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Compiled by: Adv. Sachi Kapoor & Adv. Aboli Kherde | Concept & Edited by: Dr. Mohan Dewan

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Patentibility Criteria Under European Patent Office -Artificial Intelligence & Machine Learning

Science and Technology have been unfolding new eras of growth. With each new ground breaking invention, there arises the need to protect the intellect invested in the innovations. However, granting protection can indeed be very challenging keeping in mind the high standards of pre-requisites for granting of Patents.

Recently, the European Patent Office (EPO) issued certain guidelines for patentability of Artificial Intelligence (AI) and Machine Learning (ML). The guidelines state that AI & ML are based on computational models and algorithms for classification, clustering, regression and dimensionality reduction, such as neural networks, genetic algorithms, support vector machines, k-means, kernel regression and discriminant analysis. The guidelines state that such computational models and algorithms are per se of an "*abstract mathematical nature*", irrespective of whether they can be "trained" based on training data. The guideline focusses on mathematical algorithms to have a technical character. It states that at the time of examining, the claimed subject-matter must be examined with expressions such as "support vector machine", "reasoning engine" or "neural network", since these terms usually refer to abstract models which are devoid of a technical character.

Further, the guidelines include a '*List of Exclusions*' which covers - Mathematical Methods in addition to Discoveries, Scientific theories, Aesthetic creations, Schemes, rules and methods for performing mental acts, playing games or doing business, Programs for computers and Presentations of information. Thus, AI and ML claims based on the above list are likely to be excluded from Patents.

The major component for AI and ML to have a patent claim is the 'field of application'. Only if there is a technical applicability of the mathematical method adopted in the invention, it will be patentable. The next question that arises is to **how one can assess technical applicability?** As per the guidelines, it is stated that, there are two possible criteria,

1. the mathematical method's "application to a field of technology"



and/or

2. by being adapted to “a specific technical implementation”.

The guidelines however, has no mention of the “specific technical implementation” but does indicate that the “application to a field of technology” will be an important indicator for the purpose of granting a patent.

Forever in IP news: F 21 and Puma settle over slides!

In March 2017, Puma had filed a suit against Forever 21, at the District Court of California, US, alleging that by copying its Fenty shoes' range, the latter has infringed Puma's design patent, trade dress and copyright. Since Puma's *Creepers Sneaker*, *Fur Slide* and *Bow Slide*, have been advertised as designed by the famous Barbadian singer Robyn Rihanna Fenty, these sneakers and slip-on sandals are commonly known as the 'Fenty shoes'.

The Court upheld Puma's claims of infringement of its design patent in the 'Creepers Sneakers' as it was of the view that the dissimilarities between the contending sneakers, as pointed out by Forever 21, were too less for any ordinary observer to differentiate between the designs.

For a claim of trade dress, the design claimed should have an aesthetic value over and above, or irrespective of its utility (usefulness)/ function. Puma's claim for trade dress was contested by Forever 21 stating that the elements claimed as part of the trade dress do not have any 'source identifying distinctive qualities' as a lot of other brands sold similar footwear. The Court dismissed Puma's claim of trade dress as it could not sufficiently prove the non-functionality.

Lastly, Puma has also alleged copyright infringement of the Fenty shoes which were the subject of 3 copyright applications. Parties alleging copyright infringement must possess, *inter alia*, a valid copyright ownership. Forever 21 had also tried to bring the singer Rihanna into the litigation stating that Rihanna has been advertised as the designer of said products but has not been named in the copyright applications.

It has been reported¹ in November 2018 that, after 2 years of tedious litigation and each side winning and losing its fair share, the parties have agreed to settle the dispute. The high-end fashion industry has kept Forever 21 in news with numerous infringement suits such as those by Adidas, Gucci, Foley etc. to name a few, for copying designer garments and selling their cheaper versions at retails.

¹[HTTPS://FOOTWEARNEWS.COM/2018/BUSINESS/NEWS/PUMA-FOREVER-21-FENTY-LAWSUIT-SETTLEMENT-1202704966/](https://footwearnews.com/2018/business/news/puma-forever-21-fenty-lawsuit-settlement-1202704966/)



The Taste of Cheese!

