic difference between Bangladesh and Korea to explain a wide level of international trade difference. Even a layman mind would say, this is sheer a marginal difference of tariff rate which cannot explain why trade intensity in Bangladesh is so poor while it is so high in Korea. There are other reasons that can explain this gap, one of which is strong protection of property rights.

Figure 2: Liberalization Index, 2004 (10-1= from highest to lowest rank, except tariff rate)



Source: Free the World (2006), Trade Policy Review (WTO)

3.0 The Scenario of IPR protection in Bangladesh and Korea

The link between trade and IPRs is important and there are many ways in which IPRs can affect international trade flows. In general, it seems to appear that protection of intellectual property like patent right affects the growth of a country through inducements to innovation. Helpman (1993) argues that returns to innovation could be influenced by variations in international patent

[2] Black market premium is the difference between official exchange rate and parallel black market rate

laws, with a primary channel being decisions by firms to trade in different markets. From this vantage point, it can be said that patent regimes could be an additional factor in the relationship between trade and growth. For instance, a firm may see the opportunity to export its patented products profitably to a foreign country. If potential pirates can diminish the profitability of the firm's activity in that market because of a weak IPRs regime, the firm would be barred to export in the future. In this sense, it may be the case that in a country where pirating is an usual phenomenon, a company like Microsoft may end up with selling just a copy of its particular software from which pirates would feed the market demand just copying from it. Thus, strengthening a country's patent regime would tend to increase imports as foreign firms would face increasing net demand for their products reflecting the displacement of pirates. This is called 'market expansion' effect (Maskus and Penubarti, 1995). In contrast, a firm may choose to reduce its sales in a foreign market as a response to stronger IPRs protection because of its greater 'market power' in an imitation-safe environment. Despite the fact that the effects of market-expansion and market-power remain ambiguous, Maskus and Penubarti (1995) however, propose that the benefit for trade of market expansion effect is likely to outweigh the market power effect. They state

This ambiguity exists in all markets. It seems probable, however, that the market-expansion effect would tend to be more dominant in larger countries with highly competitive local imitative firms while the market-power effect would tend to be stronger in smaller countries with limited capacity for imitation.

There are few insights to be gained from this postulation which would have important implications for our analysis to the case of Bangladesh and Korea. Market expansion effect precisely means increase in foreign export and thereby trade to an economy if it is large in terms of demand as well as local imitators are competitive. In this sense, we can roughly posit Korea as a market expansion case for foreign exporters. However, it is hard to find many cases relating to market power effect because a smaller country can rarely stimulate foreign product's demand substantially. Thus, the benefit to trade by the enactment and enforcement of IPR is pronounced.

3.1 IPR related Laws and Infrastructure in Bangladesh

Bangladesh is still lagging behind to industrial and developing countries in terms of protecting intellectual property rights. As a result, the country is losing

opportunity offered by the surge of technological development. In Bangladesh, the Industrial Property Rights covering Patents and Industrial Designs and Trademarks are protected by the Department of Patents, Designs and Trademarks of the Ministry of Industry. The origin of intellectual property right in Bangladesh can be traced back to British India. Until 1914, there was no statutory law on copyright in India. The British, who ruled the Indian subcontinent from 1757 to 1947, imported the English Copyright Act 1911 and promulgated it for India in 1912. In July 2000, Bangladesh passed new copyright legislation, called "Copyright Law 2000". Under the Copyrights Act, creators and authors of literary, dramatic, musical, and artistic and cinematography works, records and broadcasts are protected. Books, gramophone records and cassettes etc. are kept within the purview of copyright law. The Patent and design, however, is governed by the original Patent and Design Act 1911 and Patent and Design Rules 1933. Protection of an invention is secured by obtaining a patent for 16 years extendable to another 10 years. But protection of a new and original Design is secured by the registration of design for 5 years extendable for another two terms of 5 years each

The trademark wing of the Ministry of Industry functions as an enforcing body of the Trademark Act, 1940. The department receives around 7,000 trademark applications every year. A draft Trademarks Act, 2005 has been prepared by the Bangladesh Law Commission keeping it in conformity with the requirements of the TRIPS Agreement but is not yet officially promulgated. Department of Patents, Designs & Trademarks do not have any effective trademark and patent examination, search and information facilities. According to the official statistics, on an average 350 patent applications and around 900 design applications per year are filed to the Department of Patents, Designs and Trademarks. About 90 percent of the Patent applications and 5 percent of the design applications are originated from foreign countries.

