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**BEYOND THE VISUAL MARKS: THE ABSENCE OF A
CLEAR ENFORCEMENT AND INFRINGEMENT
FRAMEWORK FOR SMELL TRADEMARKS IN INDIA
FOLLOWING THE RECOGNITION OF THE SUMITOMO
ROSE-SCENTED TYRE MARK**

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ABSTRACT

The recognition of an olfactory trademark for rose scented tyres by Sumitomo Rubber Industries represents a significant development in the evolution of non-traditional trademarks under the Trade Marks Act, 1999. While the registration demonstrates a growing willingness within Indian trademark law to accommodate sensory marks beyond traditional visual and phonetic indicators, it also exposes a critical doctrinal gap concerning their enforcement. Existing trademark infringement standards under Indian law are primarily structured around the comparison of visual, phonetic and conceptual similarities, which makes them ill-suited for evaluating similarity and likelihood of confusion in relation to olfactory marks. This article examines the legal and evidentiary challenges that arise in enforcing smell trademarks in India, particularly following the recognition of the Sumitomo rose scented tyre mark. Through doctrinal analysis of the statutory framework and comparative insights from international jurisprudence, including the principles articulated in *Ralf Sieckmann v Deutsches Patent und Markenamt*, the article argues that the absence of a clear infringement framework risks rendering such registrations largely symbolic. It concludes by suggesting the need for clearer evidentiary standards and analytical methods, including scientific scent comparison and consumer perception analysis, in order to enable effective enforcement of olfactory trademarks within the Indian trademark regime.

INTRODUCTION

India's acceptance of a rose-scented tyre trademark marks a significant doctrinal milestone in its trademark law. On 21 November 2025, the Trade Marks Registry approved Sumitomo Rubber Industries Ltd.'s application for an olfactory mark described as "floral fragrance/smell

reminiscent of roses” applied to vehicle tyres¹. This decision confirms that a well-defined scent can meet the graphical representation and distinctiveness requirements of the Trade Marks Act². Notably, the Controller General of Patents observed that in the consumer’s mind, smell is often “more persistent and emotionally resonant” than sight or sound³. Firms have long relied on such sensory branding for market impact. However, registration is only the first step: a legal right is meaningful only if enforceable. India’s trademark statute (especially Section 29) was conceived for visual and phonetic marks, and it contains no methodology for evaluating scent infringement. This article identifies the enforcement gap revealed by India’s first olfactory mark and proposes a framework to address it.

LEGAL FRAMEWORK AND SUMITOMO DECISION

Statutory Tests:

The Trade Marks Act, 1999 defines a “trade mark” as one “capable of being represented graphically” and “capable of distinguishing” one person’s goods from another’s⁴. The 2017 Rules further clarify that graphical representation means any depiction on paper (e.g. logos, written words, musical notation for sounds). By design, this language assumes a visible or audible form. Fragrances, being intangible, do not naturally yield to such depiction. For decades, Indian examiners treated non-visual signs (including smells) skeptically, effectively barring them from registration due to this formal requirement.

Infringement Basics:

Section 29⁵ of the Act prohibits using a mark “identical with or deceptively similar” to a registered mark on the same or similar goods in a way likely to cause confusion. In practice, courts determine infringement by comparing the appearance, sound or meaning of two marks from the perspective of an “average consumer” and asking if confusion would result. Smell marks defy these categories: one cannot “see” or “read” an odor. Thus, without adaptation, the

¹ Rahul Bagga & Shashank Anand, *India’s First Smell Mark: A Comprehensive Analysis of the Rose-Scented Tyre Trademark*, Chambers and Partners (Dec. 1, 2025), <https://chambers.com/articles/indias-first-smell-mark-a-comprehensive-analysis-of-the-rose-scented-tyre-trademark>

² Agastya Shukla, *A Whiff of India’s First Olfactory Trademark*, The Competition & Commercial Law Review (Dec. 10, 2025), <https://www.tcclr.com/post/a-whiff-of-india-s-first-olfactory-trademark>

