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## **SMELL AS A TRADEMARK: ITS REGISTRABILITY AND CHALLENGES IN INDIA AND OTHER COUNTRIES**

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School of Legal studies, Bengaluru Year 2022**

### **DECLARATION**

I, Pooja Kulkarni, a student of LL.M Commercial Laws, CMR School of Legal Studies, do hereby declare that this research paper titled “Smell as a Trademark: Its Registrability And Challenges in India and Other Countries” is an original work of mine and is result of my own intellectual efforts. I have quoted titles of all original sources i.e. original documents and name of the authors whose work has helped me in writing this research paper have been placed at appropriate places. I have not submitted this to any College or University for the award of any degree or diploma.

Date: 30/03/2022

Place: Bengaluru

Sd/-



Pooja Kulkarni

## **SMELL AS A TRADEMARK: ITS REGISTRABILITY AND CHALLENGES IN INDIA AND OTHER COUNTRIES**

### **Abstract**

This Research Paper elucidates the most developing area of Intellectual Property Rights that is Trademark Law. Day by day the area of trademark and protection of trademark is growing throughout the World. But these days there is progress in trademark law which also covers 'Non Conventional Trademarks' such as Smell, Sound, taste etc. Firstly, this paper aims to analyze the concept of Trademark and whether Smell can be a trademark or not under the Trademark Law. Secondly, the paper covers the registration of Smell Marks in India and how other countries hold their view when it comes to the registration of Smell Marks. There is still ambiguity and argument in registrability of Smell Marks but some countries have permitted it, so this paper analyses the current scenario of registration of Smell marks. Many countries have explicitly prohibited the registration of marks of such trademarks where there is absence of words or no graphical representation, but some countries have permitted for Registration of Smell marks.

Thirdly this research paper aims to analyze challenges in registration of Smell Marks. Since Smell marks are not expressly mentioned it becomes difficult to identify and register them. The Smell marks comes under the area of non-conventional marks and in India nowhere it speaks about Smell Marks and its registration because the provisions of trademark law clearly mentions the graphical representation of the marks so when it comes to the registration there are doubts, arguments and controversies to it. And finally this research paper will conclude with suggestions and critical analysis of Smell Mark and its Registration like why registration of smell marks is needed in the present world and even non-conventional trademarks needs protection in this world where development of Intellectual Property Law is rapidly increasing.

Keywords: Trademark, Non-Conventional Mark, Smell Mark, Intellectual Property Rights, Registrability of Smell Mark.

## Introduction

One of the most important challenges in trademark law is 'non-traditional trademarks.' The Indian Trade Marks Act, 1999 defines a "mark" as a device, brand, heading, label, ticket, name, signature, word, letter, numerical, form of products, packaging, or color combination, or any combination thereof.<sup>1</sup> The list is not exhaustive, as the language of this provision indicates, and a noteworthy issue under non-traditional trademarks is that of 'Smell Marks' or 'Scent Marks.'

Since the word "trademark" has a flexible interpretation, non-traditional trademarks such as fragrance have been recognized in a number of national and international jurisdictions. However, there are various issues of disagreement in this respect that emerge when Smell Mark is registered as a trademark. One such obstacle is the difficulty of meeting the requirement of graphical representation of the characteristic in question in order for it to be trademarked.

The definition of a trademark as a symbol, word, or words capable of distinguishing one manufacturer's goods and services from those of another and capable of being graphically represented is comparable to the TRIPs Agreement definition: "Any sign, or any combination of signs, capable of distinguishing one undertaking's products or services from those of other companies, should be capable of creating a trademark."<sup>2</sup>

This restricts the scope of Indian law to just traditional trademarks. The incorporation of sound trademarks within trademark rules in India is a sign of a changing IP regime. India recently recognized and registered jingle-like sounds connected with several brands-Raymond and Britannia-as trademarks. In 2017, the trademark registration method was also updated to incorporate a particular provision on how to submit sound trademarks. The technique necessitates a graphical representation of the sound to be filed.<sup>3</sup> The approach highlights a key difficulty and restriction of Indian law in relation to other unconventional trademarks like Smell Mark, the lack of a feature to be visually depicted.

