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Trademarks and Patents - A Major Distinction

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In this article, I shall be analysing the distinction between Trademarks and Patents and why it's imperative to know the difference between the two, furthermore about how it evolved in India from a historical standpoint, and how it is imperative for any innovator to possess a lucid knowledge about these two terminologies before publicising their invention. Every innovator possesses a statutory right to protect their innovation from imitation and these rights are known as Intellectual Property Rights. The two major terminologies that a creator must be familiar with in terms of intellectual property are trademarks and patents because they are closely associated with each other and an innovator must be able to discern between the two in order to know what protects their innovation and if they start a business what will protect their brand. In this article, these two terminologies are coherently scrutinised and articulated from a legal standpoint with relevant cases which led to the proper regulation of Intellectual Property Rights. The major distinction is discussed in a succinct and perspicuous manner while keeping the linkage between them and intellectual property in conformity.

Keywords: *trademarks, patents, innovation, ipr, invention.*

INTRODUCTION

The term '*Intellectual Property* is obtaining some heed in India, especially after the *National Intellectual Policy was approved* by the cabinet on May 12, 2016, this policy was the *first of its kind*

and would cover all forms of *Intellectual Property*[1]. According to certain surveys and statistics from abundant databases, it was perceived by the government that there is some prospective potential in India in terms of innovation, and to explore that latent potential the government began introducing new policies and reforms in *Intellectual Property* to empower inventors to create, enhance and introduce new inventions and ideas. While these policies did work to some extent, at the same instant abundant inventor was also concerned about their invention, the concerns like *What if somebody stole my invention or idea? What if someone else imitates my work and gains monetary value for themselves?* The awareness of *Intellectual Property* was questioned at this instance as these inventors weren't aware that certain laws grant an exclusive right to the creator of an invention to legally safeguard their innovation to protect it from imitation and unlawful gain and those rights are the *Intellectual Property Rights* often referred to as *IP* or *IPR*.

There are two terminologies that fall under the category of IPR with whom the inventors must be familiar; *Trademarks and Patents.* There is an eminent need to discern between the two as both are closely associated with ensuring and safeguarding the rights of an invention. Both *Trademark* and *Patent* are two crucial steps any artist, creator, or inventor must take before introducing their idea, invention, or creation in the market as they provide a legal safeguard against anyone who may try to imitate or steal their invention, so it's immensely imperative to know the distinction between them[2]. There has always been a perplexity or rather an uncertainty while discerning between the two, but nonetheless, it's highly imperative to note that there is *a major distinction* between them and that's what shall be unbosomed.

TRADEMARKS

The term *Trademarks* has been defined under the *Trademarks Act* 1999[3] as a word, symbol, or phrase, which is used to point out a particular manufacturer or seller's products or services and

[1] Dinesh Abrol, 'Who Gains from the Modi Government's Intellectual Property Rights Policy?' (*The Wire*, 22 May 2016) <https://m.thewire.in/article/economy/who-gains-from-the-modi-governments-intellectual-property-rights-policy/amp> accessed 01 September 2022

[2] Daniel Kurt, Patents, Trademarks, and Copyrights: The Basics' (*Investopedia*, 4 May 2022) <https://www.investopedia.com/articles/investing/111014/patents-trademarks-and-copyrights-basics.asp> accessed 01 September 2022

[3] Trade Marks Act 1999, s 1(ZB)

discern them from the products or services of another. While the primary purpose of trademarks is the discern the products and services from others to get that product or service recognised in the market, they were also introduced to protect the identity, goodwill, and reputation which may advance with their products and services. For instance, if a person formulated a new shoe design or a soft drink recipe, that person would require a trademark not just to discern their products or services from others but also to safeguard the identity, goodwill, and reputation which their products or services might generate in the market like the Circle and Star sign of the infamous converse sneakers or the half-ate apple sign on the Apple products. Even catchphrases like ***'EAT FRESH'*** of *Subway,* ***'JUST DO IT'*** of *Nike,* ***'CONNECTING PEOPLE'*** of *Nokia,* and ***'OFF THE WALL'*** of *Vans* serve as an example of phrases in terms of trademarks that are also protected under the *Trademarks law.* The necessity to distinguish your product and get in recognised in the market with the assistance of a trademark is quite coherent, as it is significant to any company, firm, or organisation that people recognise their products and service It must be noted that often the term '***service marks***' is used to identify services instead of the products but in consensus and for the sake of brevity, they are termed as *trademarks*.

