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EXPLORING THE REALM OF NON-TRADITIONAL TRADEMARKS: AN INDIAN PERSPECTIVE

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ABSTRACT

In today's competitive market, businesses invest substantial resources, including finances and efforts, to build a strong brand image and goodwill. They spend significant time and energy differentiating their products from competitors, aiming to make them stand out. As a result, consumers have become adept at recognizing brands, which influences their buying decisions. Factors such as scent, color, shape, sound, and other elements are crucial in product recognition in modern society. However, this increased emphasis on branding has also led to a rise in trademark infringement, passing off, and deceptive practices, posing risks to businesses and their reputation. Unconventional trademarks have emerged as a potential solution to these challenges.

However, unconventional trademarks are a relatively new concept in India, with limited legal precedent in this area. Despite international agreements like the TRIPS agreement, trademark laws vary across jurisdictions, including India, leading to further complexities. Additionally, this paper will analyze the current status of such marks in India and propose suggestions to improve the legal framework concerning unconventional trademarks in the country. It will also discuss the evolution, classification, and other aspects of unconventional marks.

Keywords – Unconventional, Trademark, European Union, TRIPS Agreement

INTRODUCTION

Trademark law occupies a fascinating space in the realm of intellectual property, and it has seen many recent advancements. Essentially, a trademark acts as a form of intellectual property that enables consumers to identify specific brands, services, or goods in the market. Its primary purpose is to protect manufacturers or owners from unauthorized replication of their products while also safeguarding the interests of consumers and preventing any potential confusion. Traditionally, trademark protection was primarily extended to conventional marks such as logos, symbols, images, captions, signs, names, and similar elements. However, due to the increasing competition among manufacturers of physical goods in today's market, it has become increasingly crucial for them to differentiate themselves.¹

Brands are increasingly turning to creativity and innovative trademarks to make their products stand out in the market. This shift is aimed at avoiding the drawbacks of conventional approaches that have become too common. By exploring unique trademark options, companies aim to create a distinctive identity that resonates with consumers and leaves a lasting impression. This trend signals a departure from traditional, cookie-cutter branding, showing a willingness to think outside the box. As a result, consumers encounter fresh and exciting offerings, which enhances their shopping experience and fosters brand loyalty.

This creative approach to trademarks also encourages healthy competition among companies, driving them to continuously innovate and improve their products and services. In summary, the adoption of non-conventional trademarks has become a crucial strategy for brands aiming to thrive in a competitive market. It allows them to stand out, maintain a strong presence, and ensure their offerings are easily recognized by consumers. Examples of non-conventional trademarks include unique sounds, scents, colors, shapes, or other distinctive elements associated with a particular brand. To stay ahead in the dynamic market landscape, companies must navigate trademark law complexities while pushing the boundaries of creativity to protect and promote their unique identities.²

¹ Tanusree Roy, Registrability of Smell Mark as Trademark: A Critical Analysis, 4 Journal on Contemporary Issues of Law 121, 121-130 (2018).

² Vatsala Sahay, Conventionalising Trademarks of Sounds and Scents: A Cross-Jurisdictional Study, 6 NALSAR Student Law Review 128, 128-141 (2011).

Non-traditional trademarks represent unique forms of marks that extend beyond traditional categories. They encompass elements like touch, smell, color, shape, texture, sound, and taste. Unlike conventional trademarks, which can be visually represented, these non-traditional trademarks are protected based on their ability to establish strong associations in consumers' minds. The registration and protection of trademarks are governed by the TRIPS agreement, which doesn't mandate that a trademark must be tangible, visually perceptible, or graphically representable to qualify for protection. Consequently, non-conventional trademarks, particularly sound marks, have gained increasing popularity for registration in both the United States and the European Union.³

The Indian Trade Marks Act of 1999 establishes two main conditions for trademark registration: the ability to distinguish from other goods and the capability to be represented graphically. However, non-traditional trademarks, though they serve the essential function of trademarks, face hurdles in the registration process in India. This is mainly due to the requirement of distinctiveness and the necessity for graphical representation. These unique trademark types have the potential to confuse consumers, thus undermining the core purpose of trademarks. Despite this, the concept of non-traditional trademarks is still developing in India, leading to ongoing debates on whether they should be acknowledged as trademarks even without graphical representation. This article aims to provide a detailed analysis of the current state of protection and registration of non-traditional trademarks in India. It will explore the complexities and nuances associated with safeguarding these distinct trademarks by examining their treatment in various jurisdictions.

