

Comparative Analysis on Registration of Smell Mark

Lakshmi .K, Naveena G.J
^{1,2}*SASTRA Deemed University*

Abstract- The evolving concept of trademark protection brings into focus non-traditional marks including smell, sound, and taste. Smell marks are particularly problematic as it is based on subjective perception by humans and needs a visual depiction. Most importantly, the TRIPS Agreement does not expressly ban smell marks in terms of registration by nations, it depends on domestic law, creating different national practices that lead to confusion. Many nations like the European Union, United States, Netherlands and Australia have been able to register smell marks under specific conditions. When registering smell marks, they utilize a variety of methods, employing deterrent chemical formulations, written descriptions, and uniform classification standards like the Sieckmann test for clarity and objectivity.

In contrast, India's current rules concerning trademarks, which impose significant barriers on registration of smells as trademarks, because there is no graphic representation. This paper seeks to complete a comparative analysis of the laws relating to smell marks, and registration of smells by the developed and developing countries to determine if the concept of smell mark protection in India is tenable. The paper considers the various methods adopted by countries and whether they enforce protection of smells trademarks, the effect of smell trademarks on a country's market, and the legal concerns surrounding the absence of those protections in India. By taking into account the commercial and cultural potential of smell marks, particularly concerning traditional perfumes and incense, the study finds that reform is necessary. Proposed solutions include custom approaches like a modified Sieckmann criterion, different representations made available or relaxing distinctiveness standards for scents familiar in the Indian culture, as well as introducing technologies for capturing smells in a new manner. If India followed these recommendations, it could embark on a journey of having smell marks recognized as a legitimate category of intellectual property and also innovate for these developments to keep in step with the broader hierarchical innovation in the world.

I. INTRODUCTION

A trademark is a unique symbol, word, logo, design, or a combination of them used by an organization, company, or business organization to identify its services or goods and differentiate them from others. A trademark is used as a sign of authenticity and quality and safeguards the commercial reputation and interests of the business. In the fast-changing global landscape of the present day, where competition is cutthroat and brand identity is paramount, trademark registration has become a necessity in order to ensure legal protection against misuse or infringement¹. The Statutory definition of trademark under section 2(1) (zb) of the Trade Marks Act, 1999, indicate the legislative intention to give a broad and sophisticated meaning so as to include new business trends and brand strategies.

Traditionally, marks were words, phrases, symbols and logos that functioned as identifiers of the source of goods and services. The term has broadened remarkably with the passage of time to encompass non-conventional or non-traditional marks beyond visual signs.² These consist of product forms, colour, shades, sound, smells, textures, motion lines, holograms, taste marks and other sensory indicators that cause an immediate connection to be established between consumers and company by using multiple senses

Non-Conventional

Non-Conventional Trademarks, also as "Non-Traditional Trademarks," represent a distinct category of marks that create an instant association with a company by engaging multiple human senses such as taste, sound, and touch.³ Unlike conventional trademarks, which are limited to words, symbols, names, devices, packaging, or combinations of colours, non-conventional trademarks extend to a wider range of identifiers, including slogans, textures, smells, tastes, three-dimensional shapes, sounds,

motion marks, position marks, and holograms. These unconventional marks fall outside the ambit of the traditional definition of trademarks but have gained increasing acceptance in modern trademark law. Their recognition signifies a progressive evolution in legal thinking, reflecting the need for brands to differentiate themselves in a competitive marketplace through unique and creative identifiers that go beyond traditional visual representations.

A smell mark is a type of unconventional trademark that uses scent to recognize a brand or product⁴. Smell marks push the boundaries of trademark law, compelling the legal institutions to develop even further. Although visual and olfactory marks are well-known, smell marks present a challenge to traditional trademark registration requirements like uniqueness and representation. Therefore, successfully registering a scent mark can establish a precedent for cases to come and expand trademark law to fully encompass sensory branding.

In the case of a scent mark, *distinctiveness* requires that the fragrance be unique, non-functional, and capable of serving as a source identifier in the minds of consumers. The scent must not arise naturally from the product itself or perform a practical function; rather, it should operate solely as a brand indicator.

