

Designs 2021



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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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India

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LexOrbis

LEGAL FRAMEWORK

Relevant legislation

1 | What is the relevant legislation?

The protection of industrial designs in India is governed by a dynamic legislative framework that is aligned with advances in technology and concomitant international developments. The Designs Act 2000, which repealed and replaced the Designs Act 1911, sets down the statutory framework for the protection of designs and has been in force since 11 May 2001. The act not only provides for minimum standards of protection for industrial designs (as contemplated in the World Trade Organization Agreement on Trade-Related Aspects of IP Rights (TRIPs)), but also conforms to international trends in design administration. In conjunction with the Designs Rules 2001 (as amended in 2008 and 2014), the act streamlines the procedural aspects of registering and processing design applications. The 2014 amendment to the Designs Rules adds 'small entity' as a new category of applicant in addition to natural persons. India is also party to various international treaties which protect international designs, including the Paris Convention and TRIPs. In 2019 India acceded to the Locarno Agreement, which will help the Indian Design Office to harmonise the classification systems in line with those followed globally.

Nature of system

2 | Are design rights considered to be distinct or treated as patent rights?

Design rights are distinct and separate from patent rights and protect only the aesthetic features of an article.

Agency

3 | Which agency is responsible for registration and grant of design rights?

The design office based in Kolkata is responsible for registration of design rights in India.

Overlap with other rights

4 | Is there any overlap between design rights and other rights?

The shape of a product, its packaging or combination of colours used on a product may be a trademark, trade dress or a design applied to that product. The difference lies in the distinct purposes fulfilled by trademarks and designs. On one hand, a design is applied to a product to merely enhance its aesthetic value or commercial appeal. On the other hand, a trademark is applied to a product to showcase its source of origin. A trademark may also appeal to the eye and enhance the aesthetic value of the product, but it is necessary that it acts as an association

between the product and the source of origin, the manufacturer and the producer of the product. If a product feature merely enhances aesthetic value or commercial appeal or appeals to the eye without pinpointing any source of origin, it is clearly the subject matter of a design right. However, if it enhances the aesthetic value or commercial appeal or appeals to the eye while also indicating the source of origin, there is an overlap between trademark and design rights.

In India, parallel statutory protection cannot be sought under the Trademarks Act and Designs Act. This is because the definition of a 'design' clearly excludes trademarks. However, it is much debated whether statutory protection on design rights and common law protection on trademark rights can simultaneously exist in cases where a registered design is also acting as a trademark because it indicates the source of origin to consumers.

In addition, copyright protection for a design may be claimed under the Copyright Act 1957 if the design is capable of being registered under the Designs Act but was not registered. However, in such cases, protection is limited and expires once the design has been applied to more than 50 articles by an industrial process. The judgment of a division bench of the Delhi High Court in *Microfibres Inc v Girdhar & Co* (2009) provided much needed clarity with respect to the conflict between 'original artistic work' as defined under the Copyright Act and 'design' as defined in the Designs Act. It was held that copyright would exist in the original work of art and the author or copyright holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work. The court held that the legislative intent was to grant greater protection to original, purely artistic works (eg, paintings and sculptures) and lesser protection to design activity, which is commercial in nature. The protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure art.

The unregistered design has no statutory protection and is susceptible to copying. Thus, it is advisable to obtain design protection to ensure adequate and effective protection.

UNREGISTERED DESIGNS

Protection

5 | What protection and rights are there for unregistered designs?

An unregistered design is not enforceable under the law, so a design must therefore be registered in order to enjoy protection. However, it may be possible to protect a design under other legislation. An unregistered design may be protected under the common law tort of passing off, if it has become distinctive due to long and continuous use. In order to claim such remedy, the design owner must establish that the design has become distinctive in respect of such goods due to long and continuous use.

Designs, if not registered under the Designs Act, may also be protected under the Copyright Act 1957. However, in such cases, protection is limited and expires once the design has been applied to an article more than 50 times by an industrial process.

Use requirements

6 | How much use is generally required to establish unregistered design rights?