TRACING THE EMERGENCE AND GROWTH OF UNCONVENTIONAL TRADEMARK PROTECTION IN INDIA

In the field of branding, traditional trademarks have always been crucial assets for distinguishing products and services. These trademarks include logos, symbols, slogans, and names, all of which play a crucial role in setting products apart from each other. However, there has been a noticeable change in branding strategies recently, with companies embracing unconventional marks such as colors, shapes, smells, tastes, and more. These unique elements

³ Faye M. Hammersley, *The Smell of Success: Trade Dress Protection for Scent Marks*, 2 *Intellectual Property LawReview* 105, 105-156 (1998).

are used to differentiate products in the global market.

Despite ongoing discussions about protecting non-conventional marks for over a century, legal safeguarding and registration of such trademarks have emerged more recently. Nevertheless, many well-known brands have effectively utilized these unconventional marks for over a decade. For example, the distinctive shape of the Coca-Cola bottle, the iconic blue gift box of Tiffany, and the trademark pink color of Owens Corning Corporation are among the early examples of successfully registered non-conventional trademarks.

The Standing Committee on the Law of Trademarks, established by the World Intellectual Property Organization (WIPO), was assigned the task of studying trademarks. During their analysis, trademarks were categorized into two main types: visual and non-visual marks. Visual trademarks encompass elements such as color, shape, and holograms, while non-visual trademarks include sound, taste, smell, and texture.

Over time, it became apparent that the initial broad definition of trademarks needed refinement. This issue was first addressed during the Vienna meeting and later in Brussels. A significant milestone in trademark rights occurred in 1994 with the introduction of the TRIPS agreement (Trade-Related Aspects of Intellectual Property Rights). This agreement provided a comprehensive definition of trademarks, considering the types of marks eligible for protection. According to this functional definition, the distinctiveness of trademarks played a crucial role in granting them protection.

Furthermore, the agreement acknowledged the importance of safeguarding unconventional trademarks, which are utilized to distinguish specific products and possess unique characteristics. These distinctive trademarks warrant legal protection as they play a significant role in identifying and differentiating products in the market. The efforts of the Standing Committee, alongside the advancements in trademark rights facilitated by the TRIPS agreement, contributed to a more nuanced and comprehensive understanding of trademarks. This understanding now encompasses both traditional visual marks and non-visual marks, which are acknowledged as crucial assets in the realm of intellectual property protection.⁴

In the 19th century, Europe experienced a surge in scholarly discussions and debates regarding

⁴ Kenneth L Port, On Non-Traditional Trademarks, William Mitchell College of Law Legal Studies Research Paper Series (Jul 27th, 2023), <https://ssrn.com/abstract=1564230>.

the protection of non-traditional trademarks. In the early 20th century, Bolivia took part in dialogues concerning intellectual property rights, leading to the eventual recognition and protection of non-traditional marks like sounds and shapes. These marks were acknowledged for their ability to be graphically represented and their capacity to be distinctive. However, in the last two decades, registering and protecting non-traditional trademarks has become a contentious issue, particularly concerning visually imperceptible marks such as those based on smell, touch, and taste. Challenges have emerged in effectively safeguarding these unique trademarks. Their intangible nature and the difficulty in graphically representing them pose potential confusion for consumers.

