

Intellectual Property Rights Enforcement in Bangladesh: An Overview and Determination of the Extent of Its Becoming TRIPS-Compliant

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Introduction

Twenty first century can be considered as the century of information technology and genetic science. Advancement in nanotechnology, information technology and clean energy promotes economic growth and improves living standards worldwide. An increasing share of global economic output is generated by services, many of which depend on new and evolving technologies. Inventors, creators, entrepreneurs', firms and other risk-takers play the key role in the progress of science and technology, which later on contributes to the economic development. Protection of intellectual property rights is necessary to ensure that the technological advances and economic development resulted out of the efforts of the creative people should be rewarded and valued.

Counterfeit products-counterfeit medicines, toothpaste or auto parts-may put the lives of consumers at risk. Intellectual Property Rights (IPRs) are legal mechanisms to protect the rights of inventors, and the interest of consumers. IPRs not only protect the rights of the creative people and big firms, local entrepreneurs' and artists also enjoy the advantage of protection. A strong system of IP protection can establish an environment where innovative industries thrive to promote economic development. It also ensures that consumers are getting genuine goods and services.

Though the multinational corporations and industrialized countries were active behind the negotiation of the Agreement of Trade Related Aspects of Intellectual Rights (TRIPS), but developing countries started to realize the importance of modern intellectual property (IP) policy and laws when they have become manufacturer of IP products and export those to the whole of the world. As a member of the World Trade Organization (WTO) Bangladesh has to make its intellectual property (IP) regime TRIPS-compliant by 2013. Government has enacted new laws and taken a number of steps to make its IP regime TRIPS-compliant.

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Bangladesh has enacted the Copyright Act in 2000, and the Trademarks Act in 2009 but has failed to enforce these laws effectively. Patents and designs are still regulated by the Patents and Designs Act, 1911. Bangladesh has no specialized courts to deal with disputes relating to intellectual property. The judges and lawyers are not well equipped with the knowledge of intellectual property issues. Police and other local government agencies are not either enough in number or sufficiently conscious of their big responsibility to protect IPRs. In order to exploit its potentials in the field of science and technology, Bangladesh has to formulate modern IP policy and laws. For that purpose it has to develop highest level of expertise to use the TRIPS flexibilities.

In this paper a brief overview of the TRIPS Agreement has been made. How the developing countries are making their IP-regime modern *vis-a-vis* TRIPS-complaint that has been briefly discussed here. Secondly, the paper sketches how the intellectual property rights are enforced in Bangladesh with reference to the Copyright Act, 2000, the Trademarks Act, 2009, and the Patents and Designs Act, 1911. Thirdly, the paper has examined to what extent the IPRs enforcement mechanism in Bangladesh is TRIPS-compliant. Finally, the paper has put some recommendations as to how Bangladesh can fulfill its WTO obligations by utilizing the TRIPS flexibilities.

Background of the TRIPS Agreement

After attaining a higher level of technological and industrial capability, the industrialized countries incorporated higher standards of IPRs enforcement into their legislation. They, then, pressurized the developing countries to accept and universalized the higher standards of IPRs protection through the successful negotiation of the TRIPS Agreement. During the 1980s technological leadership of the US firms was eroded due to the catching-up process of Japan and Asian Tigers which also caused huge US trade deficit. The overseas piracy and counterfeiting activities were conceived to be the major cause of declining American competitiveness.¹

The TRIPS Agreement is alleged to be an instrument of “technological protectionism”, which has made an international division of labor where the developed countries generate and control technology and the developing countries are markets for the goods and services manufactured by their technology.²

¹ Correa, Carlos M. 2000. *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, London and New York: Zed Books Ltd., at pp. 1-6.

² *Ibid.*

In spite of the above mentioned reality it is forcefully argued that industries require IPRs protection to keep their commercial interest and to continue the process of further innovations. It is further submitted that any country, developed, developing or least developed, having creative human capital can produce IP products and export the products to the whole of the world.³ Countries having creative human capital must have a modern IP regime to promote technological development and innovations. In the negotiating stage the developing countries strongly resisted the inclusion of the TRIPS Agreement into the WTO package. But when some developing countries, particularly China and India, became producer and exporter of IP products, they also realized the importance of the enforcement and protection of IPRs.

Brief Overview of the TRIPS Agreement

The TRIPS Agreement, together with the SPS Agreement⁴ and the TBT Agreement⁵, are considered to go far beyond the trade liberalization rules. These agreements endeavor to harmonize national regulations. These are the reasons for which they have ignited more controversy and incurred more implementation problems than other WTO Agreements. On the basis of the previous conventions, the TRIPS Agreement provides for mandatory minimum standards for intellectual property protection and enforcement.⁶

According to the Preamble, the TRIPS Agreement aims-“to reduce distortions and impediments to international trade... taking into account the need to promote effective and adequate protection of intellectual property rights...” The TRIPS Agreement has tried to keep a balance between the interest of the IP right-holders and public interest.⁷ The objectives of the TRIPS Agreement are to “contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social, economic welfare, and to a balance of rights and obligations.”⁸

³ Bhala, Raj. 2008. *International Trade Law: Interdisciplinary Theory and Practice*, Newark: LexisNexis, at p. 1623.