³ Unnat P. Pandit, *India’s First Smell Mark: Sumitomo Rose-Scented Tires*, World Intellectual Property Organization (WIPO Magazine), Feb. 13, 2026, <https://www.wipo.int/en/web/wipo-magazine/articles/indias-first-smell-mark-sumitomo-rose-scented-tires-89623>

⁴ Rahul Bagga & Shashank Anand, *India’s First Smell Mark: A Comprehensive Analysis of the Rose-Scented Tyre Trademark*, Chambers and Partners (Dec. 1, 2025), <https://chambers.com/articles/indias-first-smell-mark-a-comprehensive-analysis-of-the-rose-scented-tyre-trademark>

⁵ Trade Marks Act, 1999, § 29 (India).

standard infringement analysis cannot be applied directly to scents, revealing a doctrinal void.

The Sumitomo Case Study:

Sumitomo bridged the gap through science. To satisfy representation, it submitted a seven-dimensional olfactory vector: a radar-chart “vectograph” mapping the rose fragrance across seven axes labeled Floral, Fruity, Woody, Nutty, Pungent, Sweet, and Minty⁶. This graph – generated in collaboration with IIT-Allahabad, translated the subjective experience of scent into objective data. Accompanied by detailed GC-MS (gas chromatography) analyses and expert declarations, the representation defined the fragrance “clearly, precisely and objectively”⁷. The Controller General found that the rose smell is inherently distinctive for tyres (no ordinary tyre has that scent), and therefore agreed it functioned as a mark. Consequently, the application was accepted for advertisement as India’s first olfactory trademark. The Registry’s order focuses on registration criteria and does not address any enforcement issues; it leaves open how a court might later determine infringement.

ENFORCEMENT CHALLENGES FOR OLFACTORY MARKS

Sumitomo’s registration is a breakthrough, but its practical value depends on enforcement. Three principal challenges emerge:

- 1. Comparing Two Scents – Analytical vs. Perceptual:** Trademark infringement requires comparing the registered mark to the allegedly infringing mark. For visual marks, one compares images; for sounds, audio clips or transcripts. For smells, there is no analogous “image.” In practice, evidence will need to combine:

- a) Analytical Comparison:* Scientific instruments can decompose fragrances into chemical profiles. For example, GC-MS yields a fingerprint of volatile compounds. Two scents’ chromatograms or olfactory vectors can then be compared for overlap⁸. Such analysis is objective and reproducible, but chemical similarity does not always equate to perceptual similarity. Thus, it provides a baseline.

⁶ Rahul Bagga & Shashank Anand, *India’s First Smell Mark: A Comprehensive Analysis of the Rose-Scented Tyre Trademark*, Chambers and Partners (Dec. 1, 2025), <https://chambers.com/articles/indias-first-smell-mark-a-comprehensive-analysis-of-the-rose-scented-tyre-trademark>

⁷ Unnat P. Pandit, *India’s First Smell Mark: Sumitomo Rose-Scented Tires*, World Intellectual Property Organization (WIPO Magazine), Feb. 13, 2026, <https://www.wipo.int/en/web/wipo-magazine/articles/indias-first-smell-mark-sumitomo-rose-scented-tires-89623>

⁸ Unnat P. Pandit, *India’s First Smell Mark: Sumitomo Rose-Scented Tires*, World Intellectual Property Organization (WIPO Magazine), Feb. 13, 2026, <https://www.wipo.int/en/web/wipo-magazine/articles/indias-first-smell-mark-sumitomo-rose-scented-tires-89623>

b) *Perceptual Testing*: Human panels (either trained perfumers or sample consumers) sniff the two products in a double-blind setup and report whether they perceive them as the same or different. This reflects real-world impact: if ordinary consumers routinely confuse the scents, that indicates potential infringement risk. However, human olfaction is inherently subjective – individual sensitivity, memory, and context affect perception⁹. A perceptual test provides evidence of confusion, but it must be rigorously designed (controlled environment, adequate sample size, proper questions).

