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LEGAL FRAMEWORK FOR PROTECTING NON-TRADITIONAL TRADEMARKS IN USA

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ABSTRACT

In today's competitive marketplace, brands are searching for fresh and creative methods to create a distinctive character. Traditionally, trademarks were limited to logos, names, and symbols, but over time, businesses have started using unconventional brand elements such as sounds, colours, shapes, scents, motion, and even holograms to distinguish themselves. These In branding strategies, non-traditional trademarks (NTTs) are becoming more and more significant, yet many legal systems still struggle to provide clear and consistent protection for them. This paper takes a look at how the United States approach the protection of NTTs, exploring the laws, registration processes, enforcement mechanisms, and challenges in granting legal recognition to these marks.

The study begins with the evolution of trademarks law in USA, highlighting how the legal system has responded to the growing use of NTTs. Such marks are governed under the Lanham Act (also known as the Trademarks Act) of 1946 which provides for a category of non-traditional trademarks. This paper examines the key statutory provisions and judicial decisions, that have shaped the recognition of these marks, as well as the procedures in registering NTTs and finally concludes by discussing the enforcement challenges.

KEYWORDS: NON-TRADITIONAL MARKS, LANHAM ACT, INTELLECTUAL PROPERTY.

INTRODUCTION

Trademarks serve a fundamental purpose: they distinguish goods and services of one business from another, preventing consumer confusion and ensuring brand recognition. Historically, trademarks were limited to words, symbols, and images, but as businesses expanded their branding efforts, new forms of trademarks emerged. Today, colour, shape, sound, scent, and motion marks have gained significant commercial value, requiring legal recognition to prevent

unauthorized use and imitation. In the modern world, branding is everything. Consumers no longer just associate a product with its name or logo; they recognize colours, sounds, shapes, scents, holograms, and even motion patterns as integral to a brand's identity. This shift has given rise to non-traditional trademarks (NTTs), a category of trademarks that extend beyond conventional wordmarks and logos. NTTs have become powerful tools in differentiating products and creating lasting consumer impressions. However, with their rising importance comes a legal challenge, how do existing trademark laws accommodate these unconventional marks, and what protections are available for businesses seeking to register and enforce them? Over the years, the United States has led the way in the development of trademark law, especially with the Lanham Act, which regulates trademark protection¹. While the law does not explicitly categorize NTTs as separate from traditional trademarks, judicial precedents and the practices of the United States Patent and Trademark Office (USPTO) have shaped the legal framework for their recognition. Over time, U.S. courts have had to determine whether NTTs meet the essential trademark requirements of distinctiveness, secondary meaning, and non-functionality². This legal development has been crucial, as businesses increasingly rely on sensory branding to create unique identities in competitive markets.

EVOLUTION OF TRADEMARK LAW IN USA

Trademarks have been a fundamental part of commerce for centuries, helping businesses establish unique identities and ensuring that consumers can distinguish one product from another. While early traders relied on simple marks or symbols to differentiate their goods, the rise of industrialization and cross-border trade highlighted the need for a formal legal system to protect these valuable brand assets. Trademark law in the United States has changed dramatically over time, adjusting to shifts in technology, branding tactics, and commerce. From the first federal trademark legislation in the 19th century to today's recognition of non-traditional trademarks, the legal framework has expanded to accommodate modern branding needs while addressing challenges posed by globalization and innovation.

The first real attempt to establish trademark protection in the U.S. came in 1870, when Congress passed the nation's first federal trademark law. However, it was short-lived. In *The Trade-Mark Cases* (1879)³, the U.S. Supreme Court struck down the law, ruling that Congress

¹ Lanham Act § 45, 15 U.S.C. § 1127

² *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165–68 (1995); *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210–11 (2000)

³ *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)

had overstepped its authority by basing it on the Patent and Copyright Clause of the Constitution. This setback made it clear that a more solid constitutional foundation was needed to regulate trademarks effectively. The real breakthrough came in 1946 with the enactment of the Lanham Act, which remains the foundation of U.S. trademark law today. Unlike its predecessors, this law was grounded in the Commerce Clause, giving it the constitutional legitimacy required for long-term enforcement.