There is no specific use period to establish unregistered design rights, the use should be substantial to make the design distinctive and such design must attain sufficient goodwill and reputation. If an unregistered design has become distinctive due to long and continuous use, and if it has attained sufficient goodwill and reputation, it may be protected under the common law tort of passing off. An action for passing off is founded on the use of the unregistered design element in the trade for sale of goods and for offering services, generation of reputation and goodwill, association of the unregistered design element to the plaintiff's goods and the misrepresentation sought to be created by the defendant by the use of the plaintiff's unregistered design element.

Exclusions

7 | What exclusions apply to unregistered design rights?

In unregistered designs, copyright protection is mutually exclusive and would exist as long as the article to which the design is applied is not reproduced more than 50 times by an industrial process.

REGISTERED DESIGNS

Ownership

8 | Who can apply for and own a design?

Any person claiming to be the owner of any new or original design may apply for design registration. Apart from a natural person, any company or association or body of individuals, whether incorporated or not, society, partnership firm can also own a design in India.

Scope

9 | What may and may not be protected?

According to Indian design law, a 'design' is defined as "the features of shape, configuration, pattern or ornament or composition of lines or colour or combination thereof applied to any article whether two-dimensional or three-dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye". A design does not include any mode or principle of construction or anything which is in substance a mere mechanical device. Thus, any trademark or property mark as defined under Section 479 of the Indian Penal Code, 1860 or any artistic work as defined in Section 2(c) of the Copyright Act, 1957 does not fall under the scope of design.

In order to protect a design, it must be new and original. 'New' in this context means that the subject design must not have been previously published anywhere in India or any other country in a tangible form or by use or in any other way. 'Original' implies that the design should originate from the author of the design, but as a matter of fact, those old designs which are new in terms of application are also considered original.

Indian design law protects any new and original design that is capable of being applied to an article. The feature becomes eligible for registration, provided that it:

- is new or original;

- has not been disclosed by prior publication or use or in any other way;
- is sufficiently distinguishable from known designs or their combination; and
- contains no scandalous or obscene matter and is not contrary to public order or morality.

In order to protect part of an article, the applicant must ensure that each part of such article meets the requisite condition of being "capable of being made and sold separately". If part of the article is capable of being made and sold separately and can be judged solely by eye, design protection can be obtained for such part.

Under Indian design law, a design cannot be registered that:

- is not new or original;
- has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of the application for registration;
- is not significantly distinguishable from known designs or combination of known designs;
- comprises or contains scandalous or obscene matter;
- includes any mode or principle of construction or operation or anything which is in substance a mere mechanical device; and
- is a trademark, property mark or an artistic work.

Costs

10 | What are the costs involved in registration?

It depends on several factors, such as whether there are objections or need for hearing in prosecution of application. However, the average cost of obtaining a design registration in India can be between US\$500 and US\$800.

Grace period

11 | Is there a grace period for filings?

Under the Indian design law, a six-month grace period is available but is limited to the disclosure made in a notified exhibition or trade show and where a prior notice of such public disclosure is given to the Controller of Designs in India. Prior publication without notification to the Controller of Designs would hit the novelty of the proposed Indian design application and the grace period will not be available.

PROCEDURES

Application

12 | What is the application process?

The foremost step in the process of design registration is the filing of Form 1, which includes:

- the applicant's full name, address and nationality;
- the name of the article;
- the class number; and
- an address for service in India.

The application may be signed by the applicant or its authorised agent.

Along with Form 1, the applicant must submit:

- two copies of the design;
- a brief statement of novelty endorsed on each representation sheet;
- the priority documents, in case of a convention application; and
- a power of attorney, if the application is filed by an agent or attorney.

Indian law does not permit the filing of multiple embodiments of the same article in a single application. Therefore, if an applicant wishes to

register a particular design for the articles in different classes, it must file separate applications for each class. Further, in case an applicant desires to register a design for different embodiments, the law stipulates that a separate application must be filed for each embodiment.

The law does not provide any specifications regarding the number of drawings to be filed alongside an application. As per the rules, a design should be represented exactly in drawings, photographs, tracings or other representations of the design. Such representation should clearly depict the details of that elements of the design that are sought to be protected.

In case of a claim for surface ornamentation, a photograph or computer graphic must be submitted. Further, to claim the shape and configuration of an article, it is advisable to file all basic views of the article (ie, top and bottom, front and back, left and right side and perspective views). Dotted lines are not acceptable.

