

# Velvet Whiffs: Disclosing the Correct Formula for Managing Smell

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**Abstract**—In the wake of rapid technological advancements and the efforts of inventors and creatives, intellectual property (IP) has grown rapidly. Historically, the IP framework has prioritized the protection of artistic material with tools including trademarks, copyright, patents, and other distinctive tools that distinguish or enhance a product or service. However, as businesses evolve and market segmentation gets more complex, non-traditional forms of IP like fragrances have gained prominence in legal discussions. The intricate legal framework around the hotly debated topic of IP preservation of scents is examined in this paper. The fragrances' subjective and abstract qualities make it challenging to decide if they should be protected as IP. Since it can be difficult to define, identify, and apply such rights, some nations have embraced fragrance as a topic that may be protected under certain legal systems, while others remain hesitant. The research have looked into a number of laws, judicial rulings, and legislative efforts that have influenced the conversation over scent protection. This focuses on determining whether or not odor-related rights were considered in since the beginning of IP legal framework. Additionally, the article discusses unique legal and scientific issues that keep some scents opaque to the human eye and volatile.

**Index Terms**—Trade Marks, Intellectual Property Rights, Smell Marks

## I. INTRODUCTION

The premise behind intellectual property laws is that creators and innovators ought to be able to own and benefit from their creations. When applied to ethereal goods like scent, this idea is highly potent; yet, it is less potent when applied to tangible stuff like music, literature, new items, etc.

The argument over scent protection presents complex issues about the scope and limitations of intellectual property law, as various jurisdictions recognize different types of fragrances as intellectual property. In light of current legislative actions and decisions, it also takes into consideration potential future changes in this field.

## II. SCENT MARKS

Trademark law often protects distinctive indications that identify the source of products or services. Jingles, brand names, and logos are examples of auditory or visual signals. Nonetheless, despite these limitations, a lot of nations have embraced scent marks and other invisible identifiers.

The smell mark is one unconventional type of trademark that identifies the source of a product by using a particular aroma. "Any sign capable of pictorially representing and distinguishing the goods or services of a business from others" is what the EU Intellectual Property Office (EUIPO) defines as a trademark. The idea of aroma is a challenge as it is "difficult to sketch."

In several regulatory frameworks, smell mark registration has shown to be a contentious topic. If they fulfill the requirements of uniqueness and nonperformance, fragrances are among the unconventional trademarks that can be registered under the Lanham Act in the United States. The United States first registered fragrance marks in the matter of *In re Clarke*, 17 U.S.P.Q.2d 1238 (T.T.A.B. 1990)<sup>1</sup>, wherein the plumeria flower weaving yarn trade mark

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<sup>1</sup>In re Clarke, 17 USPQ 2d (BNA) 1238 (TTAB 1990).

was found to communicate unique Strict guidelines, meanwhile, nevertheless restrict how to identify a product and hence reduce its efficacy.

One extremely compelling example of where attention is required is scents. The quality of scent cannot be captured in a physical thing since it is non-physical. Judges have so typically rejected the idea that scents qualify for copyright protection.

The court found that a scent did not fulfill authenticity requirements and could not be protected by copyright prohibition in the first case in this field, *re Celia*, 33 F.2d 1017 (C.C.P.A. 1929). The aroma could not be physically replicated, and the court ruled that it was not a "work of authorship".

### III. THE DISTINCTION

Distinctiveness is an essential factor in trademark law, and it's crucial for unusual marks like fragrances in particular. A company's scent needs to be sufficiently unique to set its products or services apart from those of competitors and to set itself apart. By definition, fragrances are more subjective than easily identifiable trademarks like corporate names or logos, which are simpler to recognize and characterize. This is a product that makes it more difficult to prove that a fragrance has stuck in the brains of people. Because distinctiveness is mostly built on a connection with a certain product over time, it is challenging to assess a fragrance's uniqueness without appropriate use and market knowledge.

Scent detection is intrinsically subjective, which adds to the complexity. Different people may perceive the same odor differently due to variances in olfactory sensitivity, culture, and personal experience. Because of these variations, it is challenging to create uniform legal criteria to determine whether a fragrance is distinctive. A unique smell might appeal to one individual in many different ways while being entirely repulsive to another. These conflicting opinions raise questions about whether scent is a good trademark or if it's just something that people care about enough to want exclusive rights.