The Lanham Act introduced several key provisions that reshaped the trademark landscape in the United States. It established a federal registration system, making it easier for businesses to claim exclusive rights over their trademarks and take legal action against infringers. The Act also clarified what makes a mark legally protectable, emphasizing the importance of distinctiveness, meaning that a trademark should be unique enough to distinguish one brand from another. Additionally, it recognized trade dress, allowing businesses to protect the visual appearance of their products or packaging if they served as a brand identifier. Another major addition was the introduction of trademark dilution protection, which allowed famous brands to prevent others from using similar marks that could weaken their uniqueness, even if there was no direct competition.

Over the years, courts have played a crucial role in shaping how the Lanham Act is interpreted and applied. Landmark cases have expanded the scope of what can be trademarked. In *Qualitex Co. v. Jacobson Products Co. (1995)*⁴, the U.S. Supreme Court ruled that a single colour could be trademarked if it had acquired secondary meaning, paving the way for businesses to claim exclusive rights over specific colours, such as Tiffany & Co.'s signature blue. Similarly, in *Two Pesos, Inc. v. Taco Cabana, Inc. (1992)*⁵, the Court held that distinctive trade dress, such as the interior design of a restaurant, could be protected without requiring proof of secondary meaning. Another pivotal case, *Wal-Mart Stores, Inc. v. Samara Bros., Inc. (2000)*⁶, reinforced that product designs must acquire secondary meaning before they can be trademarked, preventing businesses from monopolizing common product aesthetics without strong justification.

⁴ 514 US 159 (1995)

⁵ 505 U.S. 763 (1992)

⁶ 529 U.S. 205, 216 (2000)

As businesses became more creative with their branding, the concept of non-traditional trademarks (NTTs) emerged. Traditionally, trademarks were limited to words, logos, and symbols, but today, brands are identified through colours, sounds, shapes, scents, motion marks, and even holograms. U.S. trademark law has evolved to accommodate these new branding techniques, but with certain conditions. For example, sound marks like the MGM lion's roar and NBC's three-note chime have been granted trademark protection, as they are uniquely associated with their respective brands. Similarly, product shapes, such as the Coca-Cola bottle and the Hermès Birkin bag, have been successfully trademarked as long as they do not serve a functional purpose. Even scents, though rare, can be protected, such as a floral fragrance infused into sewing thread, if they are proven to be distinctive⁷.

The evolution of U.S. trademark law demonstrates its adaptability to changing commercial landscapes. From the foundational Lanham Act to the growing recognition of non-traditional marks, the legal system has continually refined its approach to balancing brand protection with market competition. As branding strategies become more innovative and globalized, U.S. trademark law will need to keep pace, ensuring that businesses can safeguard their unique identities while fostering a competitive marketplace. Whether through future legislative updates, judicial rulings, or international collaborations, trademark law will continue to evolve, reinforcing its role as a crucial pillar of intellectual property protection in the modern economy.

RECOGNITION AND REGISTRATION OF NON-TRADITIONAL TRADEMARKS IN THE USA

In the United States, the landscape of trademark law has gradually evolved beyond the conventional boundaries of names, logos, and symbols. Today, the legal system acknowledges that brand identity can be communicated through more than just text or graphics. This expanded understanding has opened the doors to non-traditional trademarks (NTTs), those marks that go beyond the standard visual identifiers and include shapes, colours, sounds, scents, and even motion or holograms. These elements have a profound psychological effect on consumers and can become just as powerful, if not more, as names or logos in building brand identity and loyalty.

⁷ IP Wave, "From Sound to Scent: The Growing Influence of Non-Conventional Trademarks in Global Branding" available at <https://www.readipwave.com/p/from-sound-to-scent-the-growing-influence-of-non-conventional-trademarks-in-global-branding> (last visited 5th march, 2025)

Non-traditional marks can often be subtle. A sound, like the Intel chime⁸, or a colour combination, such as the pink used by Owens-Corning insulation⁹, may not scream branding at first glance but have become iconic in the minds of consumers. Recognising this, US law has adapted to allow such elements to be registered as trademarks, provided they meet the required standards.

