

The Impact of Trade Mark on Brand Duplication in Bangladesh: An Empirical Analysis

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Abstract

The purpose of the study is to find out the reasons for nature of brand duplication, the reasons behind retailers perceptions and customers' lack of awareness for duplicated brand. Brand duplication creates visual illusion among the consumers in the ground of original one. The spelling of the brand name, its shape, design, colour, trade mark, etc. are copied so tactfully that if a consumer is inattentive he will commit mistake in justifying the imitated one against the original one and the original manufacturers will lose their customer. 180 retailers were interviewed from Chittagong City of Bangladesh to find out the nature of Adulteration and some of the legislations and functions of the DPDT were analyzed. Some recommendations (e.g., developing awareness among customers, proving support to the researcher involving different Government agencies etc.) are given to overcome those problems by both manufacturers and to the customers.

Key word: Brand duplications, trade mark, DTT, patent

1.0 Introduction

The Universal Declaration of Human Rights (UDHR) 1948 says- "Everyone has the right to the protection of moral and material interests resulting from scientific, literary or artistic production of which he is the author." In addition, the international character and emergence of Intellectual property is positively affirmed in numerous international conventions, i.e. -The Berne Convention for the Protection of Literary and Artistic Works 1971, The Paris Convention for the Protection of Industrial Property 1883, The Universal Copyright Convention (UCC) 1952, The Patent Cooperation Treaty 1970, The Agreement on Trade Related Aspects and Intellectual Property Rights (TRIPS) 1995. These documents also provide for the guidelines of enforcement mechanisms by the state parties. For example, Part III of the TRIPS agreement in its article 41 to 61 denotes on the enforcement provisions for intellectual property rights. Article 41 of the reiterates that effective action against any act of the infringement of intellectual property rights. It prescribes such remedies as may act as a deterrent to further infringements. (Park, et al., 1997) There are also other guidelines, i.e. - fair and equitable enforcement, expeditions trial for offences, etc. Article 36(1) of the Bern Convention provides that "any country party to this convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this convention." Paragraph 2 of the same article provides that "it is understood that, at the time a country becomes bound by this convention, it will be in a position under its domestic law to give effect to the provisions of this convention." So, it is obvious that the above provisions cannot be respected and implemented without appropriate measures for the enforcement of rights provided under the national laws of the member states.

Bangladesh as a member country is not an exception to it. Several steps have been taken by the government of Bangladesh to update the existing IP legislations to conform to the international standards (formulated by international treaties and conventions) to which Bangladesh is a signatory. In the article 40 and 42 of Constitution of Bangladesh 1972 guaranteed the citizen's right to property and within the general definition of property, property produced through creative thoughts can also be included. To support this proposition it is better to argue that 'the concept property has been expanded by courts to include practically all rights. Thus patents, licenses, trademarks and copyrights are held to be property distinct from physical or material property.'

Following this proposition it can be argued that, Constitution gives recognition of the intellectual property rights in express terms. The development of the IP system depends on the effective enforceability of IP rights. Historical context of Bangladesh reveals that the century to inherit old legal framework on intellectual property that dates back to British- India which proves that the country has a long history of IP protection. Bangladesh has few IP laws which she inherits from British period. All these laws provide protection for both the citizens and foreigners who have filed an application for such protection. But one of the shortcomings of these laws is these laws; specifically the Patent Law doesn't specifically circumscribe the area of intellectual property.

The act of brand duplication of different products is done in heterogeneous ways. Few products brand names are duplicated exactly i.e without changing any aspect of the product like spelling of the brand name, trade mark, product design & shape, color, package, label etc. exact imitation is often found in most populated items of renowned companies. Multifarious techniques are applied in the process of exact imitation. Sometimes imitators

purchase the old or used containers or packages at a nominal price from the households and thereafter, they refill the containers or packages with the low quality duplicated products which are to be merchandised in the original brand names.

