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## Trademark Governance in Bangladesh



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### Synonyms

Bangladesh; Intellectual property; Intellectual property rights; Trademark; Trademark enforcement

### Definition

Trademark includes a device, brand, heading, label, ticket, name, signature, word, letter, symbol, numeral, figurative elements, combination of colors, or any combination thereof. A trademark also includes service marks and certification mark.

### Introduction

Bangladesh, being one of the world's most densely populated countries, has the biggest concentrated business market but is yet to be a place for smooth business operations when it comes to intellectual property rights (IPR). It is commonly assumed here that the intellectual property rights

(trademarks, patents, industrial designs, copyrights, etc.) protection mechanism is introduced by the Western world to satisfy the manifestation of developed countries to establish the way of modern colonization over the developing or least developed countries. Hence, it is strongly advocated by the developed countries that the intellectual property rights (IPR) mechanism is necessary to ensure secure foreign investment by implementing sound technology transfer and knowledge sharing. Nevertheless, at the time of becoming a member of the World Trade Organization (WTO), Bangladesh endorsed the terms of "Uruguay Round" accepting the memorandum in respect of the "Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)" where a minimum global standard of IP protection was fixed for the first time of history. Article 19 of the TRIPS agreement demonstrates details in relation to the signs, symbols, logos, etc. which may be protected as trademark as well as what should be the minimum standard of trademark protection.

### Theoretical Framework

This paper emphasizes toward articulating an impression regarding the governance of trademark affairs in Bangladesh. This article aims to frame a clear picture of how the domestic authority is approaching toward realizing international obligations and standards, how the concerned ministries are designing their governance

mechanism, and in response, what is the practical scenario from the perspectives of an intellectual property rights practitioner. This article may not provide solution to any trademark conflict; rather it will draw an idea as to how trademarks and its related affairs function in Bangladesh.

## **Historical Context of Trademark Governance**

It is commonly misconceived that TRIPS has made it compulsory for Bangladesh to provide trademark protection in a larger scale. Indeed, TRIPS can be marked as a new era of trademark governance mechanism in Bangladesh despite the fact that the legal draftsmen seem insightful of protecting intellectual property rights, especially the trademark rights, since a long time. Among the existing laws of Bangladesh, reference can be made from 150 years back, i.e., the Penal Code 1860 which contains provisions for protecting trademark rights. Sections 478–489 under Chap. XVIII containing the heading of “Trade, Property, and Other Marks” clearly define trademarks, property marks, and false use of these marks along with punishment for using a false trademark or property mark, punishment for counterfeiting a trademark or property mark used by another, punishment for counterfeiting mark used by public servant, and some other relevant offenses thereof.

However, the scientific and technological development conferred the intuition that the provisions of the Penal Code 1860 might not be sufficient to protect the right of a trademark owner in the sociocultural situation of Bangladesh for some reasons. Firstly, the Penal Code is not illustrative in respect of the types of trademark rights; secondly, there is no guideline for procedural protection mechanism; and thirdly, the draftsmen might have failed to foresee the future of multi-dimensional aspects of trademark rights.

Nevertheless, sooner it was found that the popular marks using for merchandise purposes are fraudulently used by others escaping the obligations under the Penal Code 1860, and therefore,

the draftsmen came to the understanding that new law for protecting merchandise marks should be enacted to amend the law relating to fraudulent marks on merchandise. In such a perspective the Merchandise Marks Act 1889 was enacted, but it failed to demonstrate adequate legal protection for merchandise marks holders. However, the state of business affairs made it clear that along with the Merchandise Marks Act 1889, a separate law for governing the trademark affairs is necessary, and in response, the Trade Marks Act 1940 [Act No. V of 1940] was passed with the objective of providing the registration and more effective protection of trademarks in Pakistan (Bangladesh was under the British regime in that period). This Act contained 85 (eighty five) sections prescribing the types of trademarks, conditions for trademark registration, registration procedure, duration of registration, effect of registration, assignment and transmission of trademark, rectification and correction of trademark register, and other practical issues for smooth functioning of trademark affairs. The Revised Trade Marks Rules 1963, Trade Marks (Invalidation and Summary Registration) Act 1950, and Trade Marks (Invalidation and Summary Registration) Rules 1950 are some other laws governing the trademark affairs at that time.