⁴ Agreement on the Application of Sanitary and Phytosanitary Measures, it is commonly known as the SPS Agreement of the WTO.

⁵ Agreement on Technical Barriers to Trade, it is commonly known as the TBT Agreement of the WTO.

⁶ Bossche, Peter V. D. 2008. *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge: Cambridge University Press, at pp. 741, 750

⁷ *Ibid.*, at pp. 743, 744.

⁸ Article 7, the TRIPS Agreement.

The Agreement is not simply about the IP protection, rather it tries to keep a balance between IP protection and the dissemination of knowledge in the developing countries to ensure technological development and economic growth.⁹ Articles 3 and 4 situate at the centre of the TRIPS Agreement. Article 3 provides for national treatment for intellectual protection. A most favored nation (MFN) obligation has been created for such protection under Article 4. MFN obligation means every WTO member is bound to enlarge the most favored nation treatment immediately and unconditionally to all other members. But national treatment and MFN obligation have little value if such treatment affords weak protection. Before the TRIPS Agreement there were many international conventions in the field of cross-border intellectual property protection. The TRIPS Agreement therefore tries to harmonize the international IP protection and strengthens the earlier multilateral accords.¹⁰

If procedural rules, which are required for effective IPRs enforcement, are absent, substantive norms providing minimum standards of protection will be of little utility. One of the inadequacies of the WIPO conventions is the lack of such procedural enforcement obligations. Enforcement of the IP rights is a special feature of the TRIPS Agreement which complements the WIPO conventions and put in place a minimum procedural mechanism to protect IPRs. Part III of the TRIPS Agreement contains the rules on enforcement.¹¹ The Appellate Body has noted the broad coverage of Part III in *US-Section 211 Appropriation Act*.¹²

Article 41 of the TRIPS Agreement has provided for the general obligation with regard to IPRs enforcement. Article 41.1 makes an obligation for the members to incorporate the enforcement procedures into their legal systems to prevent the infringement of the IP rights protected by the TRIPS Agreement. The enforcement procedures, as required by Article 41.1 of the TRIPS Agreement, need to be applied in a way that cannot create any barrier to legitimate trade and also provide safeguard against the abuse of the IP rights. Article 41.2 to 41.4 of the Agreement provides for usual due process requirements.¹³

The enforcement part of the TRIPS Agreement is meticulous and has sensibly recognized the reality of the least developed countries as governments of these countries encounter difficult situation to allocate

⁹ See above note 3, at p. 1623.

¹⁰ *Ibid.*

¹¹ See above note 6, at p. 793.

¹² WT/DS 176/AB/R, DSR 2002:II

¹³ See above note 6, at p. 794.

their scarce resources for law enforcement and other public spending. Article 41.5 of the TRIPS Agreement reads-

It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.¹⁴

Flexibilities and Public Interest Consideration of the TRIPS Agreement

Part I of the TRIPS Agreement contains general provisions and basic principles applicable to all WTO Members. Under Article 1.1 of the TRIPS Agreement the members are obliged to “give effect” to its provisions and are “free to determine the appropriate method” of implementing their obligations within their own legal systems. The members are also not obliged to establish more extensive protection than that provided for in the TRIPS Agreement. In spite of well-reasoned criticisms and limitations of the TRIPS Agreement, these flexibilities of the WTO Agreement are spectacular. As the TRIPS Agreement has provided freedom to the WTO Members in respect of how they will give effect to their TRIPS obligations, they can utilize the flexibilities as important tools to balance the competing public policy goals.¹⁵

Articles 7 and 8 of the TRIPS Agreement are very basic to the interpretation and implementation of IPRs. The objective, according to Article 7 of the TRIPS Agreement, of the IPRs protection is not only to promote “technological innovation”, but also the “transfer and dissemination” of technology, which the developing countries consider themselves to be very important for their technological development.¹⁶

According to Article 8.1, “Members may, in formulating or amending their national laws and regulations, adopt measures necessary... to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement”. Though Article 8.1 requires the members to adhere to a “consistency test”, but any WTO Member can take into its account its public interest when making IP legislation. From general provisions and basic principles as stated in

¹⁴ World Trade Organization. 2008. *The Legal Texts*. Cambridge: Cambridge University Press, at p. 340.

¹⁵ See above note 6, at p. 750.

¹⁶ See above note 1, at pp. 6, 7.