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<sup>1</sup> Section 2(m) of Indian Trademarks Act, 1999

<sup>2</sup> Article 15(1) of TRIPS Agreement

<sup>3</sup> Trade Marks Rules, 2017 Rule 26

## Research Problem

Non-Conventional trademarks are a recent area of intellectual property rights. Such trademarks, which include Smell or scents, sounds, gestures, and holograms, can be registered and enforced if they meet the fundamental conditions for being recognized trademarks. However, any uniform viewpoint on the issue of non-conventional trademarks like Smell Mark is inadequate since they are seen and treated differently in various countries throughout the world. As a result, effective protection mechanisms for such trademarks are also required.

## Research Objective

- To understand the concept and scope of “non-traditional trademarks” with special focus on Smell as Trademark.
- To examine the registration of Smell Mark in India under Indian Trademark Act, 1999 and to know the challenges in registration.
- To know the complexity of Graphical Representation of Smell Marks.
- To analyze the position of Smell Mark in International development.

## Research Question

1. Can Smell be a Trade Mark? What is the significance of Smell Mark?
2. What is the position of Smell Marks in other countries?
3. What are the challenges in Registration of Smell Mark in India?

## Hypothesis

Smell as a trade mark is inadequately specified and vulnerable to legal challenges, necessitating a new and clearer definition.

## Research Methodology

The researcher has adopted doctrinal research with a deep study of subjects exploring secondary sources. The facts, statistical records, legislative provisions, cited in this paper will



be extracted from various reliable web sources, articles and textbooks. And the researcher has majorly adopted a qualitative method of research.

### Scope and Limitation of the Study

As there is development in the intellectual property rights sector the concept of non conventional trademarks are also developing so this research paper will mainly cover the concept of non conventional marks like smell mark and the challenges going to be faced in the registration of smell mark. But the area of non-conventional trade mark like Smell Mark lacks to fulfill the criteria of graphical representation under the Indian Trademark Act,1999. So far, registration has been a challenging procedure in the country, owing to the uniqueness requirement and the inability to be graphically represented.

### Review of Literature

1. The Book title “**Intellectual Property Law**” written by **P. Narayanan**, published by Eastern law house, helped the researcher in understanding the concept of Trademark, Trademark law in India and statutory definition of trademarks law. This book also helped the researcher in understanding the function of a trademark which tells Trademark plays an important role which gives an indication to the purchaser's eyes about trade source from which the goods come or the trade hands through which they pass on their way to the market.<sup>4</sup> The language of the book is highly professional and contains enormous information about the concept of intellectual property law. With the specific nature of the rights that a person receives in respect of trademarks and the basic conditions for trademark registration, the author recognised the goal of trademark law. As a result, the author has accomplished the book's goal of covering not only the requirements of law under the Trademark Act of 1999, but also the growth of trademark law, how a trademark works, and what constitutes a good trademark. The book titled “**Law Relating to Intellectual Property**” written by **Dr. B.L. Wadehra**, published by Universal Law Publishing Co., Very much help their researcher understand the need and emergence of Trademark law in the developing world and how a trademark is protected in India. This book helped the researcher to understand the details about Trademark law in simple language which is easy to understand. The author of the book made it easy for

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<sup>4</sup> P. Narayanan, Intellectual Property Law, Third Edition, page no.147.

the researcher to analyze the concept of Trademark and what needs to be considered as a trademark and to qualify for registration.

2. The Article titled **“REGISTRABILITY OF SMELL MARK AS TRADEMARK: A CRITICAL ANALYSIS”** written by **Tanushree Roy**, published by Journal on Contemporary Issues of Law, helped the researcher to understand the concept of SMELL MARK and its registration different countries. The article also helped me to analyze the challenges faced by the countries in registering the Smell as trademark.
3. The Article titled **“Smell Mark-A New Era”** written by **Mohit Joshi**, published by International Journal of Law Management and Humanities, helped the researcher to understand the concept of Non-Traditional Marks or Non-Conventional marks and the categories that fall under these marks. The Article helped me to analyze the Smell Mark which falls under the purview of Non-Conventional Marks and its registrability in India and under International conventional and explains whether the convention speaks anything about registrability of Smell Marks under Trademark Law.
4. The Article titled **“Non conventional Trademarks in India”**, written by **Dev Gangjee**, published by Hein Online, helped the researcher in understanding main aspects of trademark. The author has explained about the functional definition of trademark, graphical representation and what all are the procedural requirements for registration of trademarks.