1. STATUTORY BASIS AND LEGAL RECOGNITION

The primary statutory basis for trademark protection in the United States is the Lanham Act of 1946, which provides a broad definition of a trademark.¹⁰ While the Act does not explicitly list non-traditional trademarks, it defines a mark as “any word, name, symbol, or device, or any combination thereof” used to identify and distinguish goods or services. This flexible language has allowed courts and the United States Patent and Trademark Office (USPTO) to interpret the law expansively, giving room for protection of non-traditional elements. It wasn’t until case law evolved that NTTs began gaining solid legal recognition. Judicial interpretation played a crucial role in expanding the scope of what qualifies as a “trademark.” As courts began acknowledging that consumer perception and brand distinctiveness were key, the path became clearer for non-conventional marks to be protected.

2. CRITERIA FOR REGISTRATION: DISTINCTIVENESS AND NON-FUNCTIONALITY

To be eligible for registration, a non-traditional mark must satisfy two central criteria, which are distinctiveness and non-functionality¹¹. These two elements serve as the gatekeepers, ensuring that only valid and protectable marks are granted exclusive rights.

Distinctiveness refers to the ability of a mark to identify the source of goods or services. For traditional marks, distinctiveness might be more straightforward. But for NTTs, distinctiveness must often be acquired over time. This is especially true for marks like product packaging, colours, or sounds, which usually don’t carry inherent source-identifying capacity¹². Applicants are often required to show that through extensive use, marketing, and public recognition, the mark has acquired secondary meaning, meaning that consumers directly associate that feature with a particular brand.

⁸ Prashanth and Anita, “Sound Marks in India: Exploring non-conventional branding” (2021) available at <https://www.barandbench.com/law-firms/view-point/sound-marks-in-india-exploring-non-conventional-branding> (last visited 2nd march, 2025)

⁹ Owens-Corning Fiberglas Corp, 774 F.2d 1116, 1123 (Fed. Cir. 1985)

¹⁰ 15 U.S.C. § 1127 (2022)

¹¹ Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159 (1995)

¹² J. Thomas McCarthy, “Trademarks and Unfair Competition” Thomson West, 5th ed. (2025)

Non-functionality, on the other hand, ensures that businesses cannot monopolise features that are essential to a product's use or purpose. The functionality doctrine prevents someone from claiming trademark rights over a design feature that gives a product a utilitarian advantage¹³. This principle was firmly established in cases like *Qualitex Co. v. Jacobson Products Co.*¹⁴, where the US Supreme Court clarified that a colour could serve as a trademark only if it was not functional and had acquired secondary meaning.

3. REGISTRATION PROCEDURE AND EXAMINATION PROCESS

The process of registering a non-traditional trademark in the US largely mirrors that for traditional trademarks, but it typically faces greater scrutiny. Applications must be filed with the USPTO, which conducts a detailed examination. For NTTs, applicants often need to submit more comprehensive evidence to establish the mark's distinctiveness. This might include market surveys, advertising expenditures, length and exclusivity of use, and affidavits from consumers or industry experts.¹⁵

The USPTO also requires a drawing and a specimen of the mark. For sound marks, audio files must be submitted, and for scent marks, a detailed description of the scent and its use on the goods is required.¹⁶ The description must be specific, and any ambiguity can lead to rejection. Because the USPTO has no way to "smell" or "hear" a mark like a human consumer, the burden is on the applicant to bridge that sensory gap.

The scrutiny during examination reflects the cautious approach of US authorities. The rationale is that since these marks are inherently harder to define and recognise than traditional trademarks, their approval must be based on clear and convincing evidence.

4. JUDICIAL INFLUENCE AND POLICY TRENDS

The courts in the US have been instrumental in guiding how NTTs are treated. Landmark decisions have helped clarify the scope of protectable trade dress and the limits imposed by functionality. For example, in *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*¹⁷, the Supreme Court held that product design can never be inherently distinctive and must always require proof of secondary meaning. This ruling significantly affected how product configuration claims are approached.