Most of the products' brand names are imitated partially. In this process, brand name is imitated in such a way that imitated one becomes quite similar to the original one. This type of brand duplication creates visual illusion among the consumers in the ground of original one. Because in this process, the spelling of the brand name, its shape, design, colour, trade mark, etc. are copied so tactfully that if a consumer is illiterate or even careless or inattentive he will commit mistake in justifying the imitated one against the original one. For instance, Bata shoe is duplicated in the name of Batta, Beta, Rata etc, a consumer can not identify this sort of duplication unless he pays careful attention of this. Unscrupulous marketers exercise this type practice i.e. partial brand duplication, only to escape themselves from legal action. Because from the legal point of view, it is very tough to take any action against the marketers whose brand names are nearly of same spelling of same coloring or same designing to the actual one.

2.0 Objectives of the study

1. To highlight marketing problems of brand duplication in Bangladesh
2. To find out the reasons of brand duplication
3. To know the enforcing law against brand duplication which are provided by Department of Patents, Designs & Trademarks of Bangladesh.
4. To recommend some suggestion to overcome those problems

3.0 The Methodology of the Study

Data were collected by both primary & secondary sources. Primary data were collected based on 180 retailers in Chittagong city on convenience sampling basis. And the secondary data were collected from internal sources of DPDT, journals, reported case decisions, statistical publications of relevant organizations, data analysis and web sites, prospectus etc. Collected data are measured with statistical tool and then tabulated. Finally some analyses were done and research paper was drafted, and then prepared.

4.0 Findings and Analysis of the Study

A brand assists buyers in evaluating the quality of products, especially when a person lacks the ability to judge a product's characteristics. The tricky markers duplicate the brand name of the products such a way that a consumer cannot draw a clear product and the duplicated one unless he/she pays clear attention to this.

The import of China made "Youth ink" had been banned since 20 years back. (weekly shamikhon 1992) The prevailing scenarios of rampant brand duplication do neither signify that the marketers of our country have minimum sense of ethics and morality, nor laws regarding the protection of these sorts of misdeeds are implemented at all. When a person pays the price for the original goods and later he finds the poor quality of imitation goods, he hesitates to buy the goods in future and in this way, a good manufacturer is penalized through reduction of his market. (A Farouk 1982)

Tricky marketers sometimes, deceive consumers using vague and fallacious statement which also bewilders them in justifying the originally branded product, For example, marketers frequently imprint on the product 'Made as Japan' instead of 'Made in Japan' instead of 'Made in England' etc., which also create confusion in judging the original brand products. But after purchase or use, they came to know that the goods are imitated and then they do not have any say to take action against the duplicators.

[insert table-1] [insert table-2]

5.0 Reasons of Brand Duplication

To find the secret motives which instigate the duplicators to imitate products in different forms. [Insert table-3]

1. One of the potent reasons of brand duplication is the motives for earning higher margins. 85 retailers (48%) identified this cause for rampant duplication. Usually imitated goods are made of low quality materials which are less costly. Besides it does not need to advertise as advertising function is performed by the actual manufacturers. As a result, the cost of goods get reduced, and brings higher margins for duplicators.
2. In tracing the cause of brand duplication out, it was found that 45 retailers (25%) opined that lack of consumers' awareness of the products is responsible for brand duplication. Because the illiterate or half-educated consumers remain unaware as they cannot properly read out the brand name or trace-out the trademarks and they cannot distinguish the duplicated products from original ones, since products shape, colour, design, package, label etc, are same In this circumstance, the unscrupulous marketers take the advantage of consumers unawareness resulting in ceaseless brand duplication.
3. The absence of enforcement of relevant laws is one of the major reasons for massive brand duplication and 15

retailers (9%) agreed to the above cause for duplication. In most of the cases, it is found that, the law-enforcing agencies put little efforts for weeding-out the duplicated brands as a result, the imitators feel a little bit discouraged from doing this type of illegal activities.

