



INTELLECTUAL PROPERTY RIGHT IN INDIA

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Abstract: In looking at the needs for India's next stage of growth, both industry and policymakers are focusing on strategies for fostering capacity for innovation. The link between innovation and competitiveness can be clearly demonstrated at a national level, and at a sub-national level there is also a growing need for understanding the dynamics of innovation and to take requisite steps accordingly. With this in mind, a stable IPR regime is the foundation of a globally competitive nation, drawing in investments, specifically from FDI. Ultimately, India will do well in the long term if it enables a robust IP ecosystem and protects the IP of its own companies. It will also provide a stable framework for multinational companies wanting to enter India. In 1994, India signed the TRIPs Agreement, which obligated the country to dramatically strengthen its protection and enforcement of intellectual property rights (IPR).

This paper analyzes and deals with the IP law regime in India and the protections provided there under. This essay looks at the broad contours of India's current intellectual property rights (IPR) regime and offers an assessment of the current situation as well as scenarios for continued advancement.

Key Words: Intellectual, Property, Rights, TRIP, IPR, IP

Introduction: International trade involves an increasingly diverse array of products in which ideas and knowledge play an important role. These products range from high-technology goods such as new medicines and computer

processors, to creative material like films, music and books, as well as traditionally low-technology goods that are now associated with a higher proportion of invention and design, such as brand-named apparel and new varieties of plants.

India, along with several other developing countries, signed the TRIPs Agreement in 1994, and became obligated to amend its domestic IPR laws within ten years. The signing of TRIPs remained deeply controversial in India for much of the 1990s, even as the country's patent regime began to be gradually modified to

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comply with the stronger IPR requirements stipulated in the agreement. On January 1, 2005, India became fully TRIPs-compliant by bringing into effect its most important requirement of enforcing product patents in all fields of technology. Given the large number of theoretically valid conjectures on both sides of the TRIPs debate, empirical evidence on its actual consequences in India would shed some important light on the relevance of stronger IPR protection for developing countries.

There are well-established statutory, administrative, and judicial frameworks for safeguarding IPRs in India. It becomes pertinent to mention here that India has complied with its obligations under the Agreement on Trade Related Intellectual Property Rights (“TRIPs”) by enacting the necessary statutes and amending the existing statutes. Well-known international trademarks have been afforded protection in India in the past by the Indian courts despite the fact that these trade marks were not registered in India. Computer databases and software programs have been protected under the copyright laws in India and pursuant to this; software companies have successfully curtailed piracy through judicial intervention. Although trade secrets and know-how are not protected by any specific statutory law in India, they are protected under the common law. The courts, under the doctrine of breach of confidentiality, have granted protection to trade secrets.

With the advent of the knowledge and information technology era, intellectual capital has gained substantial importance. Consequently, Intellectual Property (“IP”) and rights attached thereto have become precious commodities and are being fiercely protected. In recent years, especially during the last decade, the world has witnessed an increasing number of cross-border transactions. Companies are carrying on business in several countries and selling their goods and services to entities in multiple locations across the world. Since intellectual property rights (“IPRs”) are country-specific, it is imperative, in a global

economy, to ascertain and analyze the nature of protection afforded to IPRs in each jurisdiction. This paper analyzes and deals with the IP law regime in India and the protections provided there under. This essay looks at the broad contours of India’s current intellectual property rights (IPR) regime and offers an assessment of the current situation as well as scenarios for continued advancement.

Types of Protected IP and Their Coverage by Indian Law: Under Indian law, there are six discernible major categories of innovations that are eligible for IP protections.

Patents. Patents are a set of exclusive rights that are granted to an inventor for making, selling, or using an invention. Three core pieces of legislation—the Patents Act of 1970, Patent Rules of 2003, and Patent Amendment of 2005—form the basis of patent law in India. The Patents Act has provisions with respect to compulsory licensing, the government’s rights to fix prices for patentable goods, and use of some patents for the government only. The Patent Amendment also allows petitioners to file applications through electronic media (though the paper copy should be filed within one month).

I. Which Inventions are Patentable?

Not all innovations are “inventions” within the definition of the Patents Act. The term “invention” is defined under Section 2(1) (j) of the Patents Act as “a new product or process involving an inventive step⁴⁵ and capable of industrial application.”⁴⁶ Thus, the traditional aspects of novelty, non-obviousness, and utility have been specifically included in the definition of the term “invention”.