¹³ Ibid

¹⁴ 514 US 159 (1995)

¹⁵ TMEP § 1212

¹⁶ TMEP § 1202.13

¹⁷ 529 U.S. 205, 210–11 (2000)

Policy-wise, the USPTO has become more receptive to non-traditional marks in recent years, in part because of global trends and evolving consumer behaviour.¹⁸ Brand owners increasingly seek protection for unique identifiers that set their products apart, and US law has slowly adapted to meet this demand.

5. GROWING IMPORTANCE OF PROTECTING NON-TRADITIONAL MARKS

In today's marketplace, where competition is fierce and brand differentiation is key, protecting non-traditional trademarks is more important than ever. These marks help brands communicate a sensory identity whether through sight, sound, touch, or even smell that goes beyond the logo. As consumers interact with products in more experiential ways, NTTs have become vital in shaping brand image and consumer loyalty.

By recognising and registering these marks, the US legal system empowers businesses to guard the unique experiences they offer. While the process is complex and requires robust evidence, the reward is strong, enforceable brand identity that can outlast fleeting trends and superficial branding gimmicks.

CATEGORIES OF NON-TRADITIONAL TRADEMARKS IN THE USA

In today's marketplace, the concept of a trademark is no longer confined to just words, logos, or symbols. As branding strategies have evolved, so has the interpretation of what can be protected under trademark law in the United States. The U.S. legal system has gradually embraced the idea that even unconventional or sensory aspects of a product like the elements that appeal to sight, sound, smell, touch, or movement, can serve the core function of a trademark, i.e., indicating the source of goods or services. These are what we now refer to as non-traditional trademarks (NTTs), and their growing importance reflects how modern branding appeals to the full spectrum of consumer perception.

1. SOUND MARKS

Sound marks are among the most commonly accepted forms of NTTs in the United States. These are specific sounds that, through use and association, become uniquely linked with a particular source. A classic example is the NBC chimes, a series of three musical tones that have become synonymous with the network itself. For a sound to be registered as a trademark with the United States Patent and Trademark Office (USPTO), it must be distinctive and not

¹⁸ U.S. Patent & Trademark Office, Trademark Manual of Examining Procedure (TMPE) § 1202 (Oct. 2023)

merely functional or commonplace¹⁹. The applicant must usually provide audio samples and evidence demonstrating that the sound has acquired distinctiveness through use in commerce.²⁰

2. COLOUR MARKS

The idea that a single colour could indicate the origin of a product might seem odd at first, but U.S. courts have recognised and protected colours as trademarks in specific contexts. The landmark Supreme Court case, *Qualitex Co. v. Jacobson Products Co.*²¹, confirmed that a colour can function as a trademark if it has acquired secondary meaning, that is, if the public associates the colour with a specific source of goods or services. Examples include the pink insulation by Owens Corning and the robin's egg blue used by Tiffany & Co. However, registration of colour marks can be challenging, as the applicant must show strong evidence of distinctiveness and ensure the colour is not functional.

3. SCENT MARKS

Perhaps one of the most unique forms of NTTs, scent marks, are also recognised in the U.S. legal system. Scents that are not inherent to the product but serve as a source identifier may be eligible for trademark protection. A notable example is the floral scent used in Verizon's retail stores, which has been registered as a scent mark. The key legal hurdle is that the scent must not be functional; for instance, the smell of perfume or air freshener would typically be deemed essential to the product's function and thus not registrable. Additionally, proving distinctiveness can be difficult, and applicants must provide concrete evidence that consumers associate the scent with a particular source.

4. MOTION AND HOLOGRAM MARKS

Another intriguing category includes motion marks and holograms. Motion marks are logos or symbols that appear in animated form and convey a consistent identity over time, such as the animated sequence in the Pixar logo. These marks must be submitted to the USPTO as video files or a series of freeze frames, and like other NTTs, they must serve the function of source identification.

Holograms, although rare, also fall under this category. They use optical technology to project a 3D image or symbol and can be protected if they are distinctive enough to be perceived as

¹⁹ TMEP § 1202.15

²⁰ *In re Gen. Elec. Broadcasting Co.*, 199 U.S.P.Q. 560 (T.T.A.B. 1978).