As part of International Agreement, Bangladesh is a signatory to the World Intellectual Property Organization (WIPO) since February 11, 1985. On March 3, 1991 Bangladesh acceded to Paris Convention relating to Industrial Property Rights administered by WIPO. Under the Paris Convention, member countries may claim priority date in Bangladesh on the basis of their Patents, Designs and Trademarks filed in any member countries. Bangladesh is one of the members of the World Trade Organization (WTO) which administers among other agreements, the agreements made under Uruguay Round and the TRIPS Agreement. Membership of Bangladesh to Patent Cooperation Treaty (PCT) is under consideration of the Government.

Table 1: Types of Intellectual Property Protection in Bangladesh

Type of IP	Law	Enforcement Authority
Patent	Patent and Design Act, 1911	Department of Patents, Designs, and Trademarks (Ministry of Industry)
Industrial Design	Patent and Design Act, 1911	
Trademark	The Trademark Act, 1940	
Copyright	The Copyright Act, 2000	Copyright Office (Ministry of Cultural Affairs)

Litigations for infringement of patent rights are instituted before the District Court. If in a suit for infringement of a patent and a counter claim for revocation of the patent is made, the suit is transferred to the High Court. Suits for infringement of industrial designs are also instituted before the District Court. Proprietor of a registered design may take action against any person, who, without license or consent applies the registered designs or an obvious or fraudulent imitation thereof to any article in any class of goods to which the design is registered, imports or knowingly publishes or exposes for sale such article.

Undoubtedly, the laws and regulations for protecting intellectual property rights are not sufficient. Most of them are obsolete formulating almost a century ago. Needless to say, technology at that time was not so much an integral part of life as it is today. Moreover the advancement is taking place at leaps and bounds making rules obsolete even designed merely a decade ago. In this sense, Bangladesh is lacking time-fitting laws to effectively protect IPRs.

Moreover, the laws are not properly enforced. International Intellectual Property Alliance (IIPA), which is a private sector coalition to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials, recommended Bangladesh to be kept in the US watch list for the past several consecutive years. IIPA states regarding those countries fall into the similar categories

Countries still need to adopt and implement legislation or improve existing measures to combat pirate optical disc production, including Bangladesh … which have not made sufficient progress in this area. The United States continues to urge its trading partners who face pirate optical media production within their borders to pass effective legislation and aggressively enforce existing laws and regulations.

The report has identified several areas on which pirates are rampant. For instance, it finds that there are currently six optical disc factories in Bangladesh. Their production capacity far exceeds any rational legitimate demand. The industry continues to see exports to India and perhaps Europe, as well as in the

local market saturated with pirate product. The same conditions apply to other TRIPs but due to data scarcity a precise estimation cannot be made. IIPA further shows that the loss due to piracy in 2006 was as high US $40 million merely from records and music, which is undoubtedly a substantial amount for a country like Bangladesh. In the same year the loss from books amounted to US $8 million. Loss from other sectors is not available; however, the table gives us a hint about the magnitude of total loss due to piracy and infringement of TRIP.

An interesting fact that can be observed from table 2 is that in Bangladesh application for industrial property right by non-residents is higher substantially than applications submitted by residents. This is obvious due to the fact that research and innovation in Bangladesh is very trivial. The table further shows that in 2003, as many as 7425 applications were filed for trademark by non-residents. Surprisingly, only 195 of them were duly granted the trademark which is only 2.6 percent of the total applications filed. It means that if Bangladesh can properly manage the registering process within the relevant timeframe, influx of foreign firms into Bangladesh with their IP will increase to a greater extent.