Part-I of the TRIPS Agreement it is clear that the Agreement has provided certain flexibilities for the developing country members. They could use these flexibilities when making new IP laws which would suit their economic and technological policies and their level of development.¹⁷

Enforcement of IPRs in Developing Countries

Intellectual property rights are private rights, nonetheless governments play important role in the enforcement of IPRs. Governments require resources and expertise for enforcement actions. Courts, the law enforcers, the customs and other competent authorities need to be staffed and trained in order to fight IPRs violations.¹⁸

IPRs violation has been extended from traditional industries to high-tech sectors due to the development of digitization and abundance of used manufacturing equipments.¹⁹ Criminal law context of IPRs violation defines counterfeit and piracy as prohibited or contraband activities surrounding illegal production and sale of goods. Possession, importation and exportation of contraband goods are therefore criminal offence.²⁰ Crooked traders counterfeit products to make huge profit by free-riding on the creative efforts and investment of others. Existence of counterfeit products' trade also depends on consumer demand and people's understanding as they think counterfeiting and piracy are innocent infractions. The public authorities and commercial organizations fail to make the people understand about the danger of using counterfeit products and its harmful effects on social welfare.²¹

At national level governments take care of intellectual property regime, which requires the governments: (1) to set a national public policy framework to guide IP laws; (2) to enact and administer IP laws; (3) to adjudicate IP disputes; (4) to raise public awareness for IPRs protection; (5) to carry out international IP obligations; (6) to participate in multilateral, regional and bilateral IP negotiations and organizations; and (7) to negotiate technical assistance, training and capacity-building. Among developing countries, Brazil has taken modern IP policy to ensure economic growth and industrial advancement, whereas India has

¹⁷ *Ibid.*, at pp. 7, 8.

¹⁸ Fink, Carsten, *Mondiale, Group d' Economie and Paris, Sciences Po. 2008. "Enforcing Intellectual Property Rights: An Economic Perspective", ICTSD Programme on Intellectual Property Rights and Sustainable Development.*

¹⁹ *Ibid.*, at p. 7.

²⁰ Blakeney, Michael. 2003. *Guidebook on Enforcement of Intellectual Property Right.* London: University of London, Queen Mary Intellectual Property Research Institute, at pp. 5, 6.

²¹ *Ibid.*, at p. 6.

adopted modern IP Policy to promote the development of science and technology.²²

In the area of IPRs enforcement, a government has to play proactive role. Indonesia established a National Task Force in 2006 to prevent IPRs infringement. The Task Force has been established for: (1) formulation of a national policy to obviate IPRs infringement; (2) reviewing measures to solve strategic problems relating to IP violation; (3) equipping government officials and institutions with specialized training and educating the social people about the value of IPRs protection; (4) developing bilateral, regional, and multilateral cooperation to obviate IPRs infractions. Brazil established an Inter-ministerial Committee Against Piracy in 2001 to coordinate anti-piracy strategies.²³

The government of Philippines has established a strong arrangement for IPRs enforcement. The National Committee for Intellectual Property comprises of the Philippine National Police, National Bureau of Investigation, Optical Media Board, Bureau of Customs, Department of Justice and IP Philippines. Their collaboration has come up with a Web-based IP Case Database. The Philippines, in addition to it, has developed the Public-Private Partnership Council for Intellectual Property Rights (P3CIPR). Peru established a High Level Multi-Sectoral Commission Against Contraband and Piracy which has private sector representatives.²⁴

In most developing countries public consultation on IP issues, and local expert and business community engagement are either absent or underdeveloped. Only a handful of developing countries like India, Brazil and the Philippines have established formal mechanism for public consultation and expert involvement in their IP decision-making. Many developing countries have failed to develop formal mechanism for public and private sector consultations, but there have been frequent consultations with the external donors.²⁵

Recent research and policy studies reveal that developing countries encounter challenges to protect IPRs for weak institutional, technical and financial capacity. IP policies and laws need to be designed and executed to reinforce development in the areas of innovation, public health,

²² Deere, Carolyn. 2009. "The Politics of Reform in Developing Countries", in Melendez-Ortiz, Ricardo and Roffe, Pedro (eds.), *Intellectual Property and Sustainable Development: Development Agendas in a Changing World*. Cheltenham: Edward Elgar Publishing Ltd., at pp. 21-23.

²³ *Ibid.*, at p. 26.

²⁴ *Ibid.*, at p. 27.

²⁵ *Ib.*

education and technology. Coordination among different government agencies and public-private partnership are *sine qua non* to achieve the goals. But developing country governments have failed to develop systematic coordination, engage legislative branches effectively in IP decision-making, and provide stakeholders and experts with efficacious mechanism of consultation.²⁶

IPRs Enforcement System in Bangladesh

In Bangladesh the Department of Patents, Designs, and Trademarks (DPDT) under the Ministry of Industries administers patents, designs, and trademarks and the Ministry of Cultural Affairs administers copyright. The DPDT is a quasi-judicial body and the Registrar of the department acts as tribunal. If any person is aggrieved, s/he can file an appeal to the High Court Division against the decision of the Registrar.²⁷

The Trademarks Act, 2009, the Copyright Act, 2000, and the Patents and Designs Act, 1911 have given certain IPRs to trademark and copyright holder and patentee. If the right-holder seeks civil remedy, s/he has to institute a case in any court not inferior to a Court of District Judge. The above mentioned laws have defined some violations of the rights as crime. Bangladesh Penal Code, 1860, and the Customs Act, 1969 also have declared certain activities as criminal offence.