²¹ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162–63 (1995).

indicating a source of goods or services. As the use of augmented reality and advanced packaging continues to rise, more businesses may explore hologram marks as part of their branding strategy.²²

5. TOUCH AND TEXTURE MARKS

In some cases, the feel or texture of a product can also serve as a trademark. For instance, the velvety texture of a particular wine bottle label or the raised bumps on a lotion bottle's packaging can become associated with a specific brand over time. Though relatively rare and difficult to register, these marks are not outside the realm of legal protection. The same rules apply: the tactile element must be non-functional and must serve to indicate the source of the product or service.

6. TASTE MARKS

Taste marks represent one of the most debated and least accepted forms of NTTs in the U.S. While theoretically possible, taste marks face significant hurdles related to the doctrine of functionality. Courts and the USPTO have generally been reluctant to grant protection to taste marks due to the essential role taste plays in the nature and function of edible products.²³ Nonetheless, it remains an area of ongoing legal and academic discussion, especially as sensory branding becomes more sophisticated.

ENFORCEMENT CHALLENGES IN USA

The evolution of non-traditional trademarks (NTTs) such as sounds, colours, scents, product shapes, and store layouts, has added a new dimension to modern trademark jurisprudence. While the United States has made significant strides in recognising and registering these marks under the Lanham Act²⁴, enforcing them remains a complex affair. The abstract and often subjective nature of NTTs makes it difficult to define the boundaries of infringement, leading to legal ambiguities and practical challenges. For many brand owners, the courtroom becomes the true test of their non-traditional mark's strength, and unfortunately, enforcement is often when theory clashes with commercial reality.

²² TMEP § 1202.14

²³ *In re N.V. Organon*, 79 U.S.P.Q.2d 1639

²⁴ 15 U.S.C. §§ 1051 et seq.

1. SUBJECTIVITY IN DISTINCTIVENESS AND CONSUMER PERCEPTION

Unlike traditional trademarks such as names or logos, non-traditional marks frequently struggle to establish “acquired distinctiveness” or “secondary meaning” in the minds of consumers. This is a prerequisite for enforcement if the mark is not inherently distinctive. For example, in cases involving colour marks, the courts require proof that the specific colour alone serves as a brand identifier and is not merely decorative or functional. Proving such a nuanced perception is highly subjective and often hinges on extensive consumer surveys and market evidence. This reliance on perception over tangible association makes enforcement precarious, as courts may be hesitant to grant protection without overwhelming proof.

2. THE FUNCTIONALITY DOCTRINE

One of the most significant hurdles in enforcing NTTs in the U.S. is the functionality doctrine. Under this doctrine, any feature that is essential to the use or purpose of a product or affects its cost or quality, cannot be protected as a trademark. This principle aims to prevent businesses from using trademark law to secure perpetual monopolies over useful product features.²⁵ While the doctrine plays an important role in maintaining competitive markets, it has also been used as a defence in several cases to invalidate non-traditional trademarks. For example, in *TrafFix Devices, Inc. v. Marketing Displays, Inc.*²⁶, the Supreme Court held that a dual-spring design used in road signs was functional and therefore not entitled to trade dress protection. The challenge lies in the fact that many NTTs, such as shapes or packaging, straddle the line between aesthetic appeal and functionality, complicating enforcement.

3. LACK OF UNIFORM JUDICIAL INTERPRETATION

Although federal statutes guide trademark law, its interpretation and enforcement are largely influenced by judicial discretion. Courts across various circuits often approach non-traditional trademark disputes with varying degrees of skepticism, especially when the mark involves unconventional elements such as scents or holograms. The lack of a uniform interpretative framework leads to inconsistencies in decisions, making it difficult for rightsholders to anticipate outcomes. What may be deemed protectable trade dress in one jurisdiction might not survive scrutiny in another, contributing to uncertainty and inconsistent enforcement.