After liberation (1971) from Pakistan, the said three major laws, i.e., Penal Code 1860, Merchandise Marks Act 1889, and Trade Marks Act 1940, continued to be in operation to govern the affairs relating to trademarks until the enactment of the Trademarks Act 2009 [Act No. XIX of 2009] repealing the Merchandise Marks Act 1889 and Trade Marks Act 1940 but with some reservations. However, on February 14 of 2008 Trademark Ordinance was promulgated, complying with the requirements of the TRIPS agreement during the period of the Caretaker Government of Bangladesh. At present, the entire trademark governance mechanism is dominantly governed by the Trademarks Act 2009 (as amended in 2015) along with the Trademarks Rules 2015. However, the provisions of Penal Code 1860 still exist to give an extra hand to the Trademarks Act 2009 (as amended in 2015) in applicable cases.

## Domestic Implications of International Treaties and Agreements

The influence of international treaties and agreements on trademark governance in Bangladesh is mention worthy. All the new laws in respect of trademarks have been drafted focusing its compatibility with international treaties and their guidelines. The Paris Convention for the Protection of Industrial Property 1883 (which includes trademarks, patents, industrial designs, etc.) can be traced as the fundamental treaty for setting out an international trademark protection mechanism. The only international institute that, however, introduced the most effective mechanism to implement international IPR governance in Bangladesh is the World Trade Organization (WTO) which has dominant command over the international business relationship as well as management of globalized trade market on its member states. It sets out some duties and obligations for Bangladesh to be complied with while dealing with industrial and commercial matters. After the accession to the WTO, the government felt the necessity of amending some existing laws governing trademark-related affairs in Bangladesh as to adjust with the rules governing the areas of international trade and negotiation as directed by WTO compliance. To be more specific, some provisions of the TRIPS agreement possess dominant influence over the provisions of Trademarks Act 2009 and its supplementary Rules 2015. Influence of international treaties and agreements has also been allowed by some judicial decisions. In the case of *Sunil Kumar Das v Canon Kabushiki Kaisha* and another [57 DLR (2005), P 93–100], the Division Bench of the High Court Division of the Supreme Court of Bangladesh comprising their Lordships Mr. Justice Syed Amirul Islam and Mr. Justice AKM Shafiuddin directly considered the influence of Article 6 of Paris Convention in respect of trademark conflicts.

## Operational Dimensions of Trademark Governance in Bangladesh

The Ministry of Industries is the body governing the registration mechanism of a trademark. The ministry controls the trademark application, examination, journal publication, registration, certification, objection, rectification, cancellation, and other similar natured registration mechanism through its Department of Patents, Designs and Trademarks (DPDT). This department is a specialized department for maintaining records of intellectual properties. DPDT has several units, i.e., the trademarks unit, the patents unit, the design unit, the geographical indication unit, etc. To be honest, among these units, the trademarks unit is the most active and busy one. Nevertheless, there is a registrar for the department who governs and supervises all the units, but there are separate deputy registrar, assistant registrars, and examiners for each unit.

The DPDT mainly keeps records of trademarks. It receives new trademark applications, examines, as well as gives and ceases registration (in applicable cases). It also works as a tribunal in limited cases, i.e., at the time of hearing objections and oppositions. Nevertheless, the Act 2009 has given power to the courts to interfere and pass necessary orders in certain situations. A brief discussion of the enforcement procedure will be made in subsequent portion of this article.