4. Undesirable scarcity of some popular brand items in the market, sometimes, tempts the duplicators to go for brand duplication, 10 (6%) retailers identified this as a cause of brand duplication.

5. The banning of some for some foreign goods also induces the marketers to duplicate brand. 5 retailers (3%) mentioned this as a cause for brand duplication. In face, a good portion of consumers holds the view that foreign goods are of high quality and the use of it would increase their prestige. When these goods are banned, the marketers try to imitate those products so accurately that, clear distinction between original and imitated one becomes tougher on consumers' part. Even after use of that product, a consumer can seldom understand the used product is an imitated one.

Some retailers mentioned that strong loyalty of consumers to some selected items as well as upturn price trend of products is also responsible for brand duplication. Only one retailer mentioned that the loopholes of different laws concerning this and inadequate enforcement of these laws are responsible for brand duplication.

Consumers do not get desired benefits from duplicated product thought they have to pay same piece to purchase it. When a consumer purchases the product, he considers it to be an original one. But at the time of use or consumption, he understands that he was purchased a duplicated one. Consumers may be infected with various diseases due to the consumption of duplicated products. For example, the consumption of adulterated edible oil causes various diseases like itch, scab, skin diseases, serious abdominal-pain, heart-burn, etc. Massive brand duplication creates several problems for well-established companies. As a result, a proportion of consumers may be encouraged to purchase duplicated products.

6.0 Enforcement mechanisms for protection of IP rights in Bangladesh

Trademarks Under article 15 of the TRIPS Agreement any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. In fact, trademark is a visual symbol to indicate the origin of any specific goods as distinguished from similar goods maintained and manufactured by others. The present legal basis of trademarks is based on The Trade Marks Act 2009. The proprietor or a registered user may bring an action for the infringement of trademark or for passing off and obtain relief in the form of damages, accounts of profits, delivery up of the infringing labels and marks for destruction or erasure, injunction, etc. Suits in this regard are required to be brought the courts of district judge. Criminal suit can also be filed for offences, i.e. - falsifying trademarks, making, possessing or disposing of any die, block, machine, plate, etc. Sections 73 - 91 of the Trademarks Act, 2009 are the relevant provisions for criminal proceeding for trademarks right violation in Bangladesh. If anybody commits an offense as described in items (a) to (g) in Section 73 shall be liable for the first offense to pay penalty of Tk. 200,000 with sentence of two years and Tk. 3,00,000 and three years sentence for the second offense. The other sections are also open depending on the nature of violations. Contravention of exclusive rights in relation to a trademark (both registered and unregistered) constitutes criminal offences under the Penal Code 1860. The code circumscribes the offences in this context and provides punishments, i.e.- the Act says that making or possessing any instrument for the purpose of counterfeiting a trademark would constitute an offence and the punishment for this offence is imprisonment of either description for a term which may extend to three (3) years or with fine or with both. Besides, under the Customs Act 1969 importation of goods whether by air or land or sea having relation to trademarks and any goods that are imported in violation are detained and confiscated by the customs officials. If any person makes, sells, uses an inventions without the license of patentee or imitates it the legislation provides remedies for any infringement both interim (injunction) or final remedies (Financial fines, financial compensation). Moreover, for using a false trade mark may lead one year imprisonment or/and fines and if trademark infringements found, two year imprisonment and/or fines.

However, one limitation that can be pointed here is that the Act doesn't provide provision for the compulsory registration of trade mark. However, positively, the law prohibits that a trade mark or a part of trade mark which consists of or contains any scandalous de sign, or any matter the use of which is likely to deceive or to cause confusion or is likely to hurt the religious susceptibilities of any citizen, or is contrary to any law or morality, shall not be registerable. Although there is no direct relationship between information technology (hereinafter, IT) and functions of Trademark but from a commercial point of view Due to rapid growth of e- commerce trademark protection if very important for IT based business community. But in the present system of trademark protection there exists absence of legal framework in this regard. Such a lack has created an opportunity for unscrupulous business. Another flaw of the current trademark regime is that under the Trademark Act protection is extended up to class 34 under international classification of goods. There has not been any step taken by the concerned authority to extend the protection to goods and services beyond class 34. Again, enforcing agencies must be efficient to protect the rights granted by any Act. But the trademark office set up by the Trademarks Act lacks