Both trademark authorities and courts have discussed the issue of scent mark uniqueness. In countries like

the US, where the Lanham Act allows for the registration of unconventional marks, the onus of differentiation is greater on the applicant. As demonstrated by the *In re Clarke* case, odor must have a secondary connotation to be regarded differently. So, rather than merely identifying a portion of the product, customers must be able to identify an odor in a particular place. It frequently takes other knowledge, such as consumer research, sales statistics, and marketing strategy, to establish this second understanding. Both money and time may be spent using these techniques.

The functional significance of an odor in an object can also be influenced by its uniqueness. A fragrance cannot qualify for trademark protection if it has some functional benefit, such as concealing offensive odors or improving the user experience so that competition is not unfairly hindered by a company that is limited to the functional aspects that are perceived to be necessary for the use of the product.

The notion of identity is further complicated by the potential of scenting. Compared to easily managed and duplicated identifiable trademarks, fragrances are more prone to decay and vary over time. The influences of raw ingredients, packaging, and environmental conditions on odor stability make it difficult to preserve distinctive olfactory characteristics. Long-lasting odor indicators raise questions about whether legal safeguards for maintaining uniqueness will be effective in the face of these developments.

### IV. FUNCTIONALITY DOCTRINE

In trademark law, the theory of function plays a crucial role in determining whether atypical marks, such as fragrances, should be protected. A product's quality cannot be protected by a trademark if it influences its price or quality, or if it is required to carry out an action or achieve an aim that draws customers. To prevent one company from dominating functional expertise, this strategy exposes important characteristics for all rivals to use.

The notion of usefulness sometimes hinders trademark protection in the fragrance industry. For example, lemon scents with chemical cleaning are frequently

linked with freshness and cleanliness. Fragrances are frequently utilized in items for functional purposes, such as hiding objectionable aromas, communicating freshness, or enhancing the user experience. Permitting a business to use this scent as a trademark can reduce competition in the market by deterring other businesses from incorporating it into their cleaning goods. Fragrances that fulfill commercial requirements are typically not covered by trademarks, as the business world puts it.

From the application of doctrinal case law, the courts can determine if smell markings are protectable. The U.S. In the *Qualitex Co. case*<sup>2</sup>, the Supreme Court addressed the issue of the use of paint markings, which are non-traditional, similar to scent marks. In the historic case, The Court decided that only non-functional characters with a secondary meaning might be trademarked in *Jacobson Products Co., Inc.*, 514 U.S. 515 159 (1995). This line of thinking has been used by courts to scent marks, ruling that a perfume must be nonfunctional in order to be protected as a trademark.

Moreover, the scents that are an essential component of the product are covered similarly by the notion of functioning. A natural by-product of the method or components, for instance, does not qualify as a functional scent and should not be protected by a trademark. Because fragrances are frequently employed in industries like food processing and spices, this difference is crucial. Courts have often been reluctant to grant trademark protection because it might provide the trademark owner an unfair advantage over rivals utilizing comparable goods or procedures.

The functional concept has further difficulties in that it may restrict the protection of scent marks that qualify for trademark registration to certain goods or services, even if those goods or services are determined to be nonfunctional and unique. Because of this restriction, other businesses are permitted to utilize similar smells in various places without

violating the trademark. Fragrances that are permitted for usage in a certain product category could not stop others from utilizing them in unrelated items like detergents. The expansion of this limited protection reflects weaknesses in their approach to striking a balance between the needs of maintaining fair competition in the market and the trademark's interests.

## V. THE TRADE DRESS AND SCENT CROSS

Trade dress includes the aesthetics of the product, its design, packaging, and even the store's ambiance. This type of IP protection encompasses all aspects of a product or service's whereabouts, including its visual, aural, and smell components. A developing corpus of intellectual property law states that if a product or service's aroma contributes to its unique character, it can be protected as part of its trade dress.

Due to the highly subjective and variable nature of people's perceptions of visual or auditory attributes, one of the main challenges in using fragrance as part of trade dress to distinguish fragrance and act as a source of identity is proving that fragrance has acquired a secondary meaning, indicative of a consumer source of quality or service. It might be challenging to ascribe a distinctive and unique trade dress to scent alone rather than a combination of several components because the fragrance is frequently mixed with other sensory clues.

The idea of usefulness also plays a major role in determining whether or not scent is eligible for trade dress protection. A scent that serves a useful purpose, such as improving the product's appearance or covering up unpleasant smells, is deemed functional and is not protected by trade dress laws. *Two Pesos, 1992; Inc.*<sup>3</sup> brought legal action in 1992. v. In *Taco Cabana, Inc.*, 505 U.S. 539. 763 of the U.S. According to the Supreme Court, restaurant décor that is both useful and distinctive can be protected by trade dress codes. It must be demonstrated that a smell serves as a source of identity if it is protected as trade dress.