II. Novelty

If the invention was known or used by any other person, or used or sold by the applicant to any person in India and/or outside India, then the applicant would not be entitled to the grant of a patent. Public use or publication of the invention will affect the validity of an application in India. The patent application must be filed prior to any publication or public use. However, there is a

12-month grace period permitted in India when a person has made an application for a patent in a convention country and if that person or his legal representative (or his assignee) makes an application with respect to the same invention in India. Although patent rights are essentially territorial in nature, the criteria of novelty and non-obviousness are to be considered on / compared with prior arts on a worldwide basis. Any earlier patent, earlier publication, document published in any country, earlier product disclosing the same invention, or earlier disclosure or use by the inventor will prevent the granting of a patent in India.

III. Inventions That are Not "Inventions"

Innovations that are not inventions within the meaning of the Patents Act, and accordingly are not patentable in India, include: (i) a method of agriculture or horticulture; (ii) a process for the medicinal or other treatment of human beings and animals; (iii) a mere discovery of any new property, or new use for a known substance, or a mere use of a known process, machine, or apparatus (unless such known process results in a new product or employs at least one new reactant); and (iv) an invention which is frivolous or which claims anything obviously contrary to well established natural laws.

IV. Who can be the Applicant?

India grants patent right on a first-to-apply basis. The application can be made by either (i) the inventor or (ii) the assignee⁶¹ or legal representative⁶² of the inventor. Foreign applicants are given national treatment.

V. What is the Process of Registration?

Patent rights with respect to any invention are created only upon grant of the patent by the Patent Office following the procedure established by the Patents Act and the Rules. India follows a declarative system for patent rights. Below are the three types of applications that may be filed in the Indian Patent Office:

i. Regular Application

The regular application process comprises of filling the application followed by meeting different procedures which includes meeting

various procedural objections, publication of the application, request for examination, pre-grant opposition and finally the patent is granted.

ii. Convention Application

India has published a list of convention countries under Section 133 of the Patents Act and is also a member of the Paris Convention. The convention application has to be filed within one year from the date of priority and has to specify the date on which, and the convention country in which the application for protection (first application) was made. The priority document has to be filed with the application.

iii. Patent Cooperation Treaty (PCT) National Phase Application

A National Phase Application may be filed in India as India is a PCT member country. Since December 2007, the Indian Patent Office has also been recognized as one of the many International Searching Authorities (ISA) and International Preliminary Examining Authorities (IPEA) nominated by World Intellectual Property Organization (WIPO). The office is expected to soon start operations in this capacity.

VI. What is the term of a Patent?

Every patent granted under the Act shall be dated as of the date on which the complete specification was filed. The Second Amendment prescribed a uniform term of 20 years from the date of filling the patent application in India⁶³ for all categories of patents in compliance with Article 33 of TRIPS. There is no provision for an extension of the patent term. Term of patent in case of applications filed under the PCT designating India is twenty years from the international filing date.

VII. Infringement

Section 48 of the Act grants the following rights to the patentee.

In the case of a product patent, the following actions would amount to infringement:

- making, using, offering, for sale, selling or

- Importing for these purposes, the product in India without the permission of the patentee.

In the case of a process patent, the following would amount to infringement:

- Using, offering for sale, selling, or importing for these purposes the product obtained directly by that process in India without the permission of the patentee.
- Any person without the consent of the patentee performs the above activities of the infringes the patent.

In patent infringement suits, the damages are not granted for the use of the patented invention during the period prior to the date of acceptance of the patent application. In a patent infringement action, the defendant can file a counterclaim for a revocation of the patent. Consequently, the main suit and the counterclaim are heard together.

Table No.1: Total No. of Patents (Source: Annual reports (various rounds), CGDPTM.)