Any right-holder can institute a criminal case in a Court of Metropolitan Magistrate or Magistrate of the First Class. Any appeal against the order of the Magistrate will lie to the Court of Sessions Judge. In criminal cases police investigates the case and then it will be tried by a criminal court having jurisdiction. Police officers have the authority to launch raids against counterfeit and pirated goods and seize the same. The customs officers also have to ensure that counterfeit and pirated goods are not imported into Bangladesh. IPRs violating goods must be detained, confiscated, destroyed or disposed of in the manner as specified in the law.

Bangladesh has updated its trademark and copyright laws. Though the updated laws have put stronger enforcement mechanism in place, but there are difficulties to enforce the intellectual property rights in reality. As a member of the WTO Bangladesh is under an obligation to make its IP laws TRIPS-compliant within 2013. The WTO²⁸ asked Bangladesh to

²⁶ *Ibid.*, at pp. 30, 31.

²⁷ Rahman, M. Mahbubur. 2011. "Intellectual Property Protection in Bangladesh: An Overview", available at: <http://www.unescap.org/tid/mtg/ip_bang.pdf> last accessed on 9 January, 2011.

²⁸ According to the Report of the WTO Secretariat, successive governments have taken initiatives to make IP laws compliant with the TRIPS agreement. The government of

explain the state of current IP laws and enforcement mechanism. The written submission of government has elaborated the civil, administrative/border, criminal, and provisional remedies available in the laws.²⁹

In case of copyright infringement, the right-holder can file civil suits where s/he can seek injunction and compensation. Existing patent and trademark laws have given power to the court to determine the type and extent of compensatory damages.³⁰ If there is importation of infringing copies into Bangladesh, the right-holder can move to the Registrar of the copyright to ban the importation of the product. When the infringement is proved by a court of law, the police or customs authority can destroy the counterfeit/pirated goods.

Criminal remedies include the imprisonment of infringer, imposition of fine or both, and seizure of infringing goods, products or copies. Right-holders can take resort to criminal proceedings to call the violators to account. If a written complaint is lodged in case of a willful trademark counterfeit or copyright piracy, a case can be initiated by a competent court. There is no specialized enforcement unit to investigate into the violation of IPRs. The police are enjoined to investigate the IPRs violations, but they cannot give sufficient time as they are overburdened. Moreover, they do not have specialized knowledge on IP law.³¹

Enforcement Mechanism under the Trademarks Act, 2009

The Trademarks Act, 2009 provides for civil remedies in case any person has violated the right of a trademark-holder. A suit cannot be filed to any court inferior to a court of District Judge in case: (1) any registered trademark is violated; (2) it involves any right or amended right related to the registered trademark; and (3) any similar or deceptively similar trademark, whether it is registered or not, is used.³² In such a suit the court can order for injunction, and compensation or part of profit according to the intention of the right-holder. The court can also order to destroy, or wipe away, or eliminate the label and marks.³³

Bangladesh noted that, "Considering the extended transition period to implement TRIPS Agreement until 1 July 2013, the Government of Bangladesh is examining the whole gamut of issues relating to patent, trademark, and copyright protection".

²⁹ Azam, Monirul. 2008. *Intellectual Property, WTO and Bangladesh*, Dhaka: New Warsi Book Corporation, at p. 184.

³⁰ See World Trade Organization, Trade Policy Review Body, 13 and 15 September, 2006, WT/TPR/M/168/Add.1 (Published on 10 November, 2006).

³¹ See above note 29, at pp. 186, 187.

³² Section 96, the Trademarks Act, 2009.

³³ Section 97, *Ibid.*

The Trademarks Act has elaborated different types of trademark violation. If any person- (a) has falsified any trademark; (b) has falsely used any trademark for any good and service; (c) makes, transfers, uses or takes hold of any bloc, machine, plate, instrument, or structure to falsify any trademark; (d) uses false trade description in goods or services; (e) uses name of country or location other than the country or location where the good has been made or uses false identity, name, and address of the producer or of the person for whom the good has been made; or (f) changes, disfigures, or wipes away any original mark or indication relating to the production of any good, that person is said to have violated the right of the trademark holder.³⁴