Examination and appeals

13 | How are the examination and appeals procedures conducted?

The Design Office conducts both procedural and substantive examinations. A novelty search is conducted in the database of earlier designs applied for, registered and published in India. The representations of the design are checked to ascertain whether they clearly exhibit the claimed features of the design. The examiners also examine the class of the article to which the design is applied and whether it is capable of being sold separately. If the design, as applied for, does not comply with any legal requirement, an office action is issued. Under current practice, an office action is issued around one to two months after the date of filing and the applicant must file its response to the office action within six months of the date of filing. This period can be extended by three months, provided that a prior application seeking such an extension is filed with the Controller of Designs. In exceptional cases, where it is not possible to show the design by way of representation, the Design Office may request the submission of a sample of the article. The Design Office's procedural objections to design applications usually comprise requests for a power of attorney, clear drawings and certified copies of the priority documents. If the highlighted defects are not rectified, the applicant will be heard in person. After the hearing, the controller decides whether the application should be accepted. The controller's decision is communicated in writing to the applicant or its agent, stating the reasons for the decision. The controller's decision to refuse a design registration may be appealed to the High Court within three months of the controller's decision. Once examined and accepted the design is registered in the Register of Designs and a certificate of registration is generally issued within three months of acceptance. Thereafter, the registration is published in the *Official Journal*. The term of protection for a registered design is 10 years from the date of the application and can be extended for a further five years on payment of an extension fee.

Any person aggrieved from the order passed by the Controller of Designs, Design Office, India has a right to appeal before the Calcutta High Court within three months from the date of order of refusal.

Opposition

14 | What are the opposition rules?

Indian design law has no provision to file opposition. However, the design can be cancelled at any time after registration, by filing a petition for cancellation along with the prescribed fee to the Controller of Designs on the following grounds:

- the design has been previously registered in India;
- the design has been published in India or another country before the date of registration;
- the design is not new or original;

- the design is not registrable; and
- the design is not a 'design' as defined under Section 2(d).

Registration time frame

15 | What are the registration time frames?

The term of protection of a design is 15 years, subject to renewal of 10 years from the date of filing or priority date before the expiry of the initial term.

Removal from register

16 | In what instances does removal from the register occur?

A design registration can be challenged by any interested person presenting a petition for the cancellation of design registration on the following grounds:

- the design has been previously registered in India;
- the design has been published in India or another country before the date of registration;
- the design is not a new or original design;
- the design is unregistrable under the act; and
- the design is not a 'design' as defined under Section 2(d).

ENFORCEMENT

Grounds for a claim

17 | What are the key causes of action?

The key causes for action under the Designs Act are covered under Section 22 (piracy of design).

A person infringes a registered design if, during the term of registration of the design, and without a licence or the authority of the registered design owner:

- the person, applies or causes to be applied to any article in any class of articles in which the design is registered, the design or any fraudulent or obvious imitation thereof;
- the person imports any article belonging to the class in which the design has been registered, and has applied to it the design or any fraudulent or obvious imitation of the design; and
- the person publishes, exposes or causes to be published or exposed for sale the design or any fraudulent or obvious imitation of the design has been applied to any article in any class of articles in which the design is registered, for the purpose of sale or to import for the purpose of sale.

The registered owner whose design is infringed can file a civil suit against such infringer before the District Court.

Procedures

18 | What enforcement procedures are available?

In India, design rights can be enforced only through civil procedures.

Remedies

19 | What remedies are available?

The Designs Act does not impose any criminal remedy. A registered design in India can be enforced by way of a civil action. The registered owner of a design enjoys the exclusive right to apply a design to the article in the class in which the design has been registered. A registered owner can file an infringement suit. A civil action enforcing a registered design can be filed before the District Court where the defendant resides or conducts business or where infringement has taken place. In

addition to using the defence of non-infringement, the infringer can use the defence of invalidity of the design on the grounds that the design lacks novelty, is indistinguishable from a known design or contains scandalous matter. If the defence of invalidity is used in a civil action, the District Court no longer has jurisdiction and the suit is transferred to the High Court with jurisdiction over that District Court. Under the act, the registered owner of a design should mark the article with the word 'Regd' or 'Registered' and the registration number, except in cases of textile designs and articles made of charcoal dust. If the mark is missing, the owner is not entitled to claim damages. Indian courts regularly deal with design infringement matters and a robust body of case law lays down the established legal principles.