Effective enforcement should require both types of evidence. Analytical data can show an objective similarity, while consumer testing confirms that this similarity has trademark significance. Sumitomo's success itself relied on combining lab results with expert sensory descriptions. Similarly, a claimant must demonstrate that the defendant's scent overlaps materially with the registered scent (scientifically) and that such overlap creates a material likelihood of confusion (experientially).

2. Proving Likelihood of Confusion: The core infringement question is whether the defendant's use of the scent would confuse the public into thinking it's the registrant's product. In the olfactory context, this means showing that a person exposed to both scents would associate them with the same source. Possible methods include:

a) *Consumer Surveys*: A well-conducted survey can simulate marketplace perception. For example, randomly selected consumers could be asked to sniff two unlabelled tyre samples (one with the registered rose scent, one with the defendant's scent) and asked whether they think the scents come from the same brand. Statistical analysis of responses indicates how often confusion occurs. To be credible, such surveys must be scientifically sound (random sampling, control questions, statistical significance).

b) *Expert Opinion*: Perfumers or advertising experts might testify on the distinctiveness or memorability of the scent. While informative, courts treat such expert testimony cautiously unless supported by empirical data. It cannot replace actual consumer confusion evidence.

⁹ Rahul Bagga & Shashank Anand, *India's First Smell Mark: A Comprehensive Analysis of the Rose-Scented Tyre Trademark*, Chambers and Partners (Dec. 1, 2025), <https://chambers.com/articles/indias-first-smell-mark-a-comprehensive-analysis-of-the-rose-scented-tyre-trademark>

- c) *Contextual Evidence*: Examination of how the scent is used commercially can reinforce or undercut confusion. For instance, if the registrant markets its tyres explicitly as “rose-scented,” and consumers associate “rose scent” with that brand, this supports confusion. Conversely, if the defendant’s scent is hidden or not advertised, confusion is less likely. Similarly, evidence of actual marketplace misidentification (customer complaints, survey comments) would be persuasive but rare to obtain.

Indian law’s concept of the “average consumer” would need extension to olfaction. Lacking binding precedent, the safest course would be to treat survey and test evidence as essential. Anecdotal presumptions (“rose scent is common to all cultures”¹⁰) are insufficient to establish confusion in court.

3. Functionality and Scope of Rights: Trademarks cannot monopolize functional product attributes. A fragrance is functional if it is an intrinsic characteristic of the product class. For example, a citrus scent is natural for detergents, and a vanilla scent is intrinsic to vanilla ice cream. Exclusive rights over such scents would hinder competition. The Registry explicitly found the rose fragrance non-functional for tyres (rose aroma does not enhance tyre performance). This arbitrariness was crucial to distinctiveness. In enforcement, the same principle must apply: if the defendant’s fragrance is either functional or a normal quality of the goods, an infringement claim should fail. Moreover, the scope of the registered scent should be carefully interpreted: protection ought to be limited to the precise scent profile claimed, not any floral smell. Overbroad claims (e.g. claiming “all rose-like smells”) should be rejected to prevent undue monopoly.

4. Evidentiary Procedure: India’s legal system has no established rules for scent evidence. Courts will have to innovate procedures. Possible measures include:

- a) *Sample Handling*: Establish standards for presenting scent samples (sealed containers, standard temperature/humidity, avoiding contamination) to ensure consistency and reliability.
- b) *Survey Standards*: Adopt conventional rules for market surveys (random

¹⁰ *In re Application No. 5860303 (Floral Fragrance/Smell Reminiscent of Roses as Applied to Tyres)*, Order No. CGPDTM-11021(11)/1/2025/CGTMR/1784, Controller Gen. of Patents, Designs & Trade Marks, Trade Marks Registry (Nov. 21, 2025), <https://spicyip.com/wp-content/uploads/2025/11/Smell-mark-Order-Signed-by-CGPDTM-1.pdf>

selection of participants, clear survey instruments, disclosure of methodology). Without clear guidelines, litigators risk surprise rulings. The Controller General or Supreme Court might issue practice directions or amendments to instruct how to handle olfactory evidence. For example, a Registrar's circular could require scent-mark applicants to archive reference samples under seal, as is done in some jurisdictions.