Even domain names like *Google*, *Yahoo* or *Go daddy* are considered and fall under the pretence of trademarks, this was held for the 'first time by the Hon'ble High Court of Delhi in the case of *YAHOO! Inc. v AKASH ARORA & ANR*[4] it was observed that a domain name will be provided with adequate legal protection as it serves the same function as that of the trademark because if a prudent person while surfing the internet comes across a domain name which he/she trust's to provide best search results can be confused and deceived into believing that the two domain names which may be deceptively similar might be the same[5]. So, it's imperative to provide legal safeguards to domain names as well.

[4] *YAHOO! Inc. v Akash Arora & Anr* 1999 Arb. L.R 620 (DEL.)
[5] 'Top 5 Interesting Trademark Cases in India' (*HG.org*) <https://www.hg.org/legal-articles/top-5-interesting-trademark-cases-in-india-51057> accessed 01 September 2022

PREREQUISITES OF TRADEMARKS:

Now, there are certain *sine quo non's* to fulfill to get a trademark registered while trademarks are the protection for the words, symbols, or even phrases that discerns a particular product or service from another, however, trademark protection is not limited to this only. The protection of trademarks does extend to the design, colour, look or even feel of that product because there can be certain instances where a prudent customer may be unable to distinguish or be deceived into believing that the two products are from the same manufacturer, which is if a manufacturer A produces and sell their goods or provide services with a trademark which is similar or identical to the trademark of the other manufacturer B without their mandate, it is considered as '***Trademark Infringement'*** which is defined under the *Section 29 of The Trade Marks Act 1999.*[6]

In the case of *Pfizer Products Inc.*[7], the defendant's trademark *OREX* for cough syrup was found to be deceptively and phonetically similar to the plaintiff's trademark *COREX,* and the Delhi High Court not only restrained the defendant from using the trademark OREX but also ordered him to pay the plaintiff positive damages amounting to Rs. 1 lac[8]. In a subsequent case of *Pizza Hut International LLC v Pizza Hut India Pvt. Ltd.,*[9] the Bombay Hugh Court restricted the defendant from using the word ***'PIZZA HUT'*** for their own business as it was considered to be the trademark of the plaintiff which they used for their business. So, it is imperative to be aware of these scenarios while implementing a trademark to avoid infringements and penalties. The validity of a trademark is 10 years which can be made interminable as long as it is renewed after every 10 years.

PATENTS

A patent is an exclusive legislative right granted to an inventor by a relevant government or statute for a specific period to protect his/her invention from infringement and subsequently provide a legal safeguard for the same. It grants a person or organisation a right to innovation

[6] Trade Marks Act 1999, s 29
[7] *Pfizer Products V B P Singh* 2011 (46) PTC 401 (DEL)
[8] Prof Meenu Paul, *Intellectual Property Laws* (5th edn)
[9] *Pizza Hut International LLC v Pizza Hut India Pvt Ltd* 2003 (26) PTC 208 (BOM)

and prohibits others from employing the invention in their products or processes or from importing them without the inventor's consent[10]. In consensus, it's an exclusive right to the first and true inventor to make, use or vend their innovation[11]. For instance, when *Paul Van Doren* and *James Van Doren* had the idea for the *Vans* sneaker, these sneakers were the first of their kind and there were no sneakers even remotely close to what the *Van Doren Brothers* invented, so to safeguard their invention at the cost of them disclosing it to the public, they filed for an exclusive right concerning that innovation and that right was *Patent*. In India, patent rights are mentioned and protected under *THE PATENTS ACT, 1970* which was amended in 2002 by *THE PATENT ACT, 2002* which was further amended by *THE PATENTS ACT, 2005*.