Despite ongoing discussions and efforts to address these issues, protecting non-conventional trademarks remains a complex and evolving area within intellectual property law. The absence of clear graphical representation and the risk of consumer confusion continue to present significant hurdles for their registration and legal protection.

TYPES OF UNCONVENTIONAL TRADEMARKS

1. Sound Trademarks

Auditory marks, also known as sound marks, encompass any distinctive auditory elements. Sound marks have become increasingly popular worldwide, especially in the United States, among various non-conventional trademarks. They offer unique protection and recognition to products in a competitive market, reducing confusion among consumers. Some well-known examples of enduring sound trademarks are the recognizable sound of Harley Davidson, the iconic Nokia tune, and the legendary Tarzan Yell. These sound marks play a significant role in helping consumers identify specific products with ease.

Notably, sound marks have gained widespread registration and protection, making them stand out as an essential aspect of modern trademark strategy. Their distinctive and memorable nature allows companies to establish a stronger brand presence, fostering consumer loyalty and trust. As they continue to gain popularity, sound marks are expected to play an even more crucial role in the evolving landscape of intellectual property rights. It is noteworthy that sound marks have become increasingly popular as a tool for aiding brand recognition and differentiation in the commercial sphere. Their unique auditory nature and graphical representation contribute to

their appeal and utility in trademark protection.⁵

2. Colour Trademarks

Color, a ubiquitous element surrounding us, remains a fascinating mystery in its distinctiveness.

While combinations of colors are accepted for trademark registration, registering a single color mark is a contentious issue due to its limited inherent distinctiveness. This limitation could potentially confuse consumers, considering the myriad shades a single color can possess. Moreover, allowing trademarks for individual colors could lead to conflicts with other industry players, resulting in situations where no one can utilize that specific color due to limited options. Notable examples of famous color trademarks include Cadbury's royal purple, Barbie's pink hue, and 3M's Canary yellow, effectively safeguarding their exclusive rights to these colors.⁶

3. Shape Marks

Trademark protection can extend beyond colors and textures to include the shape of a product, particularly when consumers strongly associate that shape with the product. Both the Trade Mark Act of 1999 and the UK Trade Mark Act of 1994 recognize the possibility of registering shapes as trademarks. However, registering shape marks, like other non-traditional trademarks, presents challenges due to difficulties in graphic representation and demonstrating distinctiveness. Despite these challenges, many companies have successfully protected the shapes of their products. Examples include the distinctive triangular shape of Toblerone chocolate, the unique shape of Zippo lighters, and the iconic contour of Coca-Cola bottles, among others.⁷

4. Touch Trademarks/Texture Trademarks

Texture marks, often referred to as touch marks, are not as commonly used as other types of trademarks, making them the least sought-after among unconventional trademarks. However, to successfully register a touch mark, it is crucial that the mark holds meaningful association and goes beyond mere decorative packaging for products or services. An excellent example of

⁵ Harshada Wadkar, Non-Conventional Marks, Lexology (Jul 29th, 2023), <https://www.lexology.com/library/detail.aspx?g=4339efff-eba0-4339-a5f9-47f2d72ae7d1>.

⁶ M M S Kharki, Non-Traditional Areas of Intellectual Property Protection: Colour, Sound, Taste, Smell, Shape, Slogan and Trade Dress, 10 Journal of Intellectual Property Rights 499, 499-506 (2005).

⁷ Dr. Mohan Dewan, Registering Shapes in India: Guidelines and Processes, Lexology (Jul 29th, 2023), <https://www.lexology.com/library/detail.aspx?g=94e581ac-5333-4a72-8dfc-111d746af82d>

effectively using touch as a distinctive trademark can be found in the velvet touch trademark seen on Khvanchkara wine bottles or the incorporation of leather-like material in the packaging of brandy or grappa. In both cases, the tactile experience plays a significant role in establishing a unique and recognizable brand identity.