Table 2: Industrial Property Statistics (application filed or registered for 2003)

		Patent	Trademark (2005)	Industrial design
Applied by	Residents	58	-	680
	Non-residents	260	7425	10
Granted to	Resident	14	24	588
	Non-Resident	208	195	

Source: WIPO, 2007

Various reasons can be figured out for such a malaise performance of granting trademarks to applicants. First, there is no separate autonomous
body for administering the office for trademark. It is under the direct auspices of the Ministry of Industry. It takes a long time to review the feasibility whether a trademark is eligible to be registered. Due to this lack of autonomous administration, the office has not yet coped with the challenge coming from the complex nature of trademark. In this sense, it can be argued that lack of intellectual property related infrastructure is one of the crucial reasons of hampering international trade and investment in Bangladesh.

3.2 IPR Related Laws and Infrastructure in Korea

Like other countries, Korea has industrial property right laws such Patent Act, Utility Model Act, The Design Act, and the Trade Mark Act. The aim of these acts is to encourage, protect and utilize inventions, thereby improving and developing technology, and to contribute to the development of industry. The first Patent Act was promulgated by the United States military administration in 1946 to deal with matters involving with patents, utility models, industrial design and trademarks. Under the auspices of this office, the Trade Mark Law was promulgated on November 28, 1949, the Patent Act and the Design law on December 31, 1961. In 1977, the Bureau gained independence from the Ministry of Trade, Industry, and Energy, and took the name of the "Office of Patent Administration" which was further renamed "Korean Industrial Property Office". The office revised the Copyright Act in 1986 to modernize and streamline the IPR protection on Korea.

Korea is the member of many international conventions and pacts that are aiming at protecting IPR worldwide and make the world a level playing field. For instance, it joined WIPO convention in 1979, Paris Convention in 1980, Berne Convention in 1996, Geneva Convention in 1987, and also WTO member and signatory of TRIPs agreement. For Korea, the gain from copyright based industry accounted for 6.16 percent of the total GDP in 2000 (Jong, 2005). Major contribution comes from core copyright and copyright distribution which shared 2.24 and 2.09 percent of GDP respectively in 2000. This implies that Korea has a great potentiality to gain from both local and foreign entrepreneurs if intellectual property right is protected well.

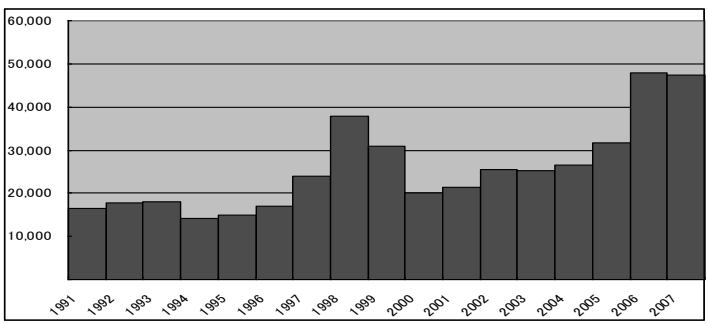
Table 3: Types of Intellectual Property Protection in Korea Source: KIPO

Types of IP	Law	Enforcing Authority
Patents	Patent Act	Korea Intellectual Property Office
Utility Models	Utility Model Act	
Designs	Industrial Model Protection Act	
Unfair competition prevention and trade secret protection	Unfair competition prevention and trade secret protection Act 1991	
Semiconductor Integrated Circuit Layout rights	Semiconductor Integrated Circuit Layout Design Act	
Trademarks	Trademark Act	
Copyright	Copyright Act	

Sound records, video products and game software	Sound Records, Video Products and Game Software Act	Ministry of Culture, Sports and Tourisms
Computer Programs	Computer Programs Protection Act	
New Breeds of Plants	Seed Industry Act	Ministry of Food, Agriculture, Forestry and Fisheries
Customs Clearance regulations on counterfeit goods	Custom Act	Korean Customs Service