Year	Filed	Examined	Granted
2003-04	12613	10709	2469
2004-05	17466	14813	1911
2005-06	24505	11569	4320
2006-07	28940	14119	7539
2007-08	35218	11751	15261
2008-09	36812	10296	16061
2009-10	34287	6069	6168
2010-11	39400	11208	7500
2011-12	43197	11031	4381
2012-13	43674	12268	4126

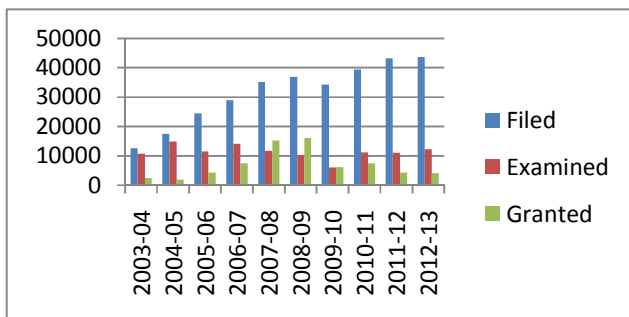


Fig 1: Total No. of Patents (Source: Annual reports (various rounds), CGDPTM.)

Trademarks. Trademarks are recognizable signs, designs, or expressions that identify the goods and services of a producer as being distinct from another. In India, the Trademark Act of 1999 was a redrafted version of the Trademark and Merchandise Marks Act of 1958 that extended trademarks to services as well. Coverage for trademarks in India is ten years from the date the application is first made, while a 2010 amendment to the act enabled stakeholders to take advantage of provisions in the Madrid Protocol, a treaty that protects trademarks in multiple countries through the filing of one application with a single office.

I. Who can apply?

Any person claiming to be the proprietor of a trademark used or proposed to be used by that person can file an application for registration. The application may be made in the name of the individual, partner of a firm, a company, any government department, a trust, or even in name of joint applicants. Domestic and international applicants are treated at par. An application can also be filed on behalf of a company that is about to be incorporated or registered under the Companies Act, 1956.

II. What is the Process of Registration?

The process of registration includes various processes which include selection of the mark, search before application, filling of the application, numbering of the application, meeting the official objections, advertising of the application, acceptance of the application, opposition proceeding and issue of certificate of registration.

III. What is the Term of Registration?

The registration is valid for ten years and is renewable for a subsequent period of ten years. Non-renewal leads to a lapse of registration. However, there is a procedure whereby a lapsed registration can be restored.

IV. Infringement of Trademark

Registration of a trademark is a prerequisite for initiating an infringement action. The following

essential conditions must exist for initiation of an infringement action:

- The allegedly infringing mark must be either identical or deceptively similar to the registered trademark;
- The goods / services in relation to which the allegedly infringing mark is used must be specifically covered by the registration of the registered trademark;
- The use of the allegedly infringing mark must be in the course of trade; and
- The use must be in such a manner as to render the use likely to be taken as being used as a trademark.
- A registered trademark is also infringed by use of a mark when because of:
 - Its identity with registered trademark and similarity with goods / services covered by registration; or
 - Its similarity with registered trademark and identity with goods / services covered by registration; or
 - Its identity with registered trademark and identity with goods / services covered by registration

If an identical or similar mark is used with respect to goods or services which are not similar to those for which a registered trademark is registered, such use amounts to infringement if a registered trademark has reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to the distinctive character or repute of the registered trademark.

Table No.2: Total No. of Trademarks (Source: Annual reports (various rounds), CGDPTM.)

Year	Filed	Examined	Registered
2003-04	92251	89958	39762
2004-05	78996	72091	45015
2005-06	85699	77500	184325
2006-07	103419	85185	10936
2007-08	123514	63605	100857
2008-09	130172	105219	102257

2009-10	141943	25875	67490
2010-11	179317	205065	115472
2011-12	183588	116263	51735
2012-13	194216	202385	44361

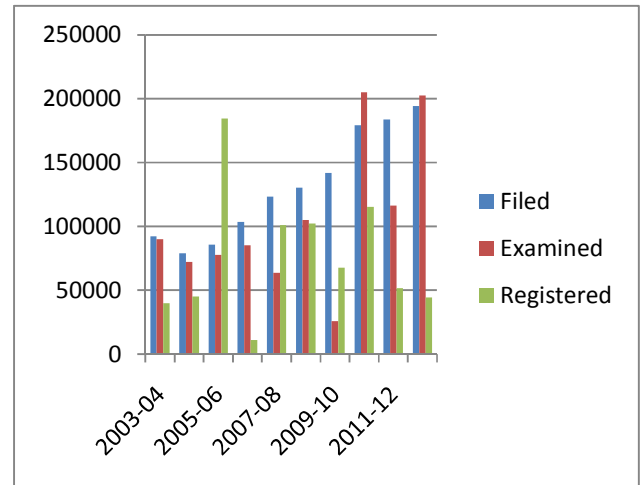


Fig 2: Total No. of Trademarks (Source: Annual reports (various rounds), CGDPTM.)