For instance, if the smell is an inherent characteristic of the product, it cannot qualify as a trademark.⁵ Distinctiveness in this context means that the scent creates a direct association with a particular brand, enabling consumers to identify the origin of the goods even without recalling the brand name. Such distinctiveness may also be reinforced through other product features, such as distinctive packaging, colour schemes, or a deliberately applied scent. For a scent mark, distinctiveness mandates that the smell is unique, non-functional, and able to be used as a source identifier in the consumer's mind. The smell cannot occur naturally from the product itself or be useful for some practical purpose; it must exist only as a brand indicator. For example, if the odour is a natural attribute of the product, it cannot be a trademark.

Distinctiveness in this regard implies that the odour evokes a direct connection with a specific brand so that consumers are able to determine the source of goods even if they do not remember the name of the

brand. Such uniqueness can also be supported by other product attributes, for example, unique packaging, colours, or a purposely added fragrance.

II. INTERNATIONAL AGREEMENT FOR SMELL MARK

The *Paris Convention for the Protection of Industrial Property, 1883* was the very first significant international treaty to address intellectual property rights like patents, copyrights, and trademarks. Though, the Convention neither established the definition of the term trademark nor established a standardized procedure for acquiring trademark rights as similar to that in the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989* neither gives the definition of a mark nor that of a trademark.

Neither does it address the substantive criteria for establishing what constitutes a valid mark such as including filing, application effects, and member countries designation.

The most exhaustive multilateral treaty addressing trademarks is the *TRIPS Agreement, 1995*, which is applicable to all member states of the WTO. Article 15(1) of the Agreement functionally defines trademarks as any sign or any combination of signs distinguishing the goods or services of one undertaking from those of another. It further gives a non-exhaustive list of signs that are eligible to be used as trademarks, such as words, letters, numerals, figurative signs, and combinations of colours.

The provision also enables member states to demand distinctiveness to be obtained by use where it is not inherent. Notably, TRIPS enables members to make visual perceptibility a registration requirement⁶. This implies that while TRIPS do not directly exclude non-traditional marks, including odour marks, it gives members room to require graphical illustration as part of the registration process. At the global level, there are no WIPO-governed treaties that set obligatory limits on the categories of signs that could be eligible for trademark registration. However, the list given under TRIPS does not specifically mention non-visual signs. Combined, these provisions make it clear that whether or not to include or exclude non-conventional

The Singapore Treaty on the Law of Trademarks, 2006

and the 2011 Regulations are a landmark step, being the first normative documents to specifically acknowledge non-traditional marks. These are colour marks, sound marks, smell marks, hologram, position marks, motion marks, and three-dimensional marks⁷. The Treaty and Regulations are primarily concerned with procedural matters like requirements for application and mark description and not with establishing substantive requirements for protection.

In the context of the European Union, Article 2 of the Directive EC provides that a trademark is any sign that can be graphically represented, which may be words, personal names, designs, letters, numerals, or shapes of goods or packages, as long as the signs are able to distinguish goods or services. This provision emphasizes the graphical representation and visual differentiation. It is unclear whether such language may cover purely non-visual marks like smells

III. REGISTRABILITY OF SMELL MARK IN DIFFERENT COUNTRIES

a) European Union

Within the European Union (EU), the law regulating the registration of trademarks is enshrined in the European Union Trade Mark Regulation (EUTMR), 2017⁸, under which a trademark is any sign that can be represented graphically and that serves to distinguish the goods or services of one business from those of another

But registration of smell trademarks in Europe is with great obstacles, mainly because of the provision of graphical representation under Article 4 of the EUTMR. This requires that a trademark be represented in such a way as to allow authorities and members of the public to ascertain clearly and with precision what the scope of protection is. Since odours are difficult to represent visually, words or chemical formulas have been insufficient since they cannot provide the necessary clarity, precision, and access for registration. Historically, the graphic representation requirement of scent marks under the ECM was fulfilled by a precise written description of the smell. However, this method still remains problematic, as it fails to accurately represent the sensory character of a scent. Therefore, even with the broad definition of trademarks recognized under EU law, protection for scent marks remains complicated and narrow in scope.