Figure 3 shows that the registration of IP by foreign firms in Korea has been rising overwhelmingly since 1990. In the earlier period, foreign firms' registration of trademarks and patents was almost two thirds of the total number of registration. Even as late as 1997, patents registered by foreign firms accounted for half of the total number of patent registered in that particular year in Korea. Among foreign firms, Japan alone constitutes almost half of the intellectual property registered in Korea in 2007. According to the estimation of Korea Intellectual Property Office (KIPO) Japanese firms registered 17,275 patents, 1,558 designs, 2,428 trademarks, and 12 utility models in 2007. Japan is followed by the United States. In 2007, US owned firms registered a total of 10,857 IP of which 6,683 was patents. Korean firms surpassed the foreign firms for patent registration in Korea in 1996. Since then, the patent registration by Korean firms is increasing tremendously. As late as 2007, they comprised almost three fourth of patent registration in Korea. The same trend is followed in the case of trademark. Since the mid-1990, Korean firms have been constituted almost two thirds of the total number of trade mark registration in Korea which reached to four-fifth in 2007. This implies that in Korea intellectual property relate activities are increasing significantly combined by domestic and foreign firms. This can be attributed to a larger part to strong protection of IPR in Korea by signing various memorandums and becoming a member country of several important conventions.

Figure 3: Registration of IP (Patent, Utility, Design, Trademark) by Foreign Companies.



Source: KIPO (www.kipo.go.kr)

A comparison between Korea and Bangladesh in the lens of laws and related infrastructure postulates that Bangladesh is definitely far away from Korea. This is one of the fundamental reasons for depressed international trade in Bangladesh. The country has not yet been able to formulate state-of-the art laws to properly safeguard intellectual property for both foreign and domestic entrepreneurs.

In the following section we illustrate one legal case from each country related to copyright infringement to observe the judges view concerning the meaning and scope of intellectual property in both countries, whether these two countries differ in respect of the fundamental notion of intellectual property.

4.0 Analysis of Cases

4.1 *Bally Schutrabriken Ag. Switzerland vs. Hosnara Begume*[3]

Background Information

Bally Schutrabirken Ag, the plaintiff, is a Switzerland based footwear company has been in business since 1851 operating in more than 100 countries except Bangladesh. Hosnara Begume, the defendant, filed an application no. 15884 for registration of the trade mark "BALLY" shoes operating from Dhaka, the capital of Bangladesh. When the Trademark was advertised the plaintiff filed opposition on the ground that by use and registration of the said trademark in respect of shoes and footwear in the name of the plaintiff, the trademark BALLY has become the property of the plaintiff. Thus, the use of world famous trademark by the applicant will create confusion and deception in the marks. Thus, the plaintiff instituted the suit to safeguard its rights from infringement.

The Verdict

The registrar of the trademark office, where the plaintiff filed objection first, has rejected the objection on the plea that registration of the mark will not create confusion or deception in the market as there was no user of the same in Bangladesh. The plaintiff then appealed to the appellate division of the high court. The appellate division argued that there is no illegality found in the impugned judgment and order passed by the Registrar of trademark. Hence there is no room to interfere with the impugned judgment; the appeal is thus, dismissed.

Reasons and facts with the verdict

The plaintiff raised the issue that allowing the defendant to register its trademark as "BALLLY" would be against section 8(a) of Bangladesh Trademark Act, 1940. Section 8 of the said act states

No trade mark nor part of a trade mark shall be registered which consists of, or contains, any scandalous design, or any matter the use of which would-

> (a) by reason of its being likely to deceive or to cause confusion or otherwise, be disentitled to protection in a Court of justice

[3] Dhaka (Bangladesh) Law Reports, Volume 52 (2000), High Court Division, Statutory Original Jurisdiction

> The plaintiff reasoned that it is the internationally reputed manufacturer of shoes and footwear under the trademark "BALLY" constituting part of their company name. This trademark has been registered more than 100 countries of the world. By use and registration of the said trademark in respect of shoes and footwear in that vast array of countries, the plaintiff has owned the right on its trademark "BALLY". Thus, the use of the world famous trademark by another applicant for the same goods would definitely violate section 8(a) of the Trademark Act 1940 which is equivalent to piracy.