COMPARATIVE AND POLICY INSIGHTS

European Union: The European Court of Justice in *Sieckmann v. DPMA* (2002)¹¹ set a demanding test for graphical representation: it must be “clear, precise, self-contained, easily accessible, intelligible, durable and objective”¹². On that basis, verbal descriptions or samples were held inadequate. Today, EUIPO guidelines effectively exclude smell marks (current policy is that technology does not yet permit acceptable representation). The EU example underscores that while India may be more flexible (as shown by *Sumitomo*), it should maintain rigorous standards for representation. Notably, there is virtually no EU jurisprudence on enforcement of a scent mark (because they seldom get registered). Thus, EU law offers little direct guidance on infringement, but serves as a caution to require clarity at registration.

United States: The U.S. Trademark Act allows scent registrations (no graphical rule), but only if they have acquired distinctiveness and are non-functional. A leading case, *In re Clarke* (TTAB 1990)¹³, granted a floral scent for yarn only after extensive evidence that consumers came to recognize that fragrance as identifying the producer¹⁴. The U.S. approach highlights the need for post-registration proof of consumer association. For enforcement, this suggests that Indian litigants may likewise need to show evidence of actual market recognition (for example, surveys verifying that consumers link the smell to the brand). The U.S. also emphasizes robust survey methodology, which Indian courts should emulate.

WIPO and Indian Policy: Unnat Pandit (Controller General of Patents) has advocated clear

¹¹ Ralf Sieckmann v. Deutsches Patent- und Markenamt, ECLI:EU:C:2002:748, 2002 E.C.R. I-11737.

¹² Unnat P. Pandit, *India's First Smell Mark: Sumitomo Rose-Scented Tires*, World Intellectual Property Organization (WIPO Magazine), Feb. 13, 2026, <https://www.wipo.int/en/web/wipo-magazine/articles/indias-first-smell-mark-sumitomo-rose-scented-tires-89623>

¹³ *In re Celia Clarke, d/b/a Clarke's Osewez*, 17 U.S.P.Q.2d (BNA) 1238 (T.T.A.B. 1990).

¹⁴ Sneha Singh & Kashika Mittal, *Trademarking the Smell of Success: Can Non-Traditional Marks Survive Indian Law?*, Centre for Innovation, Intellectual Property and Competition (CIIPR), Rajiv Gandhi National Univ. of Law (Aug. 18, 2025), <https://www.ciiprgnul.com/post/trademarking-the-smell-of-success-can-non-traditional-marks-survive-indian-law>

guidelines for olfactory marks and stronger anti-counterfeiting measures. He notes that scientific tools (“electronic noses”, AI scent profiling) and formal exam procedures are key to reliability. Moreover, he highlights that a scent mark, once registered, should function as “an enforcement handle” against copiers¹⁵. In practical terms, his commentary signals that Indian authorities should not leave enforcement to chance. Official examination norms, checklists or policy notes for smells would reduce uncertainty.

PROPOSED ENFORCEMENT FRAMEWORK

Enhanced Registration Standards: The Registry should continue to require objective scent characterizations (chemical chromatograms, olfactory vectors) as Sumitomo provided. Each smell mark in the register should be tied to a concrete formula or profile, not just a verbal description. Applicants might be required to deposit a standardized sample and definition, similar to audio samples for sound marks. This upfront rigor eases later enforcement by defining the scope precisely.