adequate manpower, i.e. - there is only one trademark registrar and assistant registrar for the whole country. Although provision is made for the post of four (4) trademark examiners but there is only one trademark examiner. Total number of staff including registrar to typist wouldn't exist 40. As a result as in every year more than five hundred applications are filed in the trademark office it takes 3-4 years to get trademark registration.

The mark in distinguishing one entrepreneur's or company's product or service from another entrepreneur's or company's product or service is called trademark. Symbol, sign, word, innovated is considered trademark. Service mark is registered for service oriented activities. Trademark has been defined clearly in the *Trademarks Act, 2009* under section 2(8). The proprietor of registered trademark/service mark reserves the exclusive right to use the mark. No resembling mark for the same or similar product or service without the consent of proprietor. Under section 22(1) of *Trademarks Act, 2009* the trademark is registered for a period of seven years. Under section 22(2) of the said Act, the trademark registration may be renewed for a further period of ten years and further renewals ten years each may be continued for indefinite period.

Corporate bodies, Industries, service providing organizations get legal safeguards through registering trademarks or services marks for the products or services. As a result neither corporate body nor service providing organization nor industry can have economic gain out of copied trademarks or service marks and customers as well as the general consumers can not be cheated and sulky. Trademark helps a product set brand image and also helps to get value addition. However, It is difficult to take legal action against the infringers in the courts if the trademark is not registered. If not registered the proprietor of the trademark cannot have exclusive right to use the trademark. Unregistered trademark cannot easily have trade reputation. It is difficult to set up joint venture industry and merge the business organizations having unregistered trademark.

Trademarks Act legally protects the manufacturers from any sort of brand duplication resorted by dishonest imitators. The Patents & Designs Act, 1911, The Patents & Designs rules, 1933, The Trademarks Act, 2009, The Trademarks rules, 1963, The Copyright Act, 2000, The Copyright rules, 2006 and the major functions of DPDT are DPDT grants & renews Patents, registers & renews the industrial Design, registers and renews the Trademarks, operates opposition tribunal to settle disputes.

7.0 Recommendations:

To curb the massive brand duplication, the following suggestions can be put forward for the greater interest of the consumers as well as the country as a whole:

- a. Consumers should be made aware so that they can properly identify the duplicated products at the time of purchase. In this regard Govt. as well different organizations like consumers Association of Bangladesh (CAB), Chamber of Commerce and Industries, etc. can play a vital role in making people aware through mass media like Radio, TV, the dailies, etc. so that they can distinguish between original product and the imitated one. Once the rejection of duplicated goods by the consumers started, the duplicators will feel discouraged to produce as well as the wholesalers or retailers will also be discouraged to stock duplicated goods for the fear of loss.
- b. To formulate a standalone IP policy and strategy at the earliest possible time.
- c. Under the initiative of Government if the imitators can be accommodated and rehabilitated giving required financial and technical assistance, their expertise can properly be utilized and massive brand duplication will automatically be lessened to a large extent.
- d. IP Training Institute should be established in Dhaka where training on IP programs on IP will be organized.
- e. To join international treaties like Patent Cooperation Treaty (PCT), Trademark Law Treaty (TLT), Patent Law Treaty (PLT), Hague Agreement on Industrial Design.
- f. To provide Tax rebate/ Tax exemption, VIP status and other facilities to the inventors.
- g. Like some other countries Bank and Financial Institutions should launch "Innovation Fund" at the directives of the ministry of Finance and Bangladesh Bank, from where inventors and innovators will get special fund to carry out research activities on the condition that if the project comes out successful, Banks and Financial Institutions will get certain percentage of the profit after commercialization of the product.
- h. In the ministry of Finance and also in the Bangladesh Bank "Innovation Financing Unit" should be set up to monitor the proper use of "Innovation Fund".
- i. There should have policy guidelines to compel foreign companies as well as local companies to transfer technology and invest at least 1% of the total turnover in R&D sector and to facilitate IP enforcement to attract FDI.
- j To generate data base of Patent, Designs and Trademarks containing full text of patent disclosure and to manage IP data base.
- k. To Build up linkage among the inventors, innovators, business community, educational and R&D institutions and IP end users to encourage innovation and creativity.