The Dutch are known for making world famous cheese, among many other things! Recently, two Dutch cheese companies indulged in a legal battle over the **Taste of cheese**. The two companies were, Levola and Smilde. Levola sold **Heksenkaas** which means "witches' cheese," and is a cream cheese spread with fresh herbs that was created in 2007, whereas Smilde produced and sold the cheese spread called **Witte Wievenkaas** wherein 'witte' refers to white and 'wieven' refers to wives which is used as a reference to 'witch of ghosts'. Therefore the element 'HEKSEN' and 'WITTE WIEVEN' have a similar meaning, and a strong conceptual similarity.

It was alleged by Levola that the cheese spread produced by Smilde tasted very similar to their product and thus violated the copyrights of Levola. Levola stated that copyright in taste refers to the 'overall sensation' caused by the consumption of the product. Levola prayed to the District Court of Netherlands to pass an injunction against Smilde from selling its products in the market. However, the Dutch Court, in 2015 held that Levola's plea stands rejected since Levola had not indicated which specific elements, or combination of elements, of the taste of **Heksenkaas** gave it its unique, original character. Levola, however, appealed against that judgment before the Court of Justice of European Union (CJEU).

The referred court was subject to one primary query – **Can taste be copyrighted?**

Levola contended that the taste of a food product may be classified as a work of literature, science or art that is eligible for copyright protection by relying on the judgment passed by the CJEU which recognized copyrights for a scent of a perfume (Let's leave this story for another time). On the other hand, Smilde submitted that the protection of tastes is not consistent with the copyright system, as the latter is intended purely for visual and auditory creations. Further, the instability of a food product and the subjective nature of the taste experience preclude the taste of a food product qualifying for copyright protection as a work.

The Court of Justice elaborated that in order to be copyrightable a piece of 'work' must comply with the following: the subject matter concerned is an **original creation** and secondly, there must be an expression of such original creation. Further, as per the Copyright Directive of the EU Parliament, 'work' is referred to as the subject matter which must be expressed in a manner that makes it identifiable with sufficient precision and objectivity. The EU Court held that '**taste**' of a food product lacks such precision and objectivity and thus cannot be considered as 'work' which shall indicate that such taste is not copyrightable.

At War With Satan!

In a recent suit filed against Netflix and Warner Bros. at the US District Court of New York, the Plaintiff, the Satanic Temple group, has claimed damages to the tune of \$50 Million over an alleged copyright and trademark violation.

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The entire issue revolves around the statue of a historical deity called the 'Baphomet' which is depicted as a human body having a goat's head, as shown in the figure below:



Netflix and Warner Bros. have recently produced a series and the same is currently being aired on Netflix by the name '*Chilling Adventures of Sabrina*'. It is alleged by The Satanic Temple group that the sculpture of the Baphomet is depicted time and again in nearly 4 out of 10 episodes of the series. Further, the group claims that, the sculpture in the series has been depicted in a negative light by associating it to death, evil, cannibalism and such other negative connotations, whereas in reality, the sculpture was created "to promote First Amendment values of separation of church and state, and equal protection." The temple society has objected to not only the blatant copy of the sculpture which is the sole Intellectual Property of the temple but also the negative connotation being attached to the Baphomet.

The Temple has demanded costs and an injunction to stop the depiction of the Baphomet by digitally altering the statue shown in the series.



*We claim no copyrights over the image used. The same has been used only for information purposes.

Patent Prosecution Highway For India-Japan

The number of patent filings by Japanese Companies in India has nearly tripled over the last decade. In 2015, Japan signed a Memorandum of Co-operation (MoC) with the Department of Industrial Policy and Promotion (DIPP) in order to promote swift acquisition of IP rights in India. Further, in 2017, the Japan Patent Office and the Office of Controller General of Patents, Designs & Trade Marks (CGPDTM) of India signed an enhanced new Action Plan. As per the this new plan, both the offices shall strive to co-operate and conduct new initiatives in the field of industrial property, including an exchange program wherein follow-up of training courses for new patent examiners of the CGPDTM will be conducted and JPO officials who are experts in the Patent Prosecution Highway (PPH) will be sent to India. It was JPO's aim to accelerate patent examination process in India and thus result in smooth and quick grants of patents.