The landmark case of Ralf Sieckmann v. Deutsches Patent- und Markenamt made EU smell mark law. A smell mark would be registered only if its representation was "clear, precise, self-contained, easily accessible, intelligible, durable, and objective" (the Sieckmann seven-fold test). Formulae in chemicals, written words, and smell samples were refused for being unclear, imprecise, and durable⁹. This rule was reaffirmed in *Odeur de fraise mûre* (2005), where the aroma of ripe strawberries was denied registration for being too indefinite. The 2017 EU Trademark Reform eliminated the strict graphical representation requirement, permitting other formats. Because of the impossibility of objectively depicting a smell, no smell marks have been successfully registered under the new regime.

A major development in EU trademark law is to remove the strict graphical representation requirement, where it allow for more liberal interpretation of presentation of trademarks.¹⁰ The EU can contemplate establishing a universal olfactory coding standard or using new technologies like AI-based scent mapping in order to produce reproducible and universally understandable scent representations. These steps can fill the gap between what is legally required and what technology can currently provide, making way for wider recognition and protection of smell marks in the future.

b) Australia

Australia legally protects smell marks by the Trade Marks Act, 1995, in which a trademark is defined as a sign employed to identify goods or services in trade and specifically includes scents in the meaning of "sign" under Section 6. Even though there is this legal protection, smell mark registrations are uncommon, with one such example being the registration of the smell of eucalyptus for golf tees. In order to qualify, the smell must be distinctive, unique, and unmistakably linked to a specific good or service in order to differentiate it from others of competing traders.

Applications should contain a graphical representation of the perfume mark in the shape of an accurate verbal description. Accordingly, although it is legally feasible for the likes of Mr. Cee of JKL Perfumes in the UAE to register a perfume mark in Australia, they need to make the perfume non-functional, distinctive,

and identifiable through consumer recognition.

c) United States

The Lanham Act is the main federal trademark law of the United States. It gives the definition of a "trademark" in a very broad way as anything that can be a word, name, symbol, device, or a combination of these which is used to show the source of goods or services¹¹. Since the definition is not limited to visual signs, a scent could be protected if it meets the normal trademark requirements of distinctiveness and non-functionality. The Basic Registration Requirements n applicant firstly should submit a registration application that is accompanied by the mark, the goods/services, and a specimen showing the mark in use clearly. For a scent mark, the specimen is supposed to show that the scent identifies and distinguishes the applicant's goods. The Trademark Manual of Examining Procedure (TMEP) is the place where the policy of the USPTO for olfactory marks is set. It also describes a scent mark as being registrable only when it is non-functional and the applicant can offer as convincing as possible evidence of acquired distinctiveness (secondary meaning)¹². The USPTO asks for not only a written description of the scent but also a physical sample that is deposited with the Office Implementing inhaling apparatus for the sample is needed if the scent is volatile or of such low intensity that it cannot be detected under normal conditions by merely wafting it in the air.¹³ Supreme court, in *Qualitex Co. v. Jacobson Products Co.*, decided to allow a colour (a non-visual) trademark that meets the source identifier requirement and is non-functional, to be protected as a trademark. The case was about colour, but the Court's logic also extends to other sensory marks, such as scent, by indicating that the Lanham Act does not exclude that kind of protection for non-visual trademarks. The Trademark Trial and Appeal Board (TTAB) turned around and gave its assent to the application of a floral fragrance for sewing thread, after the applicant demonstrated the scent to be non-functional and to have acquired distinctiveness. This ruling shows the functionality doctrine and secondary-meaning evidence as theoretical sources being applied to practice with scent marks.

d) United Kingdom

In the United Kingdom, a request for registration of a

smell mark for safeguarding the perfume of Chanel was refused under the UK Trade Marks Act, 1994 on the basis that the protection requested was for the product itself and not as an indicator of its commercial origin. However, the UK has, on some occasions, accepted and registered smell marks. Such notable examples include the registration of the scent of roses for tyres by Sumitomo Rubber Co. and the pungent scent of bitter beer for darts flights by Unicorn Products. The registrations followed the passing into law of new trademark legislation to provide for the implementation of the Community Trade Mark Regulation, 1993. The registered "smell" was defined in detail as a "unique scent created by blending a sweet, somewhat musky, vanilla-like odour, with faint overtones of cherry, and the natural aroma of a salted, wheat dough," which had been used since 1955 and was evidenced by a claim of acquired distinctiveness.