The Trademarks Act, 2009 has provided for criminal remedies for trademark violation. If any person infringes the right of the trademark-holder, that person shall be punished with imprisonment which shall not be more than 2 years but not less than 6 months or with fine which shall not be more than BDT 2 lakh (US\$ 2866.56)³⁵ but not less than BDT 50 thousand (US\$ 716.64) or with both. If that person shall be liable for the same offence for second or third time, s/he shall be punished with imprisonment which shall not be more than 3 years but not less than 1 year or with fine of not more than BDT 3 lakh (US\$ 4299.84) but not less than BDT 1 lakh (US\$ 1433.28) or with both.³⁶

If any person does not use the name of the production institution, or country, or place, or keeps the good open for sale, or takes hold of good for production or trade, that person shall be punished with imprisonment which shall not be more than 2 years but not less than 6 months or with fine which shall not be more than BDT 2 lakh (US\$ 2866.56) but not less than BDT 50 thousand (US\$ 716.64) or with both. If that person shall be liable for the same offence for second or third time, s/he shall be punished with imprisonment for not more than 3 years but not less than 1 year or with fine of not more than BDT 3 lakh (US\$ 4299.84) but not less than BDT 1 lakh (US\$ 1433.28) or with both.³⁷

The Penal Code, 1860 also provides for punishments for violation of the IPRs of the trademark-holder. Confiding the court for determining the term of imprisonment and amount of fine, the Code provides for: (1) imprisonment of either description for a term which may extend to one year or with fine or with both for using a false trademark; (2)

³⁴ Section 73, the Trademarks Act, 2009.

³⁵ Currently 1 USD equals to BDT 69.77. On the basis of this conversion rate the amount of fine in BDT has been converted into US dollar.

³⁶ See above note 34.

³⁷ Section 74, *Ibid.*

imprisonment of either description for a term which may extend to two years or fine or with both for counterfeiting of a trademark.³⁸

Enforcement Mechanism under the Copyright Act, 2000

Owner of copyright has exclusive right over his/her work. Copyright in a work is deemed to be infringed when any person, without a license from the copyright owner or the Registrar of the copyright or any other competent authority, exercises the exclusive right of the copyright owner or permits any place to be used by the public for profit and such communication constitutes an infringement of the copyright.³⁹ A person is said to have violated the copyright, if that person: (1) sales or hires; or causes to sale or hire; or exhibits commercially; or proposes to sale or hire the infringing copies of the work; (2) distributes, either for the purpose of trade or to such an extent as to affect prejudicially the owner of copyright, any infringing copies of the work; (3) exhibits commercially in public the infringing copies; (4) imports any infringing copy into Bangladesh.⁴⁰ If any person uses the copyrighted works for educational or research purposes or in furtherance of knowledge-generation that cannot be considered as infringement of copyright.⁴¹

Three types of remedies are available if any copyright is violated. A civil suit can be filed in the court of a District Judge within whose jurisdiction the plaintiff resides or carries on business or where the cause of action arose irrespective of the place of residence or place of business of the defendant. Copyright-holder can seek compensation, or search warrant, or injunction, or accounts in case of copyright violation. Anton Pillar Order⁴² or Search Order is a unique instrument in the hands of the court to help the copyright-holder as there is possibility that the infringer can destroy the evidence of infringement and defeat the ends of justice.⁴³

The copyright-holder can seek criminal remedies. If any person has violated copyright, s/he shall be punished with imprisonment for a period which may extend from 6 months to 4 years and fine which may range from BDT 50 thousand to 2 lakh (US\$ 716.64--2866.56). The plaintiff is entitled to get order for seizure of infringing copies or confiscation of duplicating equipments. In case of piracy in computer

³⁸ See above note 27, at p. 8.

³⁹ Section 71, the Copyright Act, 2000.

⁴⁰ *Ibid.*

⁴¹ See above note 29, at pp. 208, 209.

⁴² Under the Anton Pillar Order plaintiff can approach court in camera to issue search order without giving any notice to the defendant to enable the plaintiff to search defendant's premises or infringing copies.

⁴³ See above note 29, at pp. 210, 211.

programs, the fine shall range from BDT 1-4 lakh (US\$ 1433.28-5733.12). In addition to the civil and criminal remedies, the Copyright Act provides for administrative remedies. If infringing copies are imported into Bangladesh, one has to go to the Registrar of Copyright to stop such importation.

Enforcement Mechanism under the Patents and Designs Act, 1911

The Patents and Designs Act, 1911 has provided the procedure to enforce the rights of the patentee. According to the said Act, a patentee may institute a suit in the District Court to try the suit against any person who makes, sells, or uses the invention without his license, or counterfeits it, or imitates it. Where a counter claim for revocation of the patent is made by the defendant, the suit, along with the counter claim, shall be transferred to the High Court Division for decision.⁴⁴ In a suit for infringement of a patent, the Court may, on the application of either party, make such order for an injunction, inspection, or account, and impose such terms and give such directions respecting the same and the proceedings thereon, as the Court may see fit.⁴⁵

In case of piracy of registered design, the pirate has to pay to the registered proprietor of a design a sum not exceeding BDT 5 hundred (US\$ 7.16) recoverable as a contract debt for every such contravention.⁴⁶ If any person uses on his place of business, or on any document the words "Department of Patent, Design and the Trade Marks" (DPDT) or any other words suggesting that his place of business is officially connected with the DPDT, s/he shall be punished with fine which may extend to BDT 2 hundred (US\$ 2.86), and in the case of a continuing offence, with further fine of BDT 20 for each day.⁴⁷

Intellectual Property Rights Enforcement in Bangladesh: To What Extent Is It TRIPS-Compliant?