Copyrights. Copyrights are a form of intellectual property that grants the creator of original work exclusive rights for distribution for a limited period of time. The first copyright act came to India in 1914, which was modeled on the British Act of 1911. After independence, India's copyright regulations underwent thorough revisions, ultimately resulting in the Indian Copyright Act of 1957, which included (among other provisions) an extension of copyright protections to cover 50 years of protection. Since then, the act has been amended five times (most recently in 2012), with amendments covering further extensions of the copyright period, updates to reflect the digital environment, and coverage for other media forms, including radio diffusion, cinematographic film, and others.

I. Is Copyright Registration Compulsory?

Indian law, registration is not a prerequisite for acquiring a copyright in a work. A copyright in a work is created when the work is created and given a material form, provided it is original. The Copyright Act provides for a copyright

registration procedure. However, unlike the U.S. law, the Indian law registration does not confer any special rights or privileges with respect to the registered copyrighted work. The Register of Copyright acts as prima facie evidence of the particulars entered therein. The documents purporting to be copies of the entries and extracts from the Register certified by the Registrar of Copyright are admissible in evidence in all courts without further proof of original. Thus, registration only raises a presumption that the person in the Register is the actual author, owner or right holder. The presumption is not conclusive. But where contrary evidence is not forthcoming, it is not necessary to render further proof to show that the copyright vests in the person mentioned in the Register. In infringement suits and criminal proceedings, when time is of essence to obtain urgent orders, registration is of tremendous help. Copyright notice is not necessary under the Indian law to claim protection.

II. What Rights does Copyright Provide?

A copyright grants protection to the creator and his representatives for the works and prevents such works from being copied or reproduced without his/ their consent. The creator of a work can prohibit or authorize anyone to:

- reproduce the work in any form, such as print, sound, video, etc;
- use the work for a public performance, such as a play or a musical work;
- make copies/recordings of the work, such as via compact discs, cassettes, etc.;
- broadcast it in various forms; or
- translate the same to other languages

IV. What is the term of Copyright?

The term of copyright is, in most cases, the lifetime of the author plus 60 years thereafter.

X. Infringement of a Copyright

A copyright is infringed if a person without an appropriate license does anything that the owner of the copyright has an exclusive right to do. However, there are certain exceptions to the above rule (e.g., fair dealing). The Copyright

Act provides for both civil and criminal remedies for copyright infringement. When an infringement is proved, the copyright owner is entitled to remedies by way of injunction, damages, and order for seizure and destruction of infringing articles.

Geographic Indicators. A geographic indicator highlights a place of origin for a product and for the purpose of IP may be closely linked to the perceived value of the good. Examples of geographic indicators include Darjeeling tea, Banarasi Saree in India and Havana, and Champagne internationally. India's Geographic Indications of Goods (Registration & Protection) Act is relatively new, as it first passed in 1999 and was made in fulfillment of obligations under GATT, to which India is a signatory. The purpose is to exclude unauthorized persons from misusing geographic indicators and protecting consumers against deception from passing off goods not related to any geographic area. The registration of such indicators is valid for a period of ten years and can be renewed for further periods of ten years successively.

I. Registration

The Act provides for the registration of a GI and the 'authorized user' thereof. Any person claiming to be the producer of goods in respect of a registered GI can apply for registering him as an authorized user. The authorized user is able to bring an action against the wrongful users of GI. Convention applications can also be filed under this Act.

An application for registration can be filed by any:-

- Organization of persons or producers, or
- Organization or authority established by or under any law, such organization or authority representing the interest of the producers of the concerned goods.

II. Duration and Renewal

GI registration is valid for a period of ten years, and may be renewed thereafter from time to time. The registration of an authorized user is valid for a period of ten years or for the period

until the date on which the GI registration expires, whichever is earlier.