5. Smell Trademarks/Olfactory Trademarks

The human sense of smell is incredibly powerful, with the ability to effortlessly trigger memories and experiences from the past. Recognizing this, many countries have begun to acknowledge the importance of registering and protecting smells as trademarks. However, the process is challenging due to the intangible nature of smells and the difficulty in visually representing them, which sets them apart from tangible products. Some companies have attempted to overcome this challenge by providing chemical formulas for their scents. Despite these difficulties, certain companies have successfully navigated the process, completing all necessary tests and registering specific smells as their trademarks. For instance, a tire company based in the UK has secured a trademark for the scent of roses, while a London-based company has trademarked the aroma of beer incorporated into their dart flights. These examples highlight successful instances of smell trademarks being registered.⁸

6. Motion Trademarks/Movement Trademarks

Only a few nations acknowledge the registration of trademarks associated with motion pictures, videos, cinematography, documentaries, and films. The registration of taste marks poses a significant challenge within the domain of non-traditional trademarks. However, some countries have accepted the idea of registering flavors as trademarks to establish product distinction in the commercial sphere. Typically, when discussing taste marks, the customary practice involves providing written descriptions of the specific taste in question. Similar to scent marks, it is crucial for taste marks to possess uniqueness distinct from the product's inherent functionality. Despite this, there is an ongoing debate and discussion regarding the registration of taste marks for services, which complicates the issue. This trend is leading to a growing popularity of motion marks compared to other non-traditional trademarks.⁹

⁸ Smell, Sound and Taste-Getting a Sense of Non-Traditional Marks, WIPO (July 24, 2023), http://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html, last seen on July 24, 2023.

⁹ Archi Bhatia, Registration of Motion as Trademark, iPleaders (Jul 27th 2023), <https://blog.ipleaders.in/motion-mark-as-trademark/>.

7. Taste Trademarks

The registration of taste marks poses a significant challenge in the realm of non-traditional trademarks. However, certain countries have acknowledged the possibility of registering flavors as trademarks to differentiate products in the market. Typically, when discussing taste marks, the usual approach involves providing written descriptions of the taste in question. Similar to smell marks, it's crucial for a taste mark to demonstrate uniqueness distinct from the product's inherent function. This distinction is vital to ensure that the taste mark stands out on its own merits. Nevertheless, there's an ongoing debate surrounding the registration of taste marks for services, which adds complexity to the issue.¹⁰

POSITION OF UNCONVENTIONAL TRADEMARKS IN INDIA

In the Trade Marks Act of 1999, a trademark is defined under Section 2(1)(zb) as a mark that can be visually represented and has the ability to distinguish the goods or services of one person from those of others. This definition encompasses a wide range of elements, including the shape of goods, their packaging, and combinations of colors. Furthermore, Section 2(1)(m) provides a more detailed explanation, including devices, brands, headings, labels, tickets, names, signatures, words, letters, numerals, shapes of goods, packaging, or combinations of colors, or any combination of these elements.

As a result, the concept of unconventional trademarks is gradually gaining recognition in Indian jurisprudence. These non-traditional trademarks expand beyond the conventional understanding of marks, allowing for a broader scope of protection for unique and distinctive identifiers. This recognition indicates the evolving nature of trademark law in India and the increasing acknowledgment of the various forms that trademarks can take to represent businesses and their products or services. These non-traditional marks extend beyond traditional symbols and open up new possibilities for brand identification and protection. As the legal framework evolves, it becomes more accommodating of diverse forms of trademarks, which contributes to fostering creativity and innovation in the business world.