Three-Prong Infringement Test: In adjudicating olfactory infringement, the courts should systematically apply three criteria (all of which must be satisfied):

- **Analytical Similarity:** Present expert analysis of both scents. The court assesses whether the defendant’s scent shares a significant chemical/olfactory profile with the registered scent. This establishes a technical basis for comparing the two.
- **Perceptual Similarity:** Introduce consumer or expert panel data. The question is whether, under realistic conditions, an ordinary consumer would perceive the two smells as the same or confusingly similar. Well-designed blind tests should yield statistical evidence of confusion probability.
- **Contextual and Non-Functionality Check:** Consider the commercial context. Is the scent used as a brand flag, or is it inherent to the product? Has the public been educated to associate the scent with the brand? This qualitative factor weighs heavily: if the scent’s use is primarily decorative and linked to the brand, confusion is more likely. If it’s a functional attribute of the goods, confusion should be less likely.

The claimant (mark proprietor) should bear the burden to prove these elements by a preponderance of evidence. This tripartite test parallels the combined requirements in

¹⁵ Unnat P. Pandit, *India’s First Smell Mark: Sumitomo Rose-Scented Tires*, World Intellectual Property Organization (WIPO Magazine), Feb. 13, 2026, <https://www.wipo.int/en/web/wipo-magazine/articles/indias-first-smell-mark-sumitomo-rose-scented-tires-89623>

the U.S. and EU – it ensures that pure technical similarity without consumer impact (or vice versa) is insufficient on its own.

Evidentiary Guidelines and Capacity Building: The Controller General should issue examination guidelines (as recommended) and the courts should receive training on scientific evidence. A “Trademark Manual” section on smell marks could specify sampling protocols, expert qualifications, and survey standards. The government might support establishing or accrediting fragrance analysis labs. Over time, these steps will create institutional know-how, so judges are not left guessing.

Maintain Functionality Bar: Examiners and courts must rigorously apply the doctrine that functional features cannot be monopolized. In practice, any evidence that the scent has a utilitarian role (e.g. as flavor, insect repellent, etc.) should scuttle the infringement claim. Conversely, evidence that it is purely ornamental or source-identifying (as with Sumitomo’s rose scent) should strongly favor protection.

Burden of Proof and Remedies: The law may need to clarify that for non-traditional marks, the standard evidentiary burdens (as in Sections 29(1)-(2))¹⁶ still apply, but will be met with this specialized evidence. Remedies (injunctions, damages) should also be available if infringement is proved, to deter copycats. Notably, the Trade Marks Act’s existing penalties for infringement (including offense under Section 103¹⁷) should explicitly cover scent infringements once established by this framework.

CONCLUSION

India’s registration of a rose-scented tyre trademark is a forward-looking development in intellectual property. However, without clear enforcement standards, such rights risk being illusory. As one analyst cautions, in the absence of practical measures to judge scent disputes, protection will be “symbolic rather than substantive”¹⁸. To avoid that outcome, India must align its nascent olfactory trademark doctrine with science-based adjudication. By

¹⁶ Trade Marks Act, 1999, § 29(1)–(2) (India).

¹⁷ Trade Marks Act, 1999, § 103 (India).

¹⁸ Sneha Singh & Kashika Mittal, *Trademarking the Smell of Success: Can Non-Traditional Marks Survive Indian Law?*, Centre for Innovation, Intellectual Property and Competition (CIIPR), Rajiv Gandhi National Univ. of Law (Aug. 18, 2025), <https://www.ciiprgnul.com/post/trademarking-the-smell-of-success-can-non-traditional-marks-survive-indian-law>

combining rigorous analytical testing, perceptual consumer evidence, and contextual analysis as outlined above, courts can make smell marks truly enforceable. In short, the promise of olfactory branding will only be fulfilled if Indian law follows science: ensuring that when a tyre “smells like a rose,” it unmistakably smells like it belongs to Sumitomo.