The registrar of the trade mark reasoned that there are two ways to gain rights of property in trademark: either by registration of the mark or by use of the mark in connection with the goods applied for. However, the plaintiff's trademark had no use in Bangladesh at any point of time nor the same was registered in Bangladesh under any Act and as such there is no question of deception and confusion over the mark. The registrar further pointed out that the mark was registered Pakistan but was not done so after the independence of Bangladesh. As such it did not create a situation whereby a trade could be precluded from adopting and using the mark in this country. The question is of constant use. According to the rule even a registered trademark can be revoked for non use of the mark for a continuous period of 5 years. From this perspective, there is no merit of the objection filed by the plaintiff.

The High Court while affirmed the registrar decision added some additional points. The court argued that when a mark is opposed for registration by a foreign company on the ground that the mark is distinctive of its goods the registration of that mark and sale of such goods with that mark in foreign countries are not relevant. When there is no user of the mark in the local market it is immaterial whether to know about the foreign mark. Registration of plaintiff's mark in foreign countries without the user of the same is of no relevance.

4.2 ***The Burton Corporation vs. Kim*** *Dong-cheol*[4]

Origin of the suit

The Plaintiff, Burton Corporations, instituted the suit against the defendant, Kim Dong-cheol, on the ground that the defendant has applied to register a

[4] Supreme Court Decision 99Hu451 delivered on July 9, 2002

trademark in Korea that is owned by the plaintiff which is famous and well-known. The stated action is contrary to public order and morality (Section 7, Paragraph 1, item 4). From this standing, the plaintiff instituted the litigation in the Patent Court against the defendant for possible infringement of intellectual property rights on trademark.

The Verdict

The Patent Court judged whether the stated action falls under Article 7, paragraph 1, item 4 of the Trademark Act which states that

> Notwithstanding the provisions of Article 6, the following trademarks shall be unregistrable trademarks which are contrary to public order or morality

Based on their judgment of relevant facts and information, the Patent Court concluded that if the cited trademark is neither famous nor well-known, applying for trademark registration by imitating the cited trademark for different goods does not in itself fall under aforementioned clause of Trademark Act. Since the cited trademark is famous and well-known in this case means famous and well-known in Korea and thus, falls contrary to public order and morality if the registration is sought for similar or identical goods of the cited trademark. The defendant then appealed to Supreme Court against the earlier decisions and surprisingly, the decision is reversed on the ground that application for registration of a trademark that imitates a cited trademark that is famous and well-known abroad, but not so in Korea does not by itself warrant a conclusion that the registered trademark falls under public order or good morality. The reason for appeal is thus, justified.

Reasons and Issues

Public order and good morals are interpreted by the Patent Court as that imply-

> …fair and reputable commercial practices and international order, and in that sense, includes such fair practices as contemplated in the TA (Trademark Act), the Unfair Competition Prevention and Trade Secret Protection Act, the Copyright Act, and tort laws.

Explaining from these perspectives, the Patent Court held that filing a trademark which primarily imitates an existing trademark that is sufficiently well-known among domestic and foreign consumers is a violation of the public order and good morals. The court further argued that the company has already accumulated valuable intangible assets like goodwill through making continuous efforts to gain consumer recognition. In such a circumstance, imitating a trademark means it is against fair commercial practices under trademark act as well as Unfair Competition Act. The court further viewed that such a proactive may also fall against general order of the society. The court emphasized on such specific point that allowing domestic companies to involve with this practice is likely to discourage them for development of original Korean brand names and trademarks which might be deleterious because it would gradually erode the international competitiveness of Korean products. Moreover, the court was clear to point out that the cited trademark is well known which implies that consumers in foreign countries may be confused to segregate products of the defendant from that of the plaintiff.