III. Infringement

The Act also provides for infringement and passing off actions, thus recognizing the common law right in a GI, which includes civil as well as criminal remedies. Infringement has been defined to include unfair competition.

An action for infringement of a GI may be initiated in a District Court or High Court having jurisdiction. Available relief includes injunctions, discovery of documents, damages or accounts of profits, delivery-up of the infringing labels, and indications for destruction or erasure.

Table No.3: Total Geographic Indications (Source: Annual reports (various rounds), CGDPTM)

Year	Filed	Examined	Registered
2008-09	44	21	45
2009-10	40	46	14
2010-11	27	32	29
2011-12	148	37	23
2012-13	24	30	21

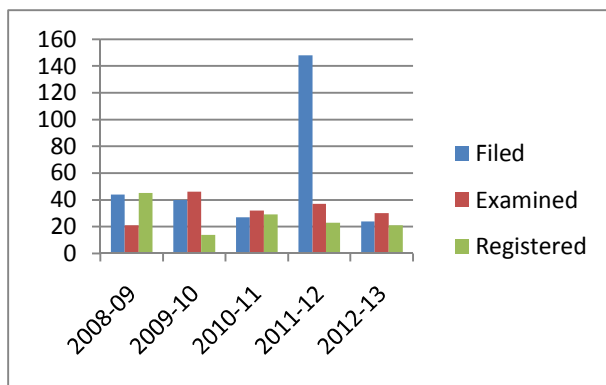


Fig 3: Total Geographic Indications (Source: Annual reports (various rounds), CGDPTM)

Industrial Designs. Indian law also safeguards IP protections for industrial designs based on the unique look or feel of an invention, such as its pattern, shape, or texture. For the purpose of registration, design-related IP protections can be conferred on fourteen classes of goods. Once registered the period of design is fifteen years with renewals at every five-year period. After

fifteen years the design becomes open and public property. Additionally, within the field of design the Semiconductor Integrated Circuits Layout Design Act and Rules of 2000 seeks specific protections for semiconductors. This act gives an owner an exclusive right to create layout design for a period of ten years. The act enables the owner to commercially exploit their creation and, in the cases of infringement, seek relief under its provisions.

I. Who can apply for Registration of a Design?

Any person claiming to be the “**proprietor of any new or original design**” not previously published in any country and is not contrary to public order or morality can apply for the registration of the design. The expressions “public order” or “morality” have not been defined in the Designs Act.

The term “original,” with respect to design, means a design originating from the author of such a design and includes the cases that, although old in themselves, are new in their application. Absolute novelty is now the criterion for registration.

II. What is the Process of Registration?

The process of registration of a design under the Designs Act requires the following steps:

- File an application for registration of design with the prescribed fee with the Controller of Patents and Designs. Photographs of the articles from all angles must be filed along with the statement of novelty.
- Reply to the objections raised by the Controller.
- Upon removal objections, the design is registered. When registered, a design is deemed to have been registered as of the date of the application for registration.
- After registration, the particulars of the design are published.
- If the Controller rejects the application, the aggrieved person can appeal to the High Court.

III. What is the term of Registration?

The first term of registration is ten years after which it can be renewed for an additional five-year period.

IV. Piracy :

Section 22 of the Designs Act lists the different acts that amount to piracy of the registered design, including: 1) any application of the registered design for the purpose of sale during the existence of the copyright in the design without a license or the express consent of the registered proprietor; 2) or the importation for sale without the consent of the registered proprietor of any article belonging to the class in which the design has been registered and having applied to it the design or any fraudulent or obvious imitation; or, 3) knowing that the design, or a fraudulent or obvious imitation has been applied to any article in any class of articles in which the design is registered, published, or exposed for sale, without the consent of the registered proprietor of such an article. Any grounds on which the design can be cancelled can also be used as a defense in an infringement action.

V. Remedies

The Designs Act provides for civil remedies in cases of infringement of copyright in a design, but does not provide for criminal actions. The civil remedies available in such cases are injunctions, damages, compensation, or delivery-up of the infringing articles.