Concluding Remarks

Enforcement of IPR has become an important issue all over the world. The Government of Bangladesh has been trying to enforce the IP laws strictly. Recently Govt has made some seminars in major city area in order to inform consumers, police, customs, judiciary, ministry of commerce, ministry of industry people about importance of trade marks in business and to train Govt. officials in this regard. To curb massive brand duplication, Government as well as different concerned agencies will have to come forward with their helping hands. But whatever role is played by the concerned quarters, expected result may not be achieved if Government does not provide direct support and assistance as needed. Cooperation between public and private sectors for building awareness will be appreciated. Effective linkage among academia research organizations, industries and Government should be established. Vigorous awareness building activities should be given proper recognition, awards and incentives.

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Appendix

Table – 1: Showing the names of Few products that are Duplicated widely in almost exact from.

<p>A – Cosmetic items i. Nivea Cream, ii. Boroline Cream/Fair & Lovely, iii. Ponds Cream, iv. Manola Vanishing Cream, v. Cute Cream, vi. Cosco Glycerine Soap, vii. Tibbet Snow</p> <p>B – Garments and Textile items i. Tangail saree ii. Hosiery Branded Products iii. Standard Lungi, iv. An style Grameen Check</p>	<p>C – Other category i. Balaka Blade and 7'o Clock Blade,ii. Close-up toothpaste iii. Feather Blade ,iv. Econo (ball point pen), v. Olympic Battery ,vi. C. I. Sheet (camel Marked),vii. Bata Shoe</p>
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Table – 2: Showing the Partial and Close Brand Duplication of Few Different products.

Name of Original brands	Different forms of Duplicated brands
<p>Cosmetic items i. Nivea Cream ii. Fair & Lovely Cream iii Meril .iv. Cute cosmetics v. . Cosco toilel soap</p> <p>Food items i.. Polar Ice Cream iiAlauddin Sweetmeat ii Maron Chand Sweetmeat</p>	<p>New Nevvia/ Nevvia Cream. Fair and love/Face and love/ Face and lovely/Fair and Lady Maril/Merlin/Merif/Merhen/Mare/Mari. Cute/Cutee/Cule Wesco toilet soap</p> <p>Polac/Polor ice cream. Alauddir/Aladinis Sweetmeat Mahon Chand Sweetmeat</p>
<p>Other items i. Bata Shoe ii.. Shahinoor Shoe iii Tri-cricle (lock)</p>	<p>Batta/Rata/Tata/Bala/Bato Shoe. Shahipur shoe. Three circle lock</p>

Table-3 Showing the Opinions about Brand Duplication

Cause of Duplication	No. of Retailers	Percentages
1. Higher margins/shortcut way to as profit	85	.48
2. Lack of Consumers consciousness	45	.25
3. Absence of effecting law	15	.09
4. Scarcity of some popular branded goods	10	.06
5. Banning of import of some foreign goods	5	.03
6. Others/Cheaprrers	20	.12
Total	180	100%

Performance of DPDT

Statistics of Patent, Design and Trademark Registration (Up to 2012)

[sources: internal data from DPDT]

Year	Patent	Design	Trademark	Total
Up to 2007	5000	8293	26943	40236
2008	37	434	555	1026
2009	131	394	1079	1604
2010	91	824	1519	2434
2011	86	646	1409	2141
2012	153	1156	2520	3829
Grand Total	5,277	11,747	34,025	51,270

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