²⁵ 15 U.S.C. § 1052(e)(5)

²⁶ 532 U.S. 23, 33 (2001)

4. HIGH EVIDENTIARY BURDEN ON THE PLAINTIFF

Another pressing enforcement challenge is the heavy evidentiary burden that lies on the plaintiff. In cases of NTT infringement, mere similarity is not enough. Plaintiffs must show that the accused use causes a “likelihood of confusion²⁷” among consumers, a standard that is already challenging with traditional marks but even more so with abstract elements like colour or sound. Courts tend to scrutinise such claims rigorously, often requiring market surveys, expert testimonies, and proof of marketing efforts. This high threshold not only increases litigation costs but also deters small businesses from enforcing their rights effectively.

5. DIGITAL AND CROSS-BORDER INFRINGEMENT

As commerce continues to move online, new enforcement challenges have emerged. In the digital marketplace, elements of a brand’s trade dress can be replicated easily and distributed across borders within minutes. The fluid nature of online infringement means that non-traditional trademarks can be appropriated by foreign entities, making it difficult to assert U.S.-based rights beyond jurisdictional boundaries. While the U.S. has bilateral agreements and is a party to the TRIPS Agreement, enforcement outside its borders remains complicated and expensive.

CONCLUSION

The protection of Non-Traditional Trademarks (NTTs) in the United States marks a significant evolution in trademark law, highlighting how businesses are continuously innovating to stand out in a competitive marketplace. Traditionally, trademarks were limited to words, names, logos, and symbols, but modern branding strategies now incorporate colours, sounds, scents, product shapes, trade dress, motion marks, and even holograms as unique identifiers. This shift has challenged the existing legal framework, requiring courts and policymakers to determine how these unconventional marks should be protected while ensuring fair competition and consumer clarity. While the United States Patent and Trademark Office (USPTO) and judicial precedents have gradually expanded the scope of trademark protection, securing rights over NTTs remains far more complex than traditional marks. The legal system places high burdens on applicants, requiring strong evidence that an NTT is distinctive, non-functional, and recognized by consumers as a brand identifier. This often involves extensive consumer surveys,

²⁷ United States Patent and Trademark Office available at <https://www.uspto.gov/trademarks/search/likelihood-confusion>

long-term marketing investments, and legal battles, making it particularly challenging for smaller businesses to protect their branding innovations.

One of the biggest hurdles in protecting NTTs is the functionality doctrine, which prevents businesses from monopolizing product features that serve a practical purpose. Another significant challenge is the requirement of acquired distinctiveness. Unlike traditional trademarks, which can be inherently distinctive, most NTTs require businesses to prove that consumers directly associate the mark with their brand through extensive commercial use and public recognition.

Furthermore, even when businesses manage to secure trademark protection for NTTs, enforcement remains a major challenge. Unlike word marks or logos, which are easily compared for similarity, proving infringement of an NTT is much more complex. Another complication in protecting NTTs arises from international inconsistencies in trademark laws. While the U.S. has recognized and protected many NTTs, other jurisdictions may not offer the same level of protection. This creates gaps in enforcement, where a business may have exclusive rights to an NTT in the United States but find it difficult to stop competitors from using similar marks in foreign markets.

Despite these challenges, the growing recognition of NTTs underscores their value in modern branding. In an age where consumers are bombarded with advertising, businesses are constantly searching for new and unique ways to differentiate themselves. Whether it's a signature sound in a commercial jingle, a distinct scent in a retail store, or a motion logo that adds a dynamic element to brand identity, NTTs play a crucial role in shaping consumer perception. Companies that successfully protect and enforce their non-traditional trademarks gain a significant competitive edge, ensuring that their branding innovations remain exclusive and recognizable in the marketplace.

Looking ahead, the legal framework for NTTs will need to evolve to accommodate emerging branding technologies and consumer trends. As businesses explore virtual reality trademarks, AI-generated branding elements, and immersive brand experiences, trademark law must adapt to address new forms of brand identification. One possible solution could be more standardized guidelines for proving distinctiveness in NTTs, reducing the burden on businesses while ensuring fair market competition. Additionally, greater harmonization of international

trademark laws could help streamline enforcement efforts, providing companies with stronger global protection for their branding elements.

Ultimately, the protection of non-traditional trademarks in the U.S. is not just a legal necessity but a vital part of modern intellectual property strategy. As brands continue to push creative boundaries, the role of colour, sound, motion, and other sensory elements in shaping brand identity will only grow in importance.