Recently, the two Prime Ministers of India and Japan decided to commence a bilateral Patent Prosecution Highway (PPH) on a pilot basis in the first half of 2019, realizing the thrust Intellectual Property protection will give to both the economies. As a direct result of this program, Japanese companies would now be able to request for expedited examinations in India through simplified procedures, based on their applications whose claims have been determined to be patentable in Japan. Also, after claims have been determined to be patentable in Japan, applicants can acquire patents swiftly and expand their business smoothly in India. Further, India will attract ample investments from Japan, especially in the field of IPR.

It is important to take note, that the PPH program will be implemented after making necessary amendments in the Patent Rules in India. Moreover, this PPH program is the first of its kind and a prelude to many more, particularly to the other big 5 jurisdictions, viz. Europe, USA, China and Korea.

What constitutes Use of a Trademark?

An application for the removal of a mark MATESHWARI which was filed by one M/s Shiv Kumar Sushil Kumar Tea Enterprises Pvt. Ltd. ("Shiv Kumar")- owners of the mark MADHUSHREE on the grounds of similarity between MADHUSHREE and MATESHWARI and non-use of the latter. Both these parties are involved in the business of processing and marketing of tea and have trademarks that are the stylized forms of "MADHUSHREE" and "MATESHWARI" respectively. The said application was dismissed by the Intellectual Property Appellate Board ("the Board") for lack of adequate evidence supporting Shiv Kumar's contentions. Here, the Board sought an opportunity to briefly assess as to what constitutes "Use" of the trademark.

According to Shiv Kumar, MADHUSHREE was being extensively used by it, making it prior and senior adopter of the same. MADHUSHREE is also registered under the Copyright Act. The Board noted that upon a bare perusal and assessment of the two contending marks, both the marks were stylized distinctively and were dissimilar.



The Applicant label Mark



The Respondent no 1 label mark

The second ground in the application for removal of MATESHWARI was that it had not been commercially used for more than 5 years and was therefore liable to be removed as per trademark laws. The Board relied upon the Supreme Court's view in a case wherein the Court had laid down that the word "use" can involve actions other than actual sale of goods or services. It is not only non-use, but also an *intention to abandon the mark* that is to be proven by the applicant seeking removal. In view of the same, the Board stated that since the intention to abandon was not proven adequately it has decided to dismiss the said application for removal on the ground of non-use.

2 noteworthy points in this precise Order are that use does not only constitute actual sale and that along with non-use it is important to put forth evidence supporting an intention to completely abandon the mark for it to be successfully removed from the trademarks' register.

Winter is coming, but Mocha Blu's got to go!

Around winters, does "Mocha" remind everyone of a steaming hot cup of Choco-coffee? Well, "Impresario" has other plans. Who?, you ask. Impresario is known for its concept-based hotels across the country, such as Social, Smoke House Deli, Mocha etc. and this winter it plans to keep its version of Mocha exclusively for itself!

In ***Impresario Entertainment & Hospitality Pvt. Ltd. v. Mocha Blu Coffee Shop***, another case of trademark infringement at the Delhi High Court, the owner of the registered trademark MOCHA, Impresario Entertainment & Hospitality Pvt. Ltd., ("Impresario") sought injunction against the defendant's infringement of Impresario's trade mark and passing it off as a coffee house related to MOCHA by Impresario.

The defendant was operating a coffee shop using the mark MOCHA BLU which was deceptively similar to Impresario's trademark. Impresario prayed that the Court proceed *ex-parte* against the defendant, because, in spite of being served with notices to its address as well as through newspapers 'THE HINDU' and 'DINA TANTHI', neither did the defendant appear in the matter, nor did it file a written statement.

The Court observed that in such cases, it should proceed *ex-parte* only if there is sufficient proof supporting the facts mentioned in the complaint and only when the Court is satisfied that no further proofs are required. The Court stated that excess caution needs to be exercised lest subsequent appeals will defeat the purpose of *ex-parte* orders in such cases- which is to expedite proceedings.



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Since the defendant failed to put forth his case and there were no apparent deficiency in the evidence it placed on record, the court passed an ex-parte order of injunction against it.