1. Shape Trademark

Within the framework of the Trade Marks Act, 1999, the recognition of shapes as trademarks,

¹⁰ Thomas A. Gallagher, Non-Traditional Trademarks: Taste/Flavour, *The Trademark Reporter* (Jul 27th 2023), http://www.inta.org/TMR/Documents/Volume%20105/vol105_No3_a4.pdf.

as delineated in Sections 2(1)(m) and 2(1)(zb), bears resemblance to the registration of color combinations as trademarks, provided certain conditions are fulfilled. One crucial requirement is that the shape must exhibit distinctiveness and be capable of graphical representation. Regarding shape trademarks, Section 9(3) of the Act lays down specific criteria that must be satisfied. Firstly, the shape must be distinguishable from the product or service itself and should not derive from the inherent nature of the product. Additionally, the shape should not serve any functional purpose, meaning it should not aim to achieve a technical result. Furthermore, the shape must not add substantial value to the product or service, thereby creating a disadvantage for manufacturers of similar goods and services. The Draft Manual of Trade Marks Practice and Procedure provides further clarification on the registration process of shape marks in India.

In numerous instances, Indian courts have consistently upheld the principle of using shapes as trademarks, as evidenced in their judgments. An illustrative example can be found in the case of *Lilly ICOS LLC and Anr. v. Maiden Pharmaceuticals Ltd.*, where the Delhi High Court ruled in favor of the plaintiff. The plaintiff argued that the defendant had unlawfully copied the distinctive almond shape of their product. Consequently, the court issued an injunction against the defendant, recognizing that they had adopted the shape with deceptive intent.

Similarly, the Bombay High Court, in the case of *Gorbatschow Wodka KG v. John Distilleries Ltd.*, acknowledged the validity of the plaintiff's vodka bottle shapes as trademarks. The court issued an injunction in favor of the plaintiff, agreeing that the distinct bottle shapes significantly contributed to the product's reputation. These judgments highlight the considerable importance Indian courts attach to shapes as trademarks and their stance against deceptive imitation or infringement.

Even prior to the enactment of the current Act, Indian Judiciary recognized shapes as eligible for trademark protection. For instance, in the 1990 case of *MRF Ltd. v. Metro Tyres Ltd.*, the plaintiff sought a permanent injunction to prevent the defendant from manufacturing and selling tires with tread patterns resembling their own. The Delhi High Court ruled in favor of the plaintiffs, stating that such similarity could potentially confuse consumers about the product's origin. This legal precedent was reaffirmed in 2011 in a similar case, *Zippo Manufacturing Company v. Anil Moolchandani and Ors.*

It's worth noting that well before the current Act, the Indian Judiciary had acknowledged shapes as trademarks. In a 1990 case, *MRF Ltd. v. Metro Tyres Ltd.*, the plaintiff sought a permanent

injunction to stop the defendant from producing and selling tires with tread patterns resembling their own. The Delhi High Court ruled in favor of the plaintiffs, stating that similar patterns, like those in question, could confuse consumers about the product's origin. This viewpoint was reaffirmed in a later case in 2011, *Zippo Manufacturing Company v. Anil Moolchandani and Ors.*

2. Sound Trademark

In India, both Yahoo Inc. and ICICI Bank obtained trademark status for their distinctive sound marks, Yahoo's three-note yodel in 2008, and ICICI Bank's corporate jingle in 2011. These instances mark significant milestones in the realm of sound trademarks in the country. Yahoo's yodel stands out as the first sound trademark in India, while ICICI Bank's jingle is notable as the first such trademark granted to an Indian entity.

Additionally, India boasts several other noteworthy sound marks. These include Britannia Industries' four-note bell sound, Nokia mobile phone's default ringtone, the famous lion's roar from MGM films, the musical sequence associated with Raymond: The Complete Man, Edgar Rice Burroughs' Tarzan yell, and even the National Stock Exchange's theme song. Each of these sound marks adds a unique dimension to their respective brands, significantly boosting their recognition in the market.¹¹

When applying to register a sound as a trademark in India, the applicant is required to submit an MP3 recording of the sound, such as a jingle, chime, or musical composition. According to Section 26(5) of the Trade Marks Rules, 2017, this recording should not exceed 30 seconds and must be sent to the Office of the Registrar of Trade Marks. Additionally, the submission must include a graphical representation of the notations associated with the sound.

