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## THE RELATIONSHIP BETWEEN PATENTS, TRADEMARKS, COPYRIGHTS, AND TRADE SECRETS

by  
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The relationship between the various types of intellectual property, namely the two types of patents (utility and design), copyrights, trademarks (including trade dress), and trade secrets is complex. For example, a particular lamp design may be protected by a utility patent, a design patent, a copyright, and the appearance of the lamp may be protected under trade dress law. Further, the method of manufacturing the lamp and the materials used can be protected under the trade secret law.

It is important to understand the relationship between these different rights so that the appropriate form of protection is obtained. To assist my law school students in understanding the relationships, I prepared a chart, which many of our clients also find helpful.

This chart, which is reproduced here, provides a detailed comparison of these intellectual property rights by subject matter, criteria for protection, how the rights are obtained, the term, what infringes, disclosure requirements, costs, continuing duties, the date protection commences, rights against independent discovery or creation, and the remedies for violation of the rights.

### CHART OF RELATIONSHIPS BETWEEN PATENTS, TRADEMARKS, COPYRIGHTS, AND TRADE SECRETS

Type of Protection	Utility Patent	Design Patent	Copyright	Trademarks	Trade Secrets
Subject Matter	Functional features of process, machine, manufactured item, or composition of matter. 35 U.S.C. 101	Ornamental designs for article of manufacture 35 U.S.C. 171	Works fixed in tangible medium of expression. Includes literary, musical, pictorial, architectural, sculptural, and motion picture works 17 U.S.C. 102	Words, names, symbols, devices, sounds, smells Non-functional trade dress 15 USC § 1127	Formulae, processes, products, software, plans, designs, specs, pricing, devices, R&D information, business information.
Criteria for Protection	Useful; New and "nonobvious" 35 U.S.C. 101, 102, 103	Ornamental; New and "nonobvious" 35 U.S.C. 102, 103	Originality; Authorship; Non-functional aspects 17 U.S.C. 102	Used to identify and distinguish goods or services/distinctive 15 USC § 1127	Anything advantageous in business and secret.
How obtain Rights?	U.S. Patent & Trademark Office.	U.S. Patent & Trademark Office.	Automatic upon creation in tangible medium; notice and registration help monetary recovery.	Common Law: Adoption and Use (secondary meaning can be required)  Federal or State Registration: Application and compliance with statutes.	Obtain legitimately. State law.
Term	17 years from date of Federal Grant. 35 USC § 154	14 years from date of Federal Grant. 35 USC § 173	Post-1/1/78 works: Life of author plus 50 years. 17 U.S.C. § 302	As long as properly used; Federal registration lasts 10 years (if formalities	As long as secret.

				complied with). Renewable for 10- year periods. 15 USC § 1059	
What Infringes?	Making, using, selling, or importing devices embodying the claimed invention or using claimed process 35 USC § 271	Do designs look alike to eye of ordinary observer?	1) Substantial copying 2) Illegal copying  i) access ii) substantial similarity	Likelihood of confusion, mistake or deception 15 USC § 1114	Improperly obtain secret or improperly use it or disclose it.
Disclosure Requirements	Best mode 35 U.S.C. 112	Best mode 35 U.S.C. 112	None; Deposit on Publication	Must use	Cannot disclose.
Cost	High, generally thousands.	Moderate	Negligible	Low	Cost of maintaining secret
Continuing Duties	None	None	None	Policing	Keep Secret
Date protection commences	Upon issuance: 2-5 years from filing.	Upon issuance: 2-5 years from filing.	When fixed in tangible medium.	First use; Filing of U.S. intent to use application	First use
Rights against independent discovery or creation	Complete	Complete	None	Good faith not defense, except limited	None
Civil remedies	Damages for injury, attorney fees if exceptional; damages can be increased; injunction. 35 USC §§ 283, 284, 285	Damages for injury or defendant's profit; attorney fees if exceptional; damages can be increased; injunction. 35 USC §§ 283, 285; 35 USC § 289	Damages, statutory damages, attorney fees, seizure, injunction. 17 USC § 502-4	Defendant's profits; plaintiff's damages, costs; exceptional case gets attorney fees and increased damages; injunction; seizure for counterfeit; punitive damages if also unfair competition. 15 USC §§ 1116, 1117	Damages, punitive damages, attorney fees, injunction.

WARNING: This chart greatly simplifies the applicable law and is for instructional purposes only. Consult the relevant statutes, case law, and treatises for a thorough analysis. Adopted from a chart by J. Thomas McCarthy, Trademarks and Unfair Competition, 2nd Edition.

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