In order to draw a clear picture in respect of trademark governance in Bangladesh, it is pertinent to scrutinize the Act 2009. This Act was enacted to add new altitude in the registration, governance, and protection mechanism of trademarks in Bangladesh. The Act contains 128 - sections categorized into 11 chapters that include and prescribe the purpose of enactment of the Act, introduction and description of the trademark office, registration mechanism, result of registration, assignment and transmission of trademarks, correction of register, different types of

trademarks, offenses under the Act and punishment thereof, forum to stop breach of trademark rights, appeal procedures, conventional priorities, and other necessary provisions to govern and protect trademark rights.

Before we move on, the readers must be satisfied regarding the concept of trademark. Section 2 subsection 8 of the Act 2009 defines trademark in relation to offenses, penalties, and procedures as “(i) a registered trademark or a mark used in relation to goods for the purpose of indicating a connection in the course of trade between the goods and the person having the right as proprietor to use the mark (ii) a mark used in relation to a service so that it may be indicated that the person has the right as proprietor to use the mark in the course of trade” and in relation to other affairs as “a mark used or proposed to be used in relation to any service or goods indicating a connection in the course of trade between the goods and the person having the right, either as proprietor or as registered user, to use the mark; and also certification mark.” Basically, a trademark is a sign devised distinctively to identify particular goods or services as manufactured, marketed, produced, or provided by a specific person, institution, company, or enterprise. A trademark helps the consumers to identify or purchase a product or service of a unique trademark as its kind, nature, and quality meet their needs.

### **Trademark Registration: Why Important?**

In Bangladesh a trademark can be registered as trademark for goods, trademark for services, certification mark, associated mark, collective mark, protective mark, etc. To get the protection under the existing law, registration is mandatory requirement as section 24 of the Act 2009 states that “No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trademark.” However, right of passing off is also recognized by the law but within a very narrow scope.

### **Trademark Governance: From Filing to Registration**

An application for registration of a trademark is to be made before the registrar of the trademarks. The applicant must be the proprietor of the trademark. The Bangladesh trademark office follows the international classification for filing trademark application, i.e., the international classification according to the NICE Agreement concerning the International Classification of Goods and Services for the purpose of registration of marks. Nevertheless, multiclass application is not permitted in Bangladesh. Separate applications shall be made in respect of every class of goods or services, and the applications are considered by the trademark office according to the serial of receipt. However, the registrar has given exclusive jurisdiction to accept or reject any trademark application. In accepting or rejecting a trademark application, the registrar considers the guideline provided by the Act 2009. Nevertheless, no mark shall be registered as a trademark if it comprises or consists of any obscene or scandalous matter, if the use of mark conflicts any provision of any existing law of the time being, if the use may deceive or cause confusion to the consumers, if the mark contains any matter which is likely to hurt the religious belief of any citizen of Bangladesh, or if the mark, without proper authorization, contains name, official sign, hallmark, map, flag, sign, or anything that resembles to these creates confusion in relation to any country, international association, or any association or office established through any international convention or treaty which is identical with or an imitation of or contains element of armorial. In addition, using names of chemical materials or using identical or deceptively similar trademarks is prohibited for registration. On the other hand, it is encouraged to insert the name of the company or individual of firm with the mark, one or more invented words having no direct reference to the character or quality of the goods or services, and to devise the mark distinctive. Nevertheless, it is wise to apply for registration without any

claim of color as the law prescribes that so far a trademark is registered without defining any color and it shall be deemed to be registered for all colors.

As per section 119 of the Act 2009, Bangladesh accepts the rules of priority application. Priority application is such an application which provides retrospective registration effect to a trademark application, subject to some conditions. States which are listed under the Paris Convention and World Trade Organization (WTO) may enjoy the privileges of priority application. Where a person has made an application for the registration of a trademark in a convention country which is a member of Paris Convention or a member of WTO, that person or his legal representative or assignee may make an application for the registration of a trademark in Bangladesh within 6 (six) months after the date in which the application was made in convention country together with the full particulars and certified copy of the priority application, and the trademark shall, if registered under the Act 2009, be treated to have its registration as of the date on which the application was made in the convention country and that date shall be deemed to be the date of registration in Bangladesh.