Passing off

The common law remedy of passing off can also be availed. In a case before the Delhi High Court, the court held that the remedy of the passing off would lie in case the competitor copies both the shape of the article and the trade dress, get up or any other feature. In which case, the owner can act to the extent that there is confusion regarding the source as indicated on the packaging.

Enforcement time frame

20 | What are the time frames for the resolution of enforcement actions for registered and unregistered rights?

The time frame of enforcement action in both registered and unregistered rights is largely the same, largely because the stages of suit proceedings before the court are same. Further, in a number of cases the dispute is settled by signing and submitting a 'compromise application' before the trial begins (ie, within one to years of instituting a suit). Further examples include:

- admission of suit and hearing on *ex parte* injunction application – the suit is listed for hearing within two to three days from the date of filing;
- appearance of defendants – within 30 days from serving the summons on the defendants; and
- filing a written statement – within 30 days from serving the summons on the defendants (extendable up to a maximum of 120 days, subject to the payment of costs and agreeing to a delay if the application is moved). The defendant is also required to file an affidavit admitting and denying the plaintiff's documents.

Should no written statement be filed, the plaintiff can file an application requesting for summary judgment. If the application is allowed, the court will hear the suit *ex parte* and pass a summary judgment within one to two years of instituting a suit. Should this be disallowed, the plaintiff will be asked to move their evidence before the court and record oral evidence before proceeding to complete adjudication of the case.

Should the suit be contested by the defendant, the timeline is as follows:

- filing a replication by plaintiff – two to four weeks from receipt of the written statement (the plaintiff is also required to file an affidavit admitting and denying the defendant's documents); and
- framing issues – 12 to 18 months from filing suit.

The completion of the trial stage of the suit (submitting list of witness, filing evidence, exhibiting of documents before the board, recording examination-in-chief and cross-examination of witnesses from both sides), final argument before the court and passing of final judgment may take anywhere between three and five years.

Recent cases

21 | What key cases from the past 18 months should rights holders be aware of?

Carlsberg Breweries v Som Distilleries and Breweries Ltd

In a judgment dated 14 December 2018, the Delhi High Court upheld the maintainability of a composite suit for design infringement and passing off.

A plaintiff can join two causes of action:

- infringement by the defendant of the plaintiff's design; and
- passing off by the defendant of the larger trade dress of the plaintiff's goods or articles.

The judgment has affirmed that a remedy for passing off can be brought if the said design is not functioning as a trademark and if the remedy of passing off is claimed for the larger trade dress infringement or any other similar infringement. The court also noted that when the claim for design infringement is *prima facie* weak, the court can provide relief to the plaintiff in the form of a passing off action.

Crocs Inc USA v Bata India Ltd, Relaxo Footwear Ltd, Liberty Shoes Ltd

The plaintiff, Crocs Inc, had filed several suits against the infringers and stated that their registered design was infringed upon by various defendants. The suits of design infringement were rejected on the grounds of prior publication. The court concluded that most of the designs were remarkably similar to the plaintiff's design. It also observed that there were minor changes in the colour and placement of perforations, but that the overall aesthetic effect was the same. However, the defendants stated that the alleged piracy and infringement never occurred, as the design should not have been registered in the first place due to prior publication of similar designs by another entity. The Division Bench in the appeal also noted that the Holey Soles' designs existed in the public domain prior to the plaintiff's design claim, which was based on a similar design. The plaintiff's appeal was dismissed as the registration of the plaintiff's design was invalid due to the prior publication.