According to the ECJ, graphical representation needs to be precise, clear, self-contained, easily accessible, durable, and objective. It also stressed that graphical representation per se is not enough unless it immediately leaves no doubt about the scope of the right of exclusion in front of third parties, e.g., consumers or competitors searching through the register.

Therefore, although smells are theoretically admissible as marks in law, their registration in practice has been extremely limited. Written statements, chemical compositions, odour samples, and even electronic sensory analysis have all been considered insufficient means of representation, rendering the actual registration of smell marks in the UK practically impossible in spite of the few isolated exceptions.

IV. INDIAN SYSTEM OF SMELL MARKS

In India, smell mark recognition is very limited, mainly because the Trade Marks Act, 1999 requires trademarks to be represented graphically. While the Act characterizes a "mark" in a broadened perspective, the need for a visual representation somewhat rules out smells from becoming "marks".¹⁴ Smell marks were also mentioned in the Draft Manual of Trademarks (2009 & 2015), but it was decided that they could not be represented, whereas the Trademark Rules, 2017 went a step further by totally excluding

them, thus indicating the gradual recognition of non-conventional marks in India¹⁵.

On the other hand, such as the United States, they permit smell marks by use of the descriptions and specimens, and the EU has implemented technical systems (e.g., Pantone for colours) to get over the representation obstacles. Unfortunately, India does not have any similar methods. Unless the Registry opts for the practice and treatment where Examiners rigorously enforce the graphic-representation clause; applications that give only a written description of a perfume, or a physical sample without a corresponding supporting formula or diagram, are refused as not complying. No Indian case law reported relating to olfactory marks all applications for scent marks have been refused during the examination procedure.

In contrast to the Sieckmann test (EU), allowing “technical” presentations (e.g., chemical structures, odour-profiles) if there is a clarity and durability test, Indian law as it exists today only allows visual representations.¹⁶ The challenges Specific to India are the statutory Gap where there is no provision for pictorially representing scents using chemical formulas or digital odour files. Besides, electronic nose data is not allowed, which stops the graphical requirement from being met.

Cultural & Commercial Importance where India has a unique and diverse tradition of the most delightful scents (Mysore sandalwood, Kerala attar, temple incense) which still remains unprotected. This leads to a limited commercial exploitation of regional scent identifiers.

There are various enforcement difficulties where proof of distinctiveness, secondary meaning, and non-functionality of a scent are hard enough but on top of that, the sound that the standards for evidence in scent infringement are very less developed makes the whole ordeal even more challenging.

Traditional Fragrance Registration a new material for "Mysore Sandal" (a proprietary blend of sandalwood, vetiver, and musk) along with a chemical formula and a deposited sample could be the source of a new protection for the craftsmen of the region and hence avoid the misappropriation.¹⁷ The modern Consumer Goods Scent Branding is the distinctive shampoo scent (e.g., citrus-jasmine-musk blend) of a brand could be registered, thereby the company would be given the exclusive rights and also have the advantage of the

hygiene market.

The Delhi High Court, in *Cadbury India Limited & Ors. v. Neeraj Food Products*, emphasized this principle, noting that the very essence and purpose of trademark legislation is to protect traders and consumers from unfair adoption of well-known marks, especially where such adoption aims to take advantage of the reputation and goodwill associated with them. Any other interpretation, the Court determined, would defeat the purposes of the law. This argument is particularly pertinent in the case of non-conventional trademarks, i.e., olfactory marks, where the onus is to establish distinctiveness and avoid misuse. Worldwide, the majority of applications for registration of olfactory marks were rejected, owing mainly to the fact that smells can be duplicated by chemical formulas and insufficiently described by verbal means, thus facilitating consumer confusion. This challenge was demonstrated in the *Sieckmann* case, wherein the failure of an olfactory mark to define the goods that it represented clearly and precisely was the reason for its rejection.