It is crucial for the application to clearly state that the trademark being sought is for a sound. Failure to do so might result in the application being treated as a word mark during examination. The acceptance or rejection of a sound trademark depends on its distinctiveness. This involves determining whether the sound has become closely associated with the product or service in the minds of consumers. The draft manual recommends representing the sound with musical notes, with or without accompanying words, to provide clarity on Section 26(5)

¹¹ Labna Kably, Jingles and Chimes can make Trademark Noise, The Times of India, Mar. 27, 2017

of the Rules. It's important to note that the Shield Mark doctrine is also applicable in India.

3. Colour Trademark

According to the Trade Marks Act of 1999, there are two main types of colour marks: those consisting of single colours and those involving combinations of colours. The Act specifically addresses combination colour marks in Sections 2(1)(m), 2(1)(zb), and 10(1). To gain trademark protection for combination colour marks, applicants are required to provide a representation of the mark as outlined in Section 26(2) of the Trade Marks Rules, 2017.

However, when it comes to single colour trademarks, the Act doesn't offer explicit guidelines. Section 9(1)(a) of the Act states that non-distinctive trademarks cannot be registered. This suggests that trademarking single colours may face limitations since they are commonly used and readily available, making it difficult for them to stand out and possess distinctiveness. The concept of "colour depletion theory" further complicates matters, suggesting that the limited availability of colours in the world adds to the challenge. As a result, the laws surrounding the trademarking of colours in India seem ambiguous, leaving a significant amount of discretion to the judiciary in resolving such cases.

In India, the issue of inconsistent court judgments regarding color trademarks has led to considerable ambiguity surrounding their precise legal standing. An example of such inconsistency can be found in the case of *Colgate Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd.* in 2003, where the Delhi High Court prohibited the defendant from using the plaintiff's red and white color combination in their product packaging. This lack of uniformity in court rulings has contributed to uncertainty surrounding the legal status of color trademarks in the country. The court even expressed the opinion that imitating the color of another product could be considered passing off.

In the case of *Cipla Ltd. v. MKI Pharmaceuticals* in 2007, a distinct approach was adopted compared to a previous case, where the plaintiff requested an interim injunction to prohibit the defendant from utilizing a closely resembling orange color in their merchandise. The court, in this case, held a contrary view, stating that colors should not be monopolized, and merely copying the color of another product does not constitute passing off.

In the dispute between Britannia and ITC, Britannia was accused of imitating ITC's Sunfeast Farmlite Digestive All Good Biscuit's distinct yellow and blue color scheme for their Nutri

Choice Digestive Zero Biscuit. However, the Delhi High Court ruled in favor of Britannia, stating that ITC failed to demonstrate that the color combination had acquired distinctiveness for their brand, thus disqualifying them for an interim injunction. Consequently, the court dismissed the case.

In the case of *Christian Louboutin Sas v. Abu Baker and Ors.*, the court extensively analyzed Sections 2(1)(m) and 2(1)(zb) of the Trade Marks Act. In a significant decision, the court ruled that single colors cannot be trademarked. Therefore, the plaintiff's trademark, based on the red color of the soles of ladies' footwear, was not deemed infringed upon by the defendant, leading to the dismissal of the lawsuit.

LEGAL LANDSCAPE OF NON-TRADITIONAL TRADEMARK REGIMES IN THE UNITED STATES AND THE EUROPEAN UNION

1. United States

The United States, the European Union (EU), and India each have distinct approaches to unconventional trademarks. In the US, the registration and protection of trademarks are governed by the Lanham Act. This Act allows for the protection of words, symbols, names, or combinations used to distinguish goods or services from one company to another. Unlike some other countries, there is no requirement for graphical representation for trademark registration in the US. However, such representation serves the purpose of informing other companies about registered trademarks. Specifically, Section 1052 of the Lanham Act outlines the criteria for trademark registration, which include non-functionality, distinctiveness, or acquired distinctiveness, all aimed at aiding consumers in identifying specific products.