M/s Crocs Inc USA v Bata India Ltd, Relaxo Footwear Ltd, Liberty Shoes Ltd

Six appeals were filed with applications for interim relief. The appeals were directed against the order dated 18 February 2019 of the single judge who had also dismissed the plaintiff-appellant's suit for passing off as not maintainable. The plaintiff-appellant had filed two sets of suits: one for the infringement of the registered design; and the other for passing off its shape trademark/trade dress. After a thorough study of the earlier case precedents in *Mohan Lal v Sona Paint & Hardware* ((2013) 55 PTC 61 (Del)) and *FB and Carlsberg Breweries v Som Distilleries and Breweries Ltd*, the Division Bench held: "whether there can be an availability of remedy of passing off in absence of express saving or preservation of the common law by the Designs Act, 2000 and more so when the rights and remedies under the Act are statutory in nature?". The court observed that a passing off action was maintainable along with an action for infringement of a registered design and granted the limited interim relief to the plaintiff on the ground of passing off against any other parties. Thus, in the interim, the plaintiff was allowed to seek relief to restrain passing off its registered design used as a trademark/trade dress, get up, presentation of the products through its packaging and so on.

Vega Auto Accessories (P) Ltd v SK Jain Bros Helmet (I) Pvt Ltd

In another significant case, on 1 June 2018 the Delhi High Court held that the registered owner of a design could not use the invalidity or prior publication of the plaintiff's design as a defence in a suit for design

infringement. The court noted that once a party has filed an application – claiming that its design is new or original, has not been published before and is distinguishable from known designs – the party cannot oppose the claim for infringement by a prior registrant on the ground that such prior registrant's design is not novel or original. It was thus held that where the plaintiff has prior registration of a design, and the defendant is the registered owner of a design that has infringed the registered design of the plaintiff, then the defendant is stopped from pleading invalidity of registration of the plaintiff.

OWNERSHIP CHANGES AND RIGHTS TRANSFERS

Assignment and licensing

22 | What are the rules surrounding assignment and licensing of design rights?

According to Indian design law, the right in a registered design can be transferred by way of assignment. An application in Form 10 and Form 11, with prescribed fees in respect of one design and appropriate fees for each additional design, for registration of the transfer documents is required to be made by the beneficiary to the controller within six months from the date of execution of the instruments or within further period not exceeding six months in aggregate. An original or notarised copy of the assignment deed is required to be enclosed with the application.

Further, an individual can file for registration of licensing of a design in the Register of Design. Only a registered licence in respect of a registered design is admissible as evidence before the courts or in any other proceeding, and therefore such instrument must be registered with the Design Office.

Licences of right

23 | Are licences of right available?

Yes, an individual can file for registration of licensing of a design in the Register of Design. Only a registered licence in respect of a registered design is admissible as evidence before the courts or in any other proceeding, and therefore such instrument must be registered with the Design Office.

UPDATE AND TRENDS

Key developments and future prospects

24 | What were the key judicial, legislative, regulatory and policy developments of the past year in relation to the protection and enforcement of designs? What are the prospects for future developments?

Recently, in October 2020, the Indian Designs Database – which contains more than 58,000 designs – was included in the Global Design Database. This will bring more information about Indian designs to stakeholders around the world.

The Design Office is reluctant to grant protection under designs law to graphical user interfaces (GUIs) and icons. At present, the Design Office does not consider a GUI to be a 'design' as defined under Section 2(d) of the Designs Act, as a GUI does not appear on the surface of the display screen but is visible or appears when the complete processing or computer system is in 'on' or 'operating' mode only and, as such, when it is in 'off' mode the "alleged design" does not appear on the screen. In addition, the Design Office also reasons that a GUI does not meet the requirements of an 'article' as provided under Section 2(a) of the Designs Act as it is not manufactured by an industrial process, nor



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can it be sold separately in the market. In view of such rationale, the applicability of design laws on GUIs has become ambiguous.

Indian design law recognises GUIs and icons to fall under the domain of Locarno Class 14-04, which provides for screen displays and icons (included in the third schedule of the Design Rules 2001). Industrial design protection for the GUIs of electronic products has become a new trend in recent years. This diversity in design protection for GUIs worldwide, and the lack of compatibility among some aspects of existing design registration systems with the specificities of GUIs, has resulted in a challenging environment for businesses wishing to obtain design protection for GUIs in an efficient and effective way. It would be desirable for the Design Office to reconsider this aspect and, if required, provide definitions for 'article' and 'design' that may be amended to include GUIs as protectable features under design law. It is hoped that the Indian Design Office will address this matter soon.

The jurisprudence on the enforcement of registered designs has been well established in Indian case law, and it is expected to continue to grow.

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