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<sup>2</sup> *Qualitex Co v Jacobson Products Co, Inc*, 514 US 159 (1995).

<sup>3</sup> *Two Pesos, Inc v Taco Cabana, Inc*, 505 US 763 (1992)

Additionally, scent protection as a component of trade dress raises important questions and makes it harder to assess and identify any safety breaches than it does for traditional trade dress items, which include packaging or manufactured. Due to the complexity of the issue, it is challenging to prove that the use of a certain scent violates trade dress rights. Because of this, in order to enforce trade dress rights for scents, it could be necessary to update the legal standards for establishing infringement in addition to developing new detection techniques.

Moreover, trade dress protection and scent protection underscore the difficulties associated with non-traditional intellectual property protection. Venues are always changing, and when new ways to offer distinctive goods and services are investigated, trade dress protection laws may be stretched to the limit. To allow for new creative expressions, such as scent, courts, and trademark authorities will need to modify the present legal frameworks. To do this, they must come to an understanding of the promotion of fair competition in the market and the defense of artists' rights, making sure that trade dress protection does not unduly limit its applications or impede innovation.

In summary, the use of scent in cosmetic and personal care advertising provides valuable insights into the behavior and intentions of the target audience. As businesses utilize fragrance more and more to develop distinctive brands and enhance customer experiences, consumers become more aware of the scent components of treadwear. Due to this change in consumer behavior, trade clothing restrictions and standards as well as regulatory protection for fragrances are becoming more and more necessary. And it becomes crucial to stay on top of the always-shifting trade clothing odor activities. Trade dress defense can only be upheld and used equitably under certain circumstances.

## VI. WHAT DOES THE WORLD SAY?

Due to variations in legal systems, legal frameworks, and cultural values, fragrance is protected differently as intellectual property in many different nations.

Companies looking to protect the intellectual property associated with fragrances face significant challenges because some countries consider fragrance to be IP that may be protected under specific conditions, while others lack a legal framework that supports protection for non-traditional marks like its own fragrance in many places.

According to the Lanham Act, a scent mark that satisfies the requirements of non-functionality and uniqueness may be registered as a trademark in the United States. Registration of scent marks is still uncommon and challenging to verify as unique. The preservation of fragrances has seen a more assertive approach from the Court of Justice of the European Union (CJEU). *Sieckmann v. the historic Deutsches Patent- und Markenamt*<sup>4</sup> ruling, effectively prohibited the registration of scent marks in the EU by ruling that all trademarks can be visually identifiable. Due to this ruling, scent marks are no longer legally protected as trademarks in several European nations, which has significantly impacted the EU's capacity to protect fragrance as a trademark.

Asian governments differ widely in their odor control policies. For instance, fragrances and other distinctive trademarks are never easily registered by the Japanese Patent Office (JPO). Due to recent changes in the trademark law, fragrances may now be registered in Japan under certain conditions. As a result, although the registration procedure is still difficult and time-consuming, JPO has started to recognize unusual trademarks, such as fragrances. Fragrances are not officially recognized as trademarks in the nation because of the historical emphasis on intellectual property protection.

A significant issue for businesses across all sectors is the absence of international collaboration in safeguarding fragrances as intellectual property. It will happen eventually if a company is able to register a scent mark in the US. even though in Asia or the EU, it might not have the same level of protection. This disparity adds to the complexity, expense, and unpredictability of safeguarding olfactory intellectual property globally. For businesses, the adoption of a

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<sup>4</sup> *Sieckmann v Deutsches Patent- und Markenamt* (Case C-273/00) [2002] ECR I-11737

scent mark in one nation may be contested or ruled invalid in another, leading to financial and legal issues. Here's another way that a lack of collaboration might result in disagreements between various sorts of governments.

Furthermore, different approaches to protecting fragrances through law mirror broader cultural notions of intellectual property and the significance of scent in consumer behavior. Fragrances are deeply connected to symbols in certain cultures and are given a lot of weight in daily activities. Scent marks may be protected differently depending on the legal setting due to these cultural variances. In certain nations, such as those where the scent is significant to rites or rituals, the smell may be more often acknowledged as a type of IP. But in nations where the aroma is seen as less significant, the scent is not regarded as a trademark.

Ultimately, an international strategy for scent conservation highlights the significance of ongoing dialogue and collaboration among various regulatory bodies. Due to businesses operating internationally and the expansion of world commerce, international treaties and agreements protecting scent and other non-traditional intellectual property are becoming more and more necessary. It does occur, and entities like the World Intellectual Property Organization (WIPO) considerably aid in this conversation. Through the pursuit of a more comprehensive and integrated strategy to odor protection, nations may ensure that businesses have the resources needed to safeguard their intellectual property (IP) and promote competition and innovation in global marketplaces.