Table No.4: Total Number of Designs (Source: Annual reports (various rounds), CGDPTM)

Year	Filed	Examined	Granted
2003-04	3357	3228	2547
2004-05	4017	4017	3728
2005-06	4949	4719	4175
2006-07	5521	4976	4250
2007-08	6402	6183	4928
2008-09	6557	6446	4772
2009-10	6092	6266	6025
2010-11	7589	6277	9206
2011-12	8373	6511	6590

2012-13	8337	6776	7252
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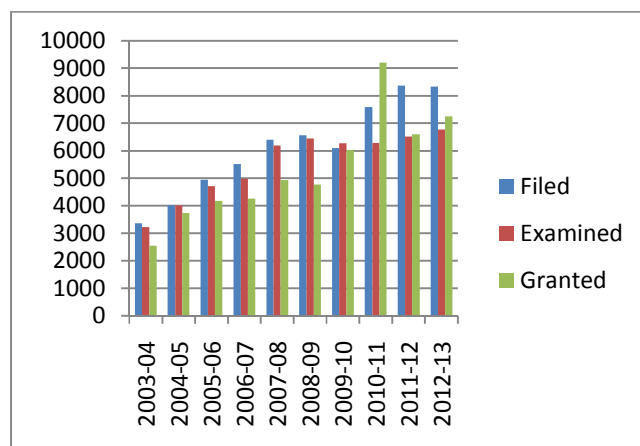


Fig 4: Total Number of Designs (Source: Annual reports (various rounds), CGDPTM)

Agriculture. Under Indian law, IPR related to innovation in crops and planting are covered by the Protection of Plant Varieties and Farmers’ Rights Act of 2001. This act seeks to provide for the “establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants.” The duration of protection of registered varieties is different for types of crops. For trees and vines, the protection is eighteen years, while for other crops it is fifteen years. Similarly, for extant varieties, protection is fifteen years from the date of notification.

I. Varieties Registerable under the Act

i. a new variety if it confirms the criteria of novelty, distinctiveness, uniformity and stability; and an extant variety if it confirms the criteria of novelty, distinctiveness, uniformity and stability as specified under Protection of Plant Varieties and Farmers’ Rights Regulations, 2006.

‘Extant Variety’ has been defined under the Act to mean:

- i. a variety notified under Section 5 of the Seeds Act, 1966; or
- ii. a farmer’s variety (which has been defined to mean a variety traditionally cultivated and evolved by the framers in their fields or a variety

which is relative or land race of a variety about which the farmers possess common knowledge); or
 iii. a variety about which there is common knowledge; or
 iv. any other variety which is in public domain

II. Registration of Plant Varieties now Possible in India

The Act has started documentation and registration of varieties of 12 crops which include the following: rice, wheat (bread wheat types), maize, sorghum (jowar), pearl millet (bajra), chickpea (chana), pigeon pea (arhar), green gram (mung), blackgram (urad), lentil (masur), field pea (matar) and kidney bean (rajmah).

Domestic Governance and Management of IPR: To execute and enforce the statutory

guidelines above, India has a patchwork bureaucracy, which, as of this writing, is being updated under the guidance of a new national IP think tank. As such, the governance and management of IPR in India still currently falls under various offices that cut across different parts of the national government.

As can be seen in the Fig 5, IP protection is the responsibility of a number of departments, including the Department of Education, the Department of Information Technology, the Department of Agriculture and Cooperation, and the Department of Industrial Policy and Promotion, among others. While several of these departments can be found within the Ministry of Commerce and Industry, other departments are housed in ministries from different parts of the national government.