## Content Analysis

### 1. Concept of Trademark

A trademark's role is to provide an indication to a customer or potential purchaser as to the manufacturing or quality of the products, as well as to provide an indication to his eye of the trade source from which the goods come, or the trade hands through which they travel on their route to the market. It provides the consumer with an acceptable guarantee of the manufacture and quality of the object he is purchasing, despite the fact that the specific quality is not visible to the naked eye.<sup>5</sup>

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<sup>5</sup> P.Narayanan, Intellectual Property Law, Third Edition, page no.147.

The Trademark Act, 1999 provides legal protection for trademark rights in India. Under the Act, the Controller General of Patents, Designs, and Trademarks is in charge of enforcing such protection. The Trademark Act of 1999 oversees trademark protection, registration, and the restriction of unlawful usage. It also addresses the trademark holder's rights, fines for infringement, remedies for injury, and trademark transfer processes.

A trademark is a visual symbol applied to items to indicate their commercial origin. The term "trademark" refers to a mark that may be represented graphically and that can differentiate one person's goods and services from those of another. Mark also contains its name or word. Any abbreviation of a name is included in the term "name."<sup>6</sup>

In India as per the provisions of Trademark Act, 1999 'Mark' includes a device, brand, heading, label, ticket, name, signature, word, letter shape of goods, packaging or combination of colors, numeral shape of goods, packing or any combination of colors or any combination thereof.<sup>7</sup>

And when it comes to the definition of trademark in the Indian scenario, the Trade Marks Act, 1999 defines a trademark as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors.<sup>8</sup>

## 2. Can Smell be a Trademark?

A Smell Mark can be connected with any food product or perfume. It can be

detected by your normal senses. We can't even touch it, let alone feel it. In this case, registering such marks becomes extremely difficult. Giving the aroma of any perfume or chemical substance cannot be considered convincing proof. So the company or people claiming it must prove the geographical circumstances as well as the scent. In the instance of RE CELIA CLARKE, DBA CLARKE'S OSEWEZ, in 1990, a perfume, characterized as a

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<sup>6</sup> Lakmikanth V. Patel v. Chetanbhat Shah, AIR 002 SC 275.

<sup>7</sup> Section 2(1)(m) of Trade Marks Act, 1999

<sup>8</sup> Section 2(1)(zb) of Trade Marks Act, 1999

strong impact, fresh, flowery aroma evocative of plumeria blooms, was put to sewing thread.<sup>9</sup> This was registered for the first time in the United Kingdom.

However, "functional" fragrances that are inherent in the product, such as perfume, are not acceptable for registration. Anything that is deemed a functional feature of a product is not protected by a trademark. The functional elements of a product can be patented if they are distinct and one-of-a-kind. If you want to trademark a fragrance, you may construct a slogan that characterizes and captures the aroma and trademark the term.<sup>10</sup>

### **Significance of Smell Mark**

Memory of a Smell is the most neglected method for connecting a brand to its customers. The most effective kind of human memory, smell, might possibly identify a product provided it meets the conditions of a trademark. Smells may also recall images and feelings, which might influence a consumer's attitude and choice to purchase a specific product. It is possible to argue that, once identifiable, a fragrance is one of the most potent ways to distinguish the wares of one merchant from those of another. As a result, humans readily recognize every scented product based on its distinct aroma. When discussing any product, the sense of smell is quite crucial.<sup>11</sup>

### **Smell as a Trademark in Indian Scenario**

As mentioned at the beginning of this research paper, the provisions of the Trade Marks Act, 1999 regulate the registrability and types of trademarks in India.<sup>12</sup> Section 2(1)(zb) and Section 2(1)(m) clearly speaks about the definition of trademarks which can be registered in India. Furthermore, under Rule 25 (12)(b) of the Trademark Rules, 2002, an application for trademark registration must include a graphical representation, but Rules 28 and 30 require it