Patents are concisely explained in the case of ***John Hinde** v **Osborne Garrette & Co***[12] as: 'The inventor of a particular innovation requests the public or rather the Crown, to provide him with an exclusive right for a certain number of years, with the respect that he will disclose the manner, specification and use of that innovation to the public'[13] Subsequently, in ***Raj Prakash** v **Mangat Ram***[14]**,** the Hon'ble High Court of Delhi interpreted and explained the patent as they mentioned that patents grant to possess a *quid pro quo* effect, where *QUID* is the information about an innovation disclosed to the public and *Quo* is the monopoly granted over that innovation. When an inventor possesses this exclusive right over their invention, it's not just assigned for it being disclosed to the public but also that inventor may or can at his/her instance assign or transfer that right to some other person in consideration of earning a monetary gain over that invention. The '*inventor*' in patent law after they are assigned the exclusive right over their innovation is termed as '*patentee*'.

There can arise a situation where the patentee may at his/her instance want to transfer the right of a particular invention to someone else in consideration of attaining a monetary gain and that person will be known as the '*assignee*' and the *assignee* can apply for a grant of patent in their

[10] 'Patent' (*Ministry of Electronics & Info Technology*) <https://www.meity.govin/content/patents> accessed 01 September 2022
[11] Meenu Paul (n 8)
[12] *John Hinde v Osborne Garrette & Co* (1882) 2 RPC 45 (65)
[13] Meenu Paul (n 8)
[14] *Raj Prakash v Mangat Ram* AIR 1978 DEL 1

favour and this situation it will be the *assignee* registered as patentee, wit concerning invention assigned to them by the inventor. Now, it's crucial to know that way this exclusive right is imperative to possess, that is because this right also prevents the separate creators of the same concept who are not utilising the creation while your idea may be one of its kind it doesn't necessarily imply that you are the only one working on it. Additional innovations will result in both benefits and drawbacks compared to existing processes, giving product designers new options at their disposal. However, a patent will only have commercial value if it covers all variations of the innovative notion, regardless of whether it covers a primary discovery or a later development. If not, there will be methods to steal the concept without violating the law, and any patent will only be useful in preventing crude imitation[15]. To abridge, the aim of patent laws in India by providing an exclusive privilege to the inventor is to embolden innovation in abundant fields of science, technology, and industry, etc., this was held by the Apex court in the case of ***Bishwanth Prasad Radhey Shyam v M/s Hindustan Metal Industries[16].***

PREREQUISITES OF A PATENT

Every patent granted has a 20-year term starting on the application filing date. However, for applications submitted within the national phase of the PCT, the patent term will be 20 years from the international filing date recognised under the PCT. Before applying for a patent, it is imperative to note what constitutes a patent and it should fall under the patent law any novel product or procedure that involves a creative step and can be used in industry qualifies as an invention and is eligible for patent protection. It must not, however, be under the classifications of inventions excluded from patentability by *Sections 3*[17] and *4i*[18] of the Act. In India, the patent must be filed with the *Indian Patent Office* which can be with provisional or concluded specifications of the invention with a fee as specified under Schedule I.

The filing of the said patent can be done by the original which is the first and true inventor or his/her assignee and can do it alone as well as jointly, in a joint filing for a deceased's person a

[15] William Cornish & Ors, Intellectual Property Rights (7th edn)
[16] *Bishwanth Prasad Radhey Shyam v M/s Hindustan Metal Industries* AIR 1975 All 231
[17] Indian Patents Act 1970, s 3
[18] Indian Patents Act 1970, s 4

legal representative can also be there. The eligibility criteria are provided under *Section 2* of the *Indian Patent Act*[19] and *Section 3(d)* of the *Indian Patent Act*,[20] which was pioneered to limit the patenting of novel formulations of currently used pharmaceuticals, and attracted international attention after it was used to reject *Novartis*' patent application for the *anti-cancer drug Gleevec* as it was discovered that patentability exceptions provided under the *Section 3* of the Act, including *Section 3(d),*[21] were responsible for 65% of all pharmaceutical patents are denied applications. Before filing a patent, it must be noted that the invention should be '*novel'*, as *novelty* is considered an essential ingredient of the term 'invention' under the *Section 2(j),*[22] this was decided by the Apex court in the case of ***Novartis AG v Union of India***[23]