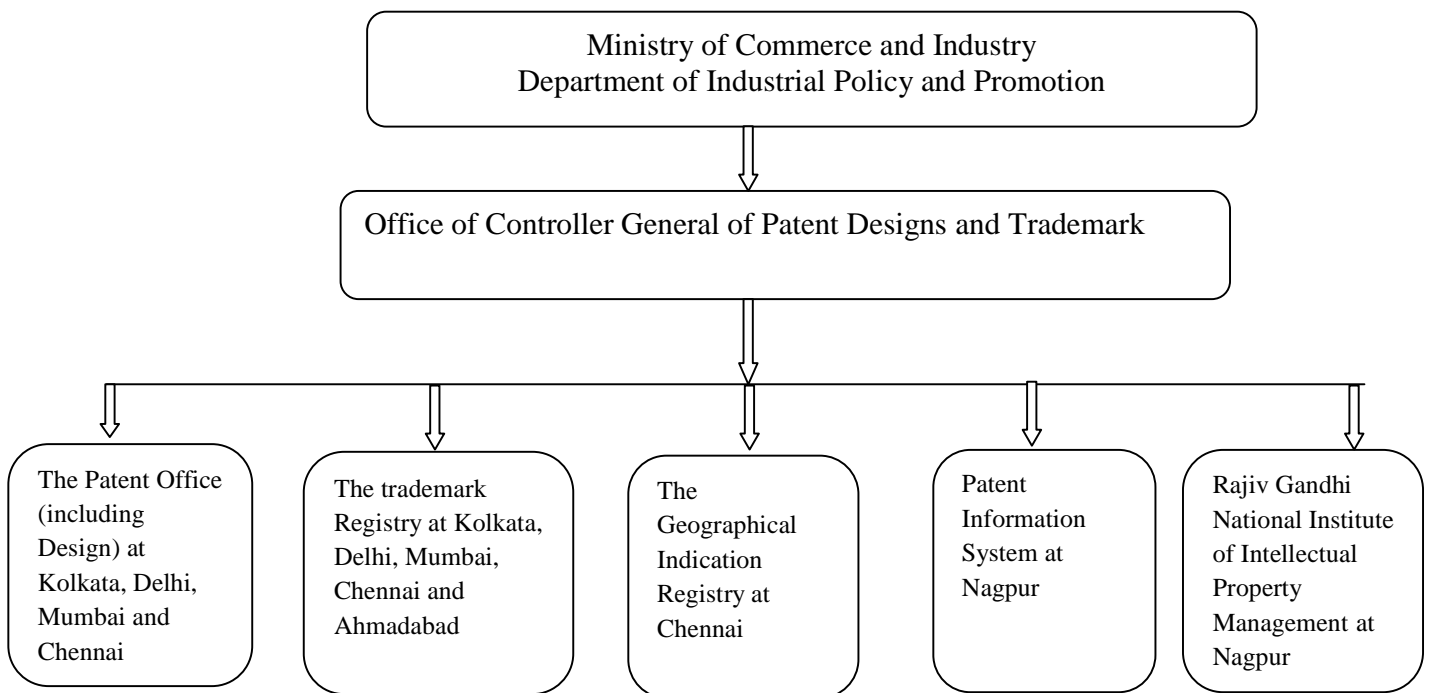


Fig 5: Office Structure of CGPDTM

Source: Controller General of Patents, Designs and Trademarks (India), *Annual Report 2012–2013* (New Delhi, 2013), http://ipindia.gov.in/cgpdmt/AnnualReport_English_2012_2013.pdf.

The third pillar of India’s IPR regime is defined as its obligations under international frameworks. On this front, perhaps the most pressing and important agreement for understanding India’s engagement in the international IPR system is its response to

TRIPS. India's position with respect to TRIPS began with being defensive about the country's obligations and its IPR developments, slowly changed to moderation, and finally changed to being aggressive with respect to some specific dimensions. The acts and legislations of India at present are increasingly coming in contact with international conventions, and in the years ahead further harmonization with the international system is expected. The IP system is in a state of transition, and a look at its facts and figures offers insights into the functioning of the system under the boundaries of these key legislations and treaties.

Conclusion: The importance of IPR and their protection is acknowledged the world over as essential to business. In tune with the world scenario, India too has recognized the value of IP, which recognition has been consistently upheld by legislators, courts and the industry. India is now a signatory to various IP treaties and conventions. This has helped India become more attuned to the world's approaches and attitudes towards IP protection. India has already taken steps to comply with its obligations under TRIPS, and the Indian IP law regime is almost at par with the regimes of many developed nations. Historically, the enforcement of IPRs in India was not particularly effective. However, recent judicial rulings and steps taken by various enforcement agencies demonstrate that India is gearing up for effective protection and enforcement of IPRs. The Indian police have established special IP cells where specially trained police officers have been appointed to monitor IP infringement and cyber crimes. Various Indian industries have also become more proactive in protecting their IPRs. For example, the Indian Music Industry, an association of music companies, which headed by a retired senior police official, has taken similar proactive steps to combat music piracy. All in all, India has taken many positive steps toward improving its IPR regime and is expected to do much more in the coming years

to streamline it with the best practices in the field of intellectual property rights.

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