Schedule I and II of the Trademarks Rules 2015 provides specific trademark forms for all types of applications to be made to the registrar and to be used for official purposes. Applications in any other form shall not be accepted by the trademark office.

Before providing registration, the trademark office follows a law-stipulated mechanism that examines an applied mark in several stages. After filing of a trademark application, upon receipt of the application, the trademark office issues official filing receipt to the applicant. The receipt copy contains all relevant filing details of the trademark, e.g., application number, date of application, the amount of remittance, the trademark, name of receiving staff, and other necessary information. New trademark applications are examined by the trademark examiner within 2–4 months of filing. If trademark application satisfies all requirements, then the respective examiner, on behalf of registrar, shall issue a letter

of acceptance for the mark to be advertised in the Trademarks Journal. If Trademark application does not satisfy all requirements, then the examiner will issue objection notice. Any objection given by the examiner may be dissolved in two ways, i.e., reply of objection and objection hearing. After the representation or hearing, if the office is satisfied, then the next step will be publication to the Trademarks Journal. Otherwise, the original TM application will be treated as rejected, and the trademark is denied to be registered by the authority. However, subject to the deposition of publication fees, the accepted mark is to be published in Trademarks Journal. Nevertheless, when a trademark is advertised in the Trademarks Journal, any person may oppose registration of the mark within 2 months from the date of such publication. In such a case, the matter will be referred to the trademark tribunal whose decision will be final, subject to the filing of appeal before the High Court Division of the Supreme Court of Bangladesh. If no opposition is filed against the published trademark, then the applicant will be asked for depositing registration fees. Upon receiving the registration fee, the registrar will issue the registration certificate within 2–6 months from the date of depositing of registration fees. Furthermore, any person who is aggrieved may file rectification case in the prescribed manner against the impugned registered trademark either before the Registrar of Trademarks or before the Hon'ble High Court Division of the Supreme Court of Bangladesh to cancel the registration of the same.

The validity of trademark in Bangladesh is a frequently asked question. Initially, a registered trademark is valid for 7 (seven) years from the date of filing of application and renewable thereafter for periods of 10 (ten) years in each term to an indefinite period, subject to the condition of depositing proper renewal fee.

### **Governance in Action: From Violation to Judicial Protection**

A registered proprietor of a trademark in respect of any goods or services enjoys the exclusive right

to the use of the trademark in relation to those goods or service. Thus, he can bring infringement action against any unauthorized use, and in such a case the Trademarks Act 2009 and the Penal Code 1860 both provide legal recourses. Authorized use can be ensured by licensing, permission, assignment, or transmission. Nevertheless, a registered trademark may lose its approval if the proprietor fails to use such trademark in any bona fide purpose within 5 (five) years from getting the registration. Nevertheless, on application of any aggrieved person, the High Court Division of the Supreme Court of Bangladesh or the Registrar of DPDT may pass order to cancel, correct, or rectify any registered trademark, which is subject to the satisfaction of certain terms and conditions as prescribed in the Act 2009.

However, despite having practical challenges in respect of enforcement mechanism of trademark rights, the draftsmen of the Act 2009 tried to include all possible ways of infringement. I personally consider the Chapter X of the Act 2009 as the most important part of the Act as it defines offenses and prescribes penalties for such offenses and procedures to stop such infringements. A trademark right may be infringed by applying false trademarks or trade description, by selling goods to which a false trademark or trade description is applied, or by falsely representing an unregistered trademark as registered or by unintentional contravention of the law relating to trademarks or abatement of any infringement committed out of Bangladesh.