The Government of Bangladesh (GOB) has taken a number of steps to protect IPRs and fulfill its obligations under the TRIPS Agreement. First, Bangladesh government has enacted the Copyright Act, 2000, which replaced the Copyright Ordinance, 1962. It is an attempt to fulfill its obligation under the TRIPS Agreement. An amendment has been incorporated into this law by the Copyright (Amendment) Act, 2005 to extend the scope of computer programs and to enhance the penalty and compensation for the infringement of copyright in computer programs.

⁴⁴ Section 29, the Patent and Designs Act, 1911.

⁴⁵ Section 31, *Ibid.*

⁴⁶ Section 53, *Ibid.*

⁴⁷ Section 78, *Ibid.*

Secondly, in 2003 the GOB has merged the Patent Office and Trade Marks Registry Office and established the Department of Patents, Designs and Trade Marks (DPDT). Earlier the two above mentioned offices were separate and independent. With the establishment of a single department the GOB has also strengthened it in terms of organizational capacity, manpower, and equipment. Now the Department of Patents, Designs and Trade Marks has 4 wings, those are: (1) Patents and Designs Wing; (2) Trademarks Wing; (3) WTO and International Affairs Wing; and (4) Administration and Finance Wing.⁴⁸ Thirdly, the government enacted the Trademarks Ordinance, 2008, which was later replaced by the Trademarks Act, 2009.

Fourthly, though Bangladesh is still regulated by the Patents and Designs Act, 1911, but the Law Commission of Bangladesh has already prepared a draft law on patents in 2001. Fifthly, separate draft laws on design, geographical indication and utility model have either been finalized or under the process of finalization. Sixthly, the DPDT has recently recruited 50 people to strengthen its workability. Software from WIPO will be customized for automation of the whole process of registration.⁴⁹

One very important feature of the Copyright Act, 2000 is that it is a law which is fully compatible with the provisions of the Berne Convention and TRIPS Agreement. The enactment of the recent copyright law has elevated the status of Bangladesh as a country having modern copyright protection system.⁵⁰

In the field of patent and design still Bangladesh is regulated by the Patents and Designs Act, 1911. It provides for both civil and criminal remedies. It is interesting to mention that the patent law was enacted in 1911 and it provides for fine of BDT 2-5 hundred. If we convert the amount of BDT into US dollar the amount will be US\$ 2.86-7.16. This ridiculous amount of fine cannot keep the interest of the domestic firms and local patent-holders, not to speak of multinational companies. Patent right is so important for the multinationals and reputed foreign firms that without their patent protection they will not be interested to invest in Bangladesh.⁵¹

⁴⁸ The Department of Patents, Designs, and Trademarks, see <<http://www.dpdt.gov.bd/>>, last accessed on 18 February, 2011.

⁴⁹ Hoque, Md. Enamul. 2010. "Milestones of Intellectual Property Rights Administration in Bangladesh", A *Souvenir* published by the Department of Patents, Designs, and Trademarks, Dhaka Chamber of Commerce and Industry and Intellectual Property Association of Bangladesh. Dhaka: DPDT, at pp. 19-21.

⁵⁰ See above note 29, at pp. 212, 213.

⁵¹ Developing and least developed countries are obliged to higher their IP standards and IPRs enforcement to that of the TRIPS Agreement. Multinational firms and developed countries were behind the negotiation of the TRIPS Agreement. Despite

In 2001 the Law Commission of Bangladesh prepared a draft law on patent to make it compatible with the TRIPS Agreement. Under the patent law of 1911, the letters patent is initially given for a period of 4 years, which can be extended for another 12 years. The draft law on patent proposes that every patent shall be granted for 20 years from the date of filing an application for patent. This proposal has been made in accordance with Article 33 of the TRIPS Agreement.⁵²

Some researchers nonetheless consider that the draft law on patent is flawed as the Law Commission has not taken into its account the developmental stage, and socio-economic reality of Bangladesh, instead it copied the patent laws of some neighboring countries. Another major defect of this law is that it failed to incorporate into it the TRIPS flexibilities and utility model certificate, which is very useful for less inventive products like handicrafts. It is also useful for small cottage industries, and small investors.⁵³

In case of IPRs violation, the TRIPS Agreement asks the WTO members to provide civil and criminal remedies and interim and border measures. When ensuring remedies fair and equitable procedures need to be ensured.⁵⁴ Civil remedies include injunctions, damages, and other remedies⁵⁵ to prevent the infringement of IPRs. Criminal remedies include imprisonment and/or monetary fines, seizure, forfeiture, and destruction of the infringing goods and of any materials and implement the predominant use of which has been in the commission of the offence.⁵⁶