During the 1988 Congress, a deliberate effort was made to uphold terms such as 'symbols' and 'devices' within the definition of trademarks outlined in Section 15 of the Act. The aim was to expand the scope of trademark registration to encompass non-conventional trademarks, such as scents, sounds, shapes, and other unique identifiers. Consequently, the legal framework governing trademarks in the United States allows for the registration and protection of not only traditional visual trademarks but also sounds and scents.

The Supreme Court has demonstrated a forward-thinking approach regarding the registration

of non-traditional trademarks, as evidenced in the landmark case of *Qualitex Co. v. Jacobson Products and Co.* In this significant ruling, the Court emphasized the paramount importance of a trademark's distinctiveness, which plays a crucial role in its registration and protection. Rather than focusing solely on its graphical representation, the Court recognized that a trademark's distinctiveness can be conveyed through other sensory experiences such as sounds or scents. In essence, the 1988 Congress deliberately maintained inclusive language in trademark definitions, enabling the registration of non-conventional trademarks. The Supreme Court's perspective, as demonstrated in the *Qualitex* case, underscores the significance of distinctiveness for trademark registration and protection, extending beyond traditional visual representations.¹²

In the United States, trademark law places significant emphasis on the functionality doctrine, commonly referred to as the protection doctrine. This principle holds that a trademark should not be directly tied to the specific products or services it represents. A well-known legal case, *Re Celia*, serves as an example of this doctrine. In this case, the court ruled that the scent of a product registered as a trademark should not be directly linked to the functionality of the product being marketed. Another landmark case, *Louboutin v. Yves Saint Laurent America Holding, Inc.*, underscores the importance of taking practical measures to prevent functional features of a product from being protected under trademark law. Instead, such features are subject to patent law.¹³

In defending against trademark infringement, two main types of functionality are recognized: traditional functionality and aesthetic functionality. Traditional functionality applies when a feature is deemed "essential to the use and purpose of the product" or significantly affects its cost or quality. In such cases, trademark protection won't be granted, making patent protection more appropriate as it can be renewed. However, even if traditional functionality isn't present, a product must still pass the aesthetic functionality test to gain competitive benefits.

In the United States, the registration and protection of non-conventional trademarks, such as scents, sounds, and visually imperceptible marks, offer a flexible and versatile approach. This adaptability allows for a wide range of unique and innovative trademarks to be safeguarded under the law.

¹² *Qualitex Co. v. Jacobson Products Co.*, 514 US 159 (1995).

¹³ *Louboutin v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2012).

One of the earliest and most well-known examples of a registered non-traditional mark dates back to 1970 when the NBC Jingle was classified as a sensory mark. Following this success, other companies also obtained registration for their distinctive marks, like MGM's iconic lion roar and the unique sound of the 20th Century movie studio. The United States has consistently embraced a liberal approach towards unconventional marks, openly welcoming and embracing new developments in this area.

2. European Union

In 1994, the United Kingdom established the Trade Marks Act to comply with EU Directive 89/104/EEC, which provides the regulatory framework for trademarks and their registration. This Act extends to the Isle of Man, a dependent territory. During this period, an interesting case arose when Chanel, a well-known perfume company, attempted to trademark the distinct fragrance of their iconic product, Chanel No. 5. However, their application for trademark status was denied because the scent of the perfume was considered inseparable from the product itself.