The Act 2009 provides both civil and criminal remedies for the breach of trademarks. A case for trademark infringement can only be filed within 3 (three) years of commission of the offense or within 2 (two) years of discovery of such infringement, whichever is earlier. Sections 73 and 74 provide criminal action/remedy for using or applying false trademark and false trade description, for example, selling goods to which a false trademark or trade description is applied, that is imprisonment for a period which may extend to 2 (two) years but not less than 6 (six) months or fine of taka, the amount of which may extend to tk. 200,000/- (two lac) but not less than tk. 50,000/- (fifty thousand), or both. In addition, for repeating the offense, punishment may extend

to 3 (three) years but not less than 1 (one) year or fine of taka, the amount of which may extend to tk. 300,000/- (three lac) but not less than tk. 100,000/- (one lac), or both. In addition, the Act also prescribes penalty for falsely representing a trademark as registered which is imprisonment for a period which may extend to 1 (one) year but not less than 6 (six) months or fine of taka, the amount of which may extend to tk. 100,000/- (one lac) but not less than tk. 50,000/- (fifty thousand). For getting recourses under these sections, an aggrieved trademark owner or his representative has to file criminal case to the concerned police station or, in appropriate cases, to the court of judicial/metropolitan magistrate or first class magistrate with proper jurisdiction. Nevertheless, the court may order forfeiture of goods where a person is convicted or acquitted of an offense under sections 73 or 74 of the Act 2009. In addition to the provisions of the Act 2009, the provisions of Penal Code 1860 as mentioned before are still in operation, and any interested person may take aid of those sections as well. The Code of Criminal Procedure, 1898, subject to some limitation, shall be applicable in respect of trial and procedure of criminal cases initiated under the Act 2009.

Nevertheless, a registered trademark owner or an unregistered trademark user (passing off) subject to some limitations may file civil suit before the Court of District Judge claiming order of injunction, damages, accounts of profits, delivery of any infringing labels and marks for destruction, or removal from deceptive products. In such a case, the procedure prescribed in the Code of Civil Procedure 1908 shall be applicable.

However, a person sued under the Act 2009 may take defense that all reasonable precautions to prevent infringement were taken by him, his activity is the ordinary course of his business which he is employed on behalf of any other person, or in applicable cases, he may file application to the High Court Division challenging the validity of the trademark and praying for rectification of trademark register in respect of the goods. In addition, appeal may be filed to the High Court Division challenging any decision of the trademark officer or the registrar.

Furthermore, to give an extra hand to the trademark rights protection mechanism, the Customs Act 1969 provides some prohibitions on goods imported to Bangladesh by air or land or sea. Section 15 restricts entry of counterfeit coin, forged or counterfeit currency notes, goods having applied thereto a counterfeit trademark within the meaning of the Merchandise Marks Act 1889, goods made or produced outside Bangladesh and having applied thereto any name or trademark being or purporting to be the name or trademark of any manufacturer, dealer or trader in Bangladesh, etc., while section 16 gives the authority power to restrict entry of any specified trademarked goods.

Therefore, it is apparent that theoretically Bangladesh has been trying to design a comprehensive mechanism of good governance of trademark-related issues to give an investor confidence in respect of his intellectual property rights protection.

### **Rhetoric Versus Reality: Perspectives from a Practitioner**

Theoretically trademark affairs are well governed by the existing laws, but the practice reflects a different picture. In comparison with the sociocultural practice as existed in Bangladesh, the laws are yet to ensure a standard protection mechanism toward trademark infringement. Offences of trademark infringements are disproportionately treated, by both the general people and the administrative or law enforcing agencies, comparing with other punishable offenses. As Bangladesh is still struggling with its economic ossification, brand responsiveness is a rarely prioritized issue. Brand value and quality fade away in terms of availability and price of any product or service, offering scopes to local businessmen to imitate or use popular and well-known trademarks. Though the recent legislations provide specific recourses to stop infringement of trademarks, a trademark infringer can take advantage of its weak enforcement mechanism. Being a regular IP law practitioner, I have found that the administration and also the judiciary are not well prepared to provide