The judicial authorities shall have jurisdiction to order prompt and effective provisional measures to prevent IPRs infringement. If any delay has the possibility to cause irreparable harm to the right-holder, the court has the authority to adopt provisional measures *inaudita altera parte*.⁵⁷ The TRIPS Agreement requires the members to enable a right-holder to file an application for the suspension by the customs

this reality a least developed country can think of developing a modern IP regime like Singapore to attract foreign investment. If multinational firms will come, Bangladesh has the possibility to be benefitted by foreign investment and technology transfer.

⁵² See above note 27, at pp. 3-4.

⁵³ See above note 29, at pp. 180, 181.

⁵⁴ See above note 14, at pp. 339-347.

⁵⁵ Articles 44, 45, and 46, the TRIPS Agreement.

⁵⁶ Article 61, *Ibid.*

⁵⁷ Article 50, *Ibid.*

authorities of the release into free circulation of counterfeit trademark or pirated copyright goods.⁵⁸

Updated IP laws of Bangladesh have ensured the civil and criminal remedies and interim measures against IPRs violation which the TRIPS Agreement requires the WTO Members to put in place. All the steps so far have been taken by the GOB to make its IP regime TRIPS-compliant can be considered a good gesture to fulfill its WTO commitment. Provisions of existing laws, except patent and some old laws, seem to be satisfactory to prevent IPRs violations. But main problem lies in the enforcement system of Bangladesh as it is not strong. Moreover, a number of difficulties exist in the effective IPRs enforcement in Bangladesh.

First, most of the procedural laws in Bangladesh were enacted during the colonial period by the British rulers. Those laws have not been updated and are not suitable to address very nuanced problems of different types of intellectual properties in Bangladesh. For example, the Code of Criminal Procedure was enacted in 1898, and the Code of Civil Procedure in 1908. How can the laws which were enacted almost 1 hundred years back address very complicated problems of ever-changing IP matters?

Secondly, the enforcing officers, namely the police and customs officials, do not have sufficient expertise on intellectual property laws. Thirdly, Bangladesh does not have strong infrastructure and sufficient resources to ensure effective IPRs enforcement. Fourthly, consumers and general people do not have sufficient consciousness about how IP infringement can harm the continuing flow of inventions, and advancement of science and technology and how it can jeopardize the growth and development of a country. Fifthly, protracted civil and criminal adjudications and cost of litigations discourage the affected people to come to the court for effective remedy.

Sixthly, Bangladesh government has enacted information technology law in 2006 to prevent software piracy. But the police and customs officials do not have sufficient technological knowledge to prevent internet piracy, so the law becomes useless and enforcement mechanism remains ineffective. Seventhly, the border measures of Bangladesh are either corrupted or weak to prevent piracy and counterfeiting in intellectual property. Eighthly, there is no national body to coordinate the activities of the police, customs, and IP officials. Lack of coordination helps pirates and counterfeiters immune from the legal procedure. Last and most importantly, there is no study as to how modern IP policy and laws can promote domestic scientific and technological development. In the

⁵⁸ Article 51, *ibid.*

absence of this study, there is also no policy priority in the IP sector, indicating grave inadequacy in IP regime of Bangladesh.

It is widely admitted that IPRs enforcement is a multi-layered concept. Only the police, customs, and IP courts cannot enforce intellectual property rights. Without policy-priority, appropriate legal framework, consistent and IP-friendly judicial activism, there cannot be any effective IPRs enforcement.⁵⁹

Recommendations to Establish a TRIPS-compliant IP Regime with Strong Enforcement Mechanism in Bangladesh

As a WTO Member Bangladesh has to make its IP regime TRIPS-compliant by 2013. In the light of the above discussion it is expected and advisable to take the following steps to strengthen the IPRs enforcement mechanism and to make the IP regime TRIPS-compliant:

- i. Bangladesh needs a study to determine whether its IP-regime is suitable to exploit its potentialities in the field of science and technology. Bangladesh has to adopt such an IP Policy and to enact/update/modify such IP laws which will keep the national interest on the one hand, and will fulfil its WTO obligations on the other.
- ii. Bangladesh has to update its laws on patent, design, geographical indication, utility model etc. in line with the TRIPS Agreement. When updating the laws the flexibilities as enunciated in Articles 1, 7, and 8 of the TRIPS Agreement should be used by the policy makers to keep a balance between the interest of the right-holders and that of the people at large. The TRIPS flexibilities should be utilized to balance the competing public policy goals.
- iii. Bangladesh has to determine strategies, and equip government institutions and officials to fight IPRs violations.
- iv. Bangladesh needs to establish specialized IP courts for satisfactory and prompt disposal of the intellectual property disputes.
- v. The judges of the District Court and Supreme Court must be trained about multi-faceted IP issues, ever-developing IP laws and their enforcement mechanism.
- vi. The Department of Patents, Designs, and Trademarks must be strengthened and equipped so that it can promote domestic development in scientific and technological field.
- vii. The government has to take proper measures to enhance the negotiating capacity of the DPDT.