V. RECOMMENDATIONS

Develop Graphical Representation Standards that are more complete and Suggest Indian standards which allow descriptive words, chemical structures, or digitally scented technologies as the new basic representations of a scent. By recognizing these formats would simplify the registration procedure and bring India to a level with the EU and US where non visual description is allowed.

It should have an Amendment in the Trade Marks Act, 1999 Recognising Non Conventional Marks Change the Act for the character of sounds, scents, and colors to be amongst the living categories of trademarks along with the existing ones.¹⁸ This amendment would furnish a modern, comprehensive framework that could keep pace with branding trends in the contemporary world and would also eliminate the confusion that exists around non-traditional marks.

Start the Implementation of a Flexible Distinctiveness Criterion for Scent Marks Build up the criteria which highlight the non-functional characteristics of the scent that show the scent mark is distinctive while it is not completely associated with the product's function.

Accordingly, the scent in the US is required to be distinctive and non-functional for the registration of the scent mark and need look for Ways to define More Clearly the Unconventional Marks and amend the definition of “trade mark” in the statutes to cover those marks which are non-conventional and give examples of sound and color marks which are already recognized in India as a basis of this new definition.¹⁹ A sufficiently clear definition will be helpful not only for the retraining of the examiners but also for the assistance of the applicants. The biggest obstacle to the process is graphical representation during registration, as Indian trademark law currently forbids the registration of smells as trademarks and lacks precedent to support this claim. Before it is feasible in India, a number of gaps must be filled.

A lack of consistency in scent mark registrations could be detrimental to national economies, even though it is uncertain whether scent marks will be used more frequently and accepted as valid trademarks in particular nations. Scent markings are currently rather rare, so it's unclear if they will eventually rank among the most valuable commercial marks or if they will just be a trend in marketing.

The registration of olfactory trademarks presents considerable challenges. Notably, even the Draft Manual of Trademarks: Practice and Procedure (March 2015) acknowledge the inherent difficulty in fulfilling the graphical representation requirement stipulated by Rule 2(1)(k) of the Trademark Rules. The Manual posits that the subjective nature of scent, coupled with the limitations of verbal description, renders it problematic to adequately depict olfactory characteristics in a manner suitable for trademark registration. Consequently, the attainment of trademark protection for scents is a complex undertaking, and the existing register appears to lack precedent for such registrations within the Indian jurisdiction

The registration of olfactory trademarks in India faces significant hurdles. Current regulations mandate that trademarks be representable in a written or printed format, a requirement that poses a practical impossibility for scent-based marks.²⁰ Further complicating matters is the burden of demonstrating distinctiveness; a scent must be proven to be artificial and not inherent to the product's natural properties to

qualify for trademark protection.

Despite these challenges, Sumitomo Rubber Industries Limited, a producer of vehicular tires, submitted an application in December 2023 for an olfactory trademark pertaining to their floral-scented tires. The outcome of this application holds considerable significance, as its approval would mark a precedent for the first officially recognized smell mark within the Indian jurisdiction

VI. CONCLUSION

The inherent role of a trademark is its capacity to make an impression on customers and distinguish one trader's products or services from the other. Instead of ignoring the problem, it is essential to investigate mechanisms that overcome these challenges and facilitate registration of such marks. International agreements, as well, need to catch up with the realities of contemporary commerce and consider developments in non-conventional branding. Their subjective nature, the challenges of reproduction in a similar way, and issues relating to distinctiveness give rise to intricate legal issues in the use of fragrances as trademarks. Only 20 of 72 trademark offices, based on a WIPO survey, accept aromas and fragrances as registrable marks, which indicates the absence of uniformity in jurisdiction. In India, the scope for smell mark registration is still limited, as the legal system under the Trade Marks Act is still not robust enough to support such non-conventional trademarks. As a result, smell marks are infrequently registered, even though commercial interest is increasing. But with changing societal and business needs, the need for non-conventional trademarks will continue to increase, and thus a more flexible and progressive legal framework will be needed. Through suggesting tangible changes, the research highlights the imperative of India streamlining its trademark system in order to better protect not only traditional marks but also new categories such as odour marks so that there is equilibrium between innovation, consumer protection, and fair competition.

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