The Supreme Court however, interpreted the clause 'public order or morality' in rather a different way. The court viewed that according to Article 7 Paragraph (1) Item 4 of the Trademark Act, the term 'public order or morality' refers

> …to one that, by its composition or use on the designated goods, conveys a meaning or content that is contrary to public order, or the good morals and customs of ordinary citizens. If the cited trademark is neither famous nor well-known, applying for trademark registration by imitating the cited trademark for different goods does not in itself fall under Article 7 Paragraph (1) Item 4 of the TA. The cited trademark's being famous and well-known in this case means being famous and well-known in Korea.

Since the trademark is not famous and well known in Korea, the imitation is not in violation of 'public order and good morals'. At the time of the registration assessment, the cited trademarks were not domestically famous and well-known or even sufficiently known to the extent that domestic consumers recognize the mark as that of the plaintiff. From this perspective, there is no question that registering this trademark in Korea would infringe the trademark which is famous and well known in foreign countries.

4.3 *Summary and Discussion*

There are few insights to be gained from these cases regarding the notion of property rights. Despite there are lot of differences in issues and context, the basic reason of complains is somewhat similar. In the first case, the grounding reason for complaint was that consumers who would buy local 'BALLY' trademark shoes might be confused to segregate the brand from the cited trademark 'BALLY' which is reputed and famous outside Bangladesh. Thus, the issue raised by the plaintiff, was that such a practice is against the good moral and fair business principles which at worse would constitute deception to customers.

The grounding reason of the second case was almost similar. The plaintiff sued against the defendant on the plea that imitation of the plaintiff's trademark which is famous and well-known outside Korea translates into violation of public order and good morals. In the business practice this construes a confusion and deception to customers and also free-ride by the defendant on plaintiff's goodwill which has been built through continuous effort and advertisement.

Facts which the judges considered for verdict are somewhat similar between these two cases. In the first case, both the registrar of trademark and the high court viewed that the cited trademark is famous and well known in foreign countries but not at the domestic market. Thus, there is no scope to deceive customers by registering a trademark in local market similar to the cited trademark. In the second case, the Patent Court of Korea, however, viewed the problem from a different perspective. The court held that a trademark that is famous and well known in this case means it is so irrespective of place. From this perspective, the court invalidated registration of an imitation mark for goods mainly identical or similar to those of the cited trademarks. Contrary to that, the Supreme Court held that registering a trademark similar to the cited mark would cause confusion and deception only if the cited trademark is famous and well known in Korea. If it is neither famous nor well-known, applying for trademark registration by imitating the cited trademark for different goods would not violate the principle of public order and good moral. The court thus, concluded that the reason for appeal is justified.

This implies that courts in both cases have taken a similar view that if the cited trademark is famous and well-known in the local market then imitation of the mark would cause customer's confusion and to some extent

deception. By so doing they have focused on a narrower view instead of taking a broader sense of the fact 'public order or morality'.

We can draw few examples of the similar type of litigation from international experience. For instance, in the case of United Artists Pictures Inc. vs. Pink Panther Beauty Corp[5] the Federal Court of Canada allowed the registration of trade mark 'PINK PANTHER' despite the fact that famous brand PINK PANTHER is owned by United Artists Corporations. The court held that the cited trademark is famous for wares pertaining to hair care which is different from the registered trademark service, beauty parlor. Since the product and services are different there is no reason to believe that consumers would be confused over the trademark. By concluding this, the court apparently elucidated that a brand famous for a specific product is not necessarily mean that it is equally applicable for all products and services so that it causes confusion among customers. The Federal Court of Canada has made this point more pronounced in the case of Matte Inc. v. 3894207 Canada *Inc.*[6] The defendant, 3894207 Canada Inc. applied for registration of "Barbie's" trademark in connection with its small chain of restaurants. Matte Inc. the producer of the famous BARBIE doll, raised objection against the registration on the ground that the "Barbie's" name in relation to restaurants would likely create confusion with BARBIE trade mark. The court did not endorse the reason merely on fame which the court viewed related only to doll, not to chain restaurant. Thus, there is no association between Barbie doll and food.