⁵⁹ Azam, Monirul and Chowdhury, A. Hamid. 2008. "IP Enforcement Mechanisms to Combat Piracy: The Context of Software Piracy", Vol. 3, Issue 1-2, *Asian Journal of International Law*, at pp. 117, 118.

- viii. A Public-Private Partnership Council should be established for awareness of the people about the importance and enforcement of intellectual property rights.
- ix. GOB can take initiative to collect fund for IPRs enforcement from domestic firms and industries. It can also seek assistance from the developed country members of the WTO as they are obliged under Article 67 of the TRIPS Agreement to provide technical and financial cooperation to developing and least developed country members. It can also seek assistance from the WIPO Advisory Committee on Enforcement. Bangladesh government can judiciously utilize the assistance of the WTO and WIPO for making its IP laws TRIPS-compliant as well as establishing an effective IPRs enforcement system.
- x. The IP regime of Bangladesh should be consistent with broader public policy goals.
- xi. Bangladesh has to establish a National Task Force or National Committee for Intellectual Property comprising of the representatives from the judicial department, IP experts, the police, the customs, the business community, and media. The tasks of the Task Force or National Committee will be to take care of IP issues, obviate IPRs infringements, and take care of innovations in the field of science and technology as a whole.

Conclusion

In the age of economic globalization, the enforcement of intellectual property rights has ignited huge controversy. It is said to be a strong instrument at the hands of the developed countries and the big multinationals to multiply their huge profit and obstruct technological and economic development of the developing nations. There are, at the same time, strong arguments for IPRs enforcement as it is necessary for economic growth and technological development of any country when it becomes manufacturer of IP products. According to studies, protection of IPRs promotes innovations in developed countries. Particularly, pharmaceutical, chemical, and petroleum industries, bio-technology, software, and ICT industries require and are benefitted by the IPRs protection.

In developing countries the experience is mixed. According to some studies, IPRs protection has little impact on the inventions and technological advancement of developing and least developed countries. Some studies have found that IPRs protection in developing countries can push their technological capacity towards further innovations. This will in turn promote scientific and technological development, ensuring economic growth and poverty reduction.⁶⁰ According to other studies,

⁶⁰ Wunsch-Vincent, Sacha. 2009. "The Economic Argument for a Patent System: A Modern Development Perspective", Issue 3, *Quarterly Economic Viewpoint Publication*, at p. 3.

IPRs enforcement may protect local commercial and industrial innovation as well as encourages technology transfer and foreign investment. IPRs enforcement therefore may be a developing and least developed country tool for technological and economic development, if that country has the capacity to absorb, reproduce and exploit modern technology.

Though Bangladesh is a least developed country (LDC), among LDCs it has huge potentiality to become a middle income country within a couple of years. The World Bank in its report predicted that Bangladesh could reach Middle Income Country status (defined as US\$ per capita of US\$ 875) by 2016 if it grows 7.5 per cent per year. Considering its developing economy in pharmaceuticals, ready-made garments (RMG), leather industry, and in some other businesses and services, Bangladesh has to protect the rights of the intellectual property holders.

Bangladesh has its domestic IP regime with IP laws enacted almost 1 hundred years back. But it has already taken initiatives to make its IP regime compatible with the TRIPS Agreement. The enactment of the Trademarks Act, 2009, and the Copyright Act, 2000 are the steps to fulfil its obligation under the WTO Agreement. Government has also taken initiative to make new laws on patent, design, geographical indication, utility model etc. and established the Department of Patents, Designs, and Trademarks. But the government measures seem not to be satisfactory if we take the examples of the IP policy and laws of some developing countries, namely India, Brazil, Philippines, and Indonesia. Moreover, Bangladesh has not yet designed any IP policy to promote its scientific, technological, and economic development. It does not have policy priority, infrastructure, and resources to make an effective enforcement system.

Given the national reality and its WTO commitment, policy-makers of Bangladesh should judiciously envisage some policy issues. First, as a WTO member Bangladesh is obliged to make its IP regime TRIPS-compliant by 2013. Secondly, if Bangladesh wants to exploit its economic potentials in scientific and technological field it will require modern IP policy and laws. Thirdly, in spite of severe criticism of the TRIPS Agreement it has flexibilities. Bangladesh government should endeavor to achieve highest level of expertise to exploit the TRIPS flexibilities to make a balance between IPRs and broader public policy goals. Fourthly, policy-priority, proactive police and customs officials, and IP-promoting judicial activism will be *sine qua non* for establishing an effective IPRs enforcement mechanism.