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<sup>9</sup> Mohit Joshi, *Smell Mark-New Era*, International Journal of Law Management and Humanities, Volume 3, issue 3, 2020, ISSN 2581-5569

<sup>10</sup> Xavier Morales, *Can I Trademark an Odor or Smell?*, available at <https://secureyourtrademark.com/blog/> (last visited on 15/03/2022)

<sup>11</sup> Non-Conventional Trademark-Smell Marks, available at <https://www.bananaip.com/ip-news-center/non-conventional-trademark-smell-marks/> (last visited on 15/03/2022)

<sup>12</sup> *Supra* 7 and 8

to be represented on paper in a durable form. As a result, this condition is a considerable hurdle to recognizing Smell markings as legal trademarks in India.<sup>13</sup>

### 3. Registrability of Smell Mark in Different Countries

When it comes to the registrability of Smell Mark, both international treaties and our Indian legal system are silent on the subject. Various international conventions, such as the Madrid Protocol, do not allow for trademark registration. Furthermore, the Paris Convention only addressed industrial marks and designs, not unconventional marks. So, when we look at the Trademark Law Treaty of 1994, we can see that it clearly prohibits the registration of sound and scent marks. In terms of the TRIPS Agreement, it has remained totally neutral in the area of smell and sound marks and their registration.

The case of Sieckmann v. Deutsches Patent is a milestone case in the history of "non-conventional trademark" registration. In this decision, the "European Court of Justice" established one of the most fundamental tests for identifying what elements should be considered when registering a trademark. The "Sieckmann Criteria" became well-known as a result of the test. According to the text, the "graphical representation" must be "clear, accurate, self-contained, easily accessible, comprehensible, durable, and objective."<sup>14</sup>

#### United Kingdom:

A word, logo, or phrase that directly expresses a brand is the standard format for a trade mark. Nevertheless, there was an increase in non-traditional trademarks, such as colors. Smells are the most recent peculiar trade marks to be examined.

A trademark, regardless of its format, must meet Section 1 of the Trade Marks Act 1994 in order to be registered in the United Kingdom. This specifies that a mark must be able to be

<sup>13</sup> Javvadshaikh, *Olfactory Marks(Smell Marks, available at <https://www.legalserviceindia.com/legal/article-2928-olfactory-marks-smell-marks-.html>*, (last visited on 18/03/2022)

<sup>14</sup> Ralf Sieckman vs Deutsches Patent, European Court of Justice Case

visually depicted and distinguish between products and services. The issue with a scent is determining how it can be visually portrayed.<sup>15</sup>

The United Kingdom first recognized smell as a product attribute eligible for trademark consideration in 1996, when it issued a smell trademark to Sumitomo Rubber Company for the rose-flavored fragrance put to their tires. The trademark was then transferred to 'Dunlop Tyres.' In another case, 'Unicorn Products' was awarded registration of a scent trademark for the bitter beer fragrance of their product darts.<sup>16</sup>

### **United States of America:**

The United States is the world's largest capitalist country. Every day, new businesses spring up in the United States. Some businesses specialize in scents and odor-related items. As a result, Smell Marks are widely accepted in the United States. Section 2(f) of the United States Trademark Act of 1946 (the Lanham Act) includes non-traditional marks in the definition of a trademark by not excluding them, "any word, name, symbol, or device, or any combination thereof used by an individual to identify and distinguish his or her products, especially a distinctive product, from those created or sold by others, as well as to show the source of goods, even when the source is unknown."<sup>17</sup> In 1990, a 'plumeria bloom scented thread' used for needlework received the first trademark for a "smell." The request was made by the Californian corporation OSEWEZ.<sup>18</sup>

### **Australia:**

It's tough to register a smell as a trademark. To be considered a trade mark in Australia, a scent must be rare and distinctive, and it must be linked to a specific product or service. You must describe how the smell will be administered in a brief written statement in your application. The eucalyptus aroma for golf tees is an example of a perfume trade mark (reg

<sup>15</sup> Ellis, *Can smell be a trademark*, August 24, 2016, available at <https://trademarkroom.com/blog/item/can-a-smell-be-a-trade-mark/> , (last visited on 18/03/2022)