The insight relevant to our cases is that registration of a mark which is imitation of a cited trademark might be permissible if their business is in different area of products or services. If they are similar, which is in our cases, it is most likely that consumers would be confused; at worse it is equivalent to deception to customers. While the Patent Court of Korea has taken the right view, neither the High Court of Bangladesh, nor the Supreme Court of Korea has taken a view commensurate with international practices on trademark. This is likely to cause disincentive for domestic entrepreneurs towards innovation on the one hand and can block the influx of foreign trade on the other.

5.0 Conclusion

[5] [1998], 80 C.P.R. (3d) 247, Federal Court of Appeal, Canada
[6] [2006] 1 S.C.R. 772, 2006 SCC 22

Obviously Korea and Bangladesh are not in a level position to make an effective comparison. Their level of economic development is different and so their level of international trade. It is for granted that the magnitude of overall international trade in Korea should be higher than Bangladesh because higher per capita income in Korea means higher purchasing power of the people. As a consequence, foreign companies find it attractive to export their products and services. On the other hand, Korea is much developed in technology which means that it is capable of producing goods and services that can be exported to outside countries after meeting local demand. Considering these facts it is understandable that turnover of trade would be higher in Korea than it is in Bangladesh.

Despite these sweeping factors having an impetus on international trade, it is also true that without securing property of both local and foreign entrepreneurs, international trade would not grow expectedly. From this perspective we have argued in this paper that property rights have crucial impacts on international trade. A secure state of property rights provides incentive for productive activities. In this respect, we have described the situation of Bangladesh and Korea in terms laws and infrastructure to protect intellectual property rights.

Our finding shows that that Bangladesh is still far behind to Korea in terms of providing related infrastructure to intellectual property rights. In Bangladesh, laws are obsolete which were formulated many decades or even century before and therefore, cannot cope up with the state of the art technology. As a result, it should review and formulate time-fitting laws to protect intellectual property without further delay. In so doing, Bangladesh can consult with advanced economies like South Korea to understand what other laws related to IPR needs to be formulated. Moreover, there is the need to establish a separate court system to resolve issues related to intellectual property so that entrepreneurs at home and abroad can recourse to the court in the case of right infringement and receive immediate remedy. This will entice particularly foreign companies to register their patent and trademark in Bangladesh which will ultimately positively impact international trade. It is shown that even though there were many applications for trademark registration, only a very few had been registered which might be attributed to lack of infrastructure such as specialized human resource to properly scrutinize the relevant facts and information. Training for human recourses who are working in these offices is to be given priority to quicken the process. Moreover, Bangladesh has to enter into as many international treaty regarding intellectual property rights as possible keeping in mind the national interest.

This will motivate the country to be more careful about protecting property rights as we see in the case of Korea. These initiatives nonetheless, will not bring desired result unless public awareness about the benefits of IPR protection is not increased.

This is however, a part of the problem. Having all laws regulating IPR does not mean enforcement is perfect. Proper interpretation of the laws and facts is also a critical part of the enforcement. In this regard, we have analyzed legal cases from Bangladesh and Korea to show how courts in both countries interpret rights in certain circumstances. We find that there are great similarities between these two countries in terms of viewing property rights on trademark. Based on this we can conclude that Bangladesh has to improve its legal infrastructure and enforcement in an emergency basis. However, our conclusion suffers from a limitation which is that only a single case from each country has been analyzed. So, it would be instructive to include more cases in the analysis so that other aspects of interpretation come into the light. This issue remains as our future research agenda. Despite this criticism, the conclusion remains valid because of the fact that verdict of certain lawsuits works as reference for future dispute resolution.

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