Around the same time, Sumitomo Rubber Co. managed to register the scent of roses in connection with their tires, and Unicorn Products also obtained a trademark for the smell of beer associated with their darts. These cases underscored the possibility of registering specific olfactory marks under the Trade Marks Act, provided they possess distinctiveness and are distinct from the actual product. It is important to note that the Act was enacted to implement the EU Directive on trademarks, which aims to ensure the proper protection and regulation of intellectual property rights and branding in both the UK and the Isle of Man. Despite some initial challenges in determining the eligibility of olfactory marks, the Act has played a crucial role in safeguarding various trademarks and promoting innovation in the business world.¹⁴

In the case of *Shield Mark BV v. Kist*, an intriguing legal dispute emerged when Shield Mark BV filed a lawsuit against its rival, Joost Kist, claiming that he had infringed upon their distinctive sound trademark. The central issue revolved around whether a sound could be protected under trademark law, provided it was unique and could be represented visually. The European Court of Justice (ECJ) made a significant ruling, affirming that a sound could indeed qualify for trademark protection if it met these criteria. The court drew support from Article 2

¹⁴ Sumitomo Rubber Co's Application No. 2001416, 31 October 1994

of EU Directive 89/104/EEC and precedent established in the Seickmann case.

A landmark case clarified that describing sounds using words or onomatopoeia alone wasn't enough for trademark protection. Instead, sounds had to be represented graphically, typically through musical notes or other visual notations. Only sounds that had been trademarked in this manner were legally protected. This case set a precedent not only in Europe but also influenced judgments in countries like India.

It's crucial to note that the requirements for trademark registration have changed significantly. The EU Trademark Directive 2015/2436 and EU Trademark Regulation 2015/2424 have streamlined the process for registering non-traditional trademarks, including smells, tastes, movements, touch, colors, shapes, and sounds. This evolution has made it easier to obtain legal protection for these unconventional trademarks by eliminating the graphical representation requirement. Consequently, securing legal rights for unique brand assets has become more accessible, offering businesses and creators broader opportunities to protect their trademarks covering various sensory experiences beyond traditional visual marks.¹⁵

CONCLUSION

Trademarks play a vital role in helping consumers identify the origin of products, contributing significantly to building brand image, goodwill, and reputation. Businesses invest a great deal of resources into creating unique products and services that distinguish them from competitors, aiming to foster brand loyalty and product differentiation. However, the traditional approach to trademarks is evolving. Nowadays, companies are exploring various sensory experiences, including smell, sound, taste, and touch, to create more immersive and distinctive brand experiences. This innovative approach offers new opportunities for businesses but also brings challenges, such as an increased risk of trademark infringement and passing off, which can have negative consequences. India faces challenges in recognizing and addressing unconventional trademarks effectively. Unlike developed countries such as the European Union and the United States, India has not fully explored and established a robust legal framework for this concept. As a result, certain types of unconventional marks lack proper recognition.

Despite having the Trade Marks Act of 1999, Trade Marks Rules of 2017, and the Draft Manual

¹⁵ Shield Mark BV v. Kist, Case C-283/01, European Court of Justice

of Trade Marks Practice and Procedure, India lags behind in registering unconventional marks compared to developed countries. To address this issue, it is advisable for India to draw inspiration from the trademark laws of these developed nations and integrate necessary provisions into its existing statutes. This initiative would result in a more comprehensive and forward-thinking legal framework that promotes innovation and safeguards unconventional trademarks, thereby stimulating growth and enhancing competitiveness in the global market.

After conducting a thorough analysis of relevant legal provisions, case studies, and precedents, the following proposals and suggestions have been formulated:

1. **Sensory Trademarks:** Trademarks associated with sensory experiences like smell, taste, and touch often face challenges in being registered in India due to the requirement of graphical representation as mandated by the Trademarks Act of 1999. To encourage the registration of such non-visual, non-conventional trademarks in India, it is proposed to address this issue under the TRIPS agreement. This would remove the barrier of graphical representation, provided these trademarks can demonstrate distinctiveness.
2. **International Consistency:** It is essential to establish a globally consistent policy for the registration and protection of non-conventional trademarks. This would alleviate the complexities faced by international brands when navigating trademark regulations across different jurisdictions.

To effectively implement these recommendations, it is crucial to develop a suitable legal framework that allows for the registration and protection of sensory trademarks and other non-conventional forms while ensuring their distinctiveness and applicability on an international scale.