instant aid to trademark infringement. TRIPS persuasion successfully compelled Bangladesh to enact new laws, rules, and regulations, but it was not considered whether Bangladesh has the infrastructure to maintain the compliance or whether Bangladesh needs strict IPR protection at this stage. Apart from the most debated conflict of interest between the developing countries and strict IPR administration, it must have taken into consideration that whether the government employees are duly trained and educated on these issues, whether the customs authority is practically advanced to conduct necessary inspection, whether the international dispute resolution mechanism in context of Bangladesh is well adjusted. Nevertheless, the hurried implication of IPR compliance led to a practical disorder in its enforcement process. From filing to registration and from violation to judicial protection, the practical scenario is different. The trademark office is succumbing with its very poor logistic support to tackle the loads of trademark files and ultimately leading toward unreasonable delay in file processing, responding queries, providing official decision to facilitate enforcement mechanism, and hence, creating an impasse at the very beginning of right enforcing practice. In addition, the judiciary seems very weak and elastic in dealing with trademark infringement cases. It takes years in resolving cases, be it civil or criminal in nature, when a week's infringement may have serious consequences in terms of loss of reputation or goodwill. Furthermore, the government fees prescribed from filing to registration is over charged in context of the socioeconomic condition of the country, which is impliedly creating prima facie hurdle for the small-ranged investors.

Apart from irregularities in effective IP governance mechanism, the reason for non-responsive tendency and lack of promptness of the law enforcing agencies in the event of trademark infringements, in my opinion, is that copying well-known trademarks is yet to be considered as morally wrong in Bangladesh. This implies the need for creating awareness from the very root of the society. Guaranteeing a complete and effective trademark protection mechanism requires huge investment and social revolution.

The price for implementing strict trademark protection mechanism in a developing country like Bangladesh will be very high as it involves the need to set out a complete IP protection mechanism, while the threat of hindering development process of the developing countries by obtaining privileged entrance to its market by the developed countries still subsists.

The duration from trademark infringement to enforcement of right needs to be minimized in order to uphold the spirit of the TRIPS agreement by creating an effective trademark governance system. Alternative approach may be adopted by either developing own enforcement facilitating force of the Department of Patents, Designs and Trademarks (DPDT) or by delegating cognizance power to the law enforcing agency in cases of trademark infringement.

## Conclusion

Despite the stack of limitations, Bangladesh always adopts progressive measures and has been embracing challenges coming with the fruits of globalization. Trademark is now a commonly known concept, and the recent business laws are indicating technical improvements in enforcing a sustainable trademark protection mechanism. Moreover, lots of recent judicial works in explaining the trademark rights are going on. For example, registration of a “phonetically identical trademarks” was examined in the case of *Mr. Electric Ltd. vs. Mozammel Hoque (Md), Trading as MK Electrical Industries and others* [60 DLR (2008), P 53–59]. Similarly, the right of passing off was endorsed in the case of *Dominous Pizza and others vs. Domino’s Pizza Inc.* [61 DLR (2009), P 780–788], and the meaning of “use of a registered trademark” was scrutinized in the *Case of Managing Director, Baghdad Vegetable Oil Industries Ltd. vs. Van Den Heghs and others* [66 DLR (2014), P 450–457]. Nevertheless, many more judicial instances can be drawn as examples to make a strong argument that the entire legal system is trying to present a sustainable trademark governance mechanism to make our laws compatible with the provisions

of international treaties and agreements. Furthermore, the DPDT is now a profit-making wing of the Ministry of Industries. To facilitate fruitful outcome, WIPO is funding training to trademark examiners and government employees. In addition, brand awareness is witnessed by the emergence of many prominent Bangladeshi brands. To sum up, it is to say that the laws for trademark governance system in Bangladesh are broadly comprehensive and actively operational, thus presenting a strong trademark protection mechanism for the trademark right holders in Bangladesh.

## Cross-References

- ▶ [Legal History of Trademarks in Bangladesh](#)
- ▶ [Trademark Affairs in Bangladesh](#)
- ▶ [Trademark Cancellation in Bangladesh](#)
- ▶ [Trademark Enforcement in Bangladesh](#)
- ▶ [Trademark Filing in Bangladesh](#)
- ▶ [Trademark Governance](#)
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