<sup>16</sup> Raja Selvam, *What is Smell Mark or Scent Mark?*, March 11, 2013, available at <https://selvams.com/blog/smell-trademark/> (last visited on 19/03/2022)

<sup>17</sup> Section 2(f) United States Trademark Act, (The Lanham Act), 1946

<sup>18</sup> IN RE CELIA CLARKE, DBA CLARKE'S OSEWEZ, September 19, 1990, available at <https://ipmall.law.unh.edu/content/ttab-trademark-trial-and-appeal-board-1-re-celia-clarke-dba-clarkes-osewez-serial-no-758429> (last visited on 21/03/2022)

no 1241420). The following smell trade marks were denied by IP Australia because they failed to pass this test:<sup>19</sup>

A musk aroma for perfume (reg no 727820);

a eucalyptus scent for laundry detergent (reg no 762286);

A musk aroma for perfume (reg no 727820);

### **India:**

The definition of a trademark under Indian law is similar to that of prior international treaties. It does not expressly include or prohibit the registrability of nontraditional trademarks. Despite the fact that the definition of mark is subject to interpretation, it does not include any non-traditional trademarks. However, the Trademark Office's Draft Manual provides for special treatment for certain non-traditional trademarks. Two questions are frequently asked when it comes to consideration. One is the extent to which traditional trademark rules are applied to unconventional subject matter, and the other is the presence of loopholes in the existing legislation.

## **4. Challenges in Registration of Smell Marks in India**

In India, as in the United States, the situation is vastly different. There are only a few cases related to this issue that have been filed in India. India, as a traditional convention following state, doesn't have any extensive cases on the subject. The Trade Marks Act, 1999 governs the issue of registration of the mark and forms of Trade Marks in India, as stated at the beginning of this research paper.<sup>20</sup> It generally deals with marks that may be represented visually and that can be used to differentiate one person's goods or services from those of another.

India has never seen a Smell as a Trademark. Even though graphical representation remains the main requisite for a prospective registered trademark, judicial and administrative bodies have allowed for the registration of some non-traditional trademarks when it could be

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<sup>19</sup> Ayatalla Lewih, *How to Trade Mark Colours, Scents, Sounds and Shapes*, available at <https://legalvision.com.au/4-types-of-trade-marks-explained/> (last visited on 22/03/2022)

<sup>20</sup> *supra* 8 and 9

indicated that the mark clearly differentiated the goods it related to from other similar products on the market. Yahoo's registration of a sound mark is one of the most well-known examples of non-traditional trademark registration in India. In 2008, the well-known sound of a human voice yodeling the words "Yahoo" was granted trademark registration.<sup>21</sup>

The registration of non-conventional trademarks in India is a complex undertaking. The Indian Trademarks regime has expressed the registration of non-conventional trademarks under Rule 26(5) of the Trademarks Rules, 2017, such as sound trademarks, which can be registered by submitting a sound clip along with musical notations, with the duration of the sound clip not exceeding 30 seconds; for example, ICICI bank was the first Indian entity to get a sound trademark registration for its jingle, and the grant of Yahoo's sound trademark was a very was a step towards development for trademark regime in India.<sup>22</sup> There is currently no provision for registering Smell as Trademark.

### **Perplexity of Graphical representation:**

In India, Section 2(zb) of the Trade Marks Act states that a "trademark" is a mark that can be expressed "graphically." This makes the registration procedure more difficult because a simple description of the 'smell's chemical components cannot be considered an appropriate graphical representation.<sup>23</sup>

The same principles for pictorial representation as laid out in the Sieckmann case<sup>24</sup> are mentioned in the Indian Draft Manual of Trade Marks, 2015. It was stated that due to the lack of the aforementioned criteria, smell marks cannot be registered under Indian trademark law.<sup>25</sup>

## **I. Hypothesis Tested**

<sup>21</sup> livemint, available at <https://www.livemint.com/Home-Page/5z2B1NQUy3YyPkpRDp789M/Yahoo-awarded-India8217s-first-sound-mark-Nokia-in-queue.html> , (last visited on 23/02/2022)

<