The filing of a patent can be done at any time and the patent office does keep it a secret, however, the application for filing should be done as early as possible for abundant reasons because someone else might file a patent for the same innovation as you or there can even be an inadvertent public for that particular invention. There can even arise a situation where your invention may qualify as innovative and useful but still won't qualify for a patent, this can happen due to certain following reasons:

- an invention that is frivolous or provides claims that are plainly in violation of well-known divine laws.
- an innovation that might seriously endanger the health of people, animals, plants, or the environment, or whose primary or planned use or commercial exploitation might be against public decency or order.
- the coherent articulation of a conceptual theory, or unravelling of any live entity or inanimate material happening in the creation, or a coherent unravelling of a scientific principle.

[19] Indian Patents Act, s 2
[20] Indian Patents Act, s 3(d)
[21] *Ibid*
[22] Indian Patents Act 1970, s 2(j)
[23] *Novartis AG v Union of India* AIR 2013 SC

- the simple finding of a discovery of a new property or application for a known material, the simple use of a known method, equipment, or technology unless it creates a new product or utilises at least one new reactant are examples of simple discoveries.

The above certain guidelines must be carefully scrutinised along with the application to ensure a successful filing of a patent without any complications whatsoever as India has a stringent patenting system to ensure the utmost protection of innovation. It is explicitly mentioned in *Section 15 of the Indian Patent Act*[24] that the power of the controller has the right to refuse any application for the grant of a patent[25]. The validity of the patent falls under a territorial right and is only potent solely within Indian territory. In India, a patent is valid for 20 years from the day it was filed. If a patent application has been filed under the *PROTECTION COOPERATION TREATY* (PCT)[26] the term of that patent shall be 20 years from the international date of filing.

A MAJOR DISTINCTION

So far it can be conclusively inferred that both *Trademarks* and *Patents* possess an imperative role to ensure a legal safeguard to innovation, but at the same time they both serve different purposes for that legal safeguard from certain different angles and there is a nuance between these two which must be read up on. One of the most key distinctions between the two is that when an inventor posse an idea that he/she believes will be obliging and beneficent to the public at large, he/she would require a *patent* grant which will be provided by the concerned authority for a limited period to protect and legally secure that invention and *trademark* gets a brand recognised in the market and to discern it from others. For instance, when *Carl Pei* founder of *Nothing Technology Pvt. Ltd.* possessed the nothing phones 1, he got a *patent* grant to ensure a legal safeguard for his invention to disclose it to the public for monetary gain, and subsequently, the name *Nothing* is used as a brand name for the recognition of that invention in the market and is protected under *trademark* law.

[24] Indian Patents Act 1970, s 15
[25] *Ibid*
[26] WIPO Protection Cooperation Treaty 1970

This invention was *patented* as it was novel, original, and had some industrial value and inventions like this will be protected under *the patent* law which also provides exclusive authority to the inventor over the *patented* invention with the right to exclude others from imitating the *patent* to earn a monetary gain. The *trademark* law provides a similar but distinct exclusive right to use the mark or logo or (whatever falls under the pretence of a trademark), to exclude anyone from imitating that mark with proper authorisation and it also provides the exclusive right to the owner to sell the trademark for the monetary gain.

CONCLUSION

To conclude, it can be now inferred that *Intellectual Property Rights* possess an imperative role in ensuring a legal safeguard that acts as a security for an invention. It is also highly imperative for an inventor to possess a coherent knowledge about these two aspects of *IPR* as an inventor can never be done these laws at once instance, they possess validity and that validity has to be renewed, so it's imperative to be consistent with the laws of *Intellectual Property* as in recent time they have gained a certain kind of enthusiasm and concern in the legal field. Even today, *IP* laws are discussed and critically debated at many forums, seminars and conferences. Ordinarily, the need for robust policies and reforms are coherently discussed and debated and it can't be taken out of proportion that *IP* laws, in foreseeable future will encounter certain challenges and new reform policies might be implemented so an inventor must know certain *major distinctions* while facing the music of *IP* laws.