#### VII. WHAT DOES THE ETHICS HAVE TO SAY?

When preserving scent intellectual property, ethical questions include those about consumer rights, access to necessary resources, and potential monopolies. Businesses that restrict customer choice run the danger of losing out to rivals if they want to safeguard their distinctive scent. This is especially important in places where a product's aroma has a big impact on how appealing it is. Due to ethical problems surrounding fragrance protection, a circular framework that takes into account the rights of intellectual property owners as well as the general welfare is important.

Monopoly power is one of the main ethical problems with odor protection. Allowing a business to produce goods only with the use of a certain scent can effectively monopolize the market, reducing competition and driving up consumer expenditure. This is especially important in sectors like the fragrance trade, where a small number of perfumes dominate the majority of the market. Scents by themselves have the power to inhibit innovation, making it harder for rivals to create new goods that incorporate protected scents, giving consumers options and limiting originality.

Odor preservation has ethical ramifications related to accessibility and justifiable worries. The scent of some pricey goods, such as groceries, cleaning supplies, and personal care items, has deep cultural importance. Because they cannot pay the high expenses connected with trademarks, low-income customers may act as barriers to entry if these odors are protected as intellectual property. The availability of resources is a major worry, and this is a pertinent problem in particular. Scents, like intellectual property, have the potential to worsen existing disparities by creating a market in which only the wealthiest customers can purchase high-end scents.

The preservation of odors brings up significant issues with transparency and consumer rights. The fact that a scent is protected by intellectual property is frequently unknown to consumers, and they might not be aware of how this protection affects their ability to make purchases. Customers believe that the fragrance industry's lack of clarity on scent protection is a tactic employed by the industry to manipulate or influence consumers. Certain psychological or emotional responses can be elicited by smell. To maintain scent and its role in the market, addressing these challenges will need increased consumer education and transparency.

A thorough examination of how IP fosters innovation and creativity also touches on the moral concerns related to fragrance safety. While IP rights are meant to promote innovation, too wide or restrictive protection runs the danger of limiting creativity via innovation. The volume and variety of the market can be decreased by too restrictive scent regulations,

which can hinder new fragrance-based goods and product innovation.

Ultimately, scent protection's ethical ramifications emphasize the necessity of an informed and nuanced approach to IP law. While promoting creativity and defending artists' rights are vital, these goals shouldn't come at the price of consumer protection, fair competition, or access to necessary resources. Giving careful thought to the moral implications of scent protection all parties' interests are taken into account while creating and interpreting intellectual property laws. A balanced approach to the development of a legislative framework that promotes innovation and the welfare of consumers can be used.

### VIII. CONCLUSION

Sophisticated legal frameworks such as trade dress, patents, and trademarks offer limited opportunities for distinctive and lucrative fragrances. Case law from a variety of sources highlights implementation challenges of legal principles established in non-traditional marks. Fragrances are still protected as intellectual property under these increasingly complex legal frameworks.

European Union vs Sieckmann. The Deutsches Patent- and Markenamt ruling, which restricted the registration of failure marks and demanded photographic proof, brought attention to the difficulty of protecting fragrances under existing trademark regulations. Comparatively, case law from the United States, including *In re Clarke and Qualitex Co. v. Jacobson Products Co., Inc.*, has shown that proving a fragrance is unique and ineffective requires a high standard of proof, which frequently results in the exclusion of fragrances from trademark protection.

The connection between trade dress protection and scent extends beyond trademark law and highlights the significant difficulties in incorporating non-traditional intellectual property into already-existing legal systems.

From an international standpoint, several nations have various legal systems. On the possibilities of odor protection, some people agree and some are not. The inconsistent odor protection in various nations serves

as a stark reminder of the significance of international collaboration and coordination in the development of common legal standards.

Concerns about monopolistic power, consumer rights, and access to necessary resources are among the ethical problems that have a significant impact on scent protection. While striking a balance between the requirements of customers, just competition, and the new incentives, lawmakers and courts must exercise caution.

The need for precise and significant regulatory requirements will rise in tandem with businesses' ongoing exploration of novel applications for scent in manufacturing and branding. A smart strategy that strikes a balance between copyright and the larger public interest is needed to protect scent as intellectual property. Though it has successfully preserved this intangible but priceless asset, encouraging innovation and fair competition in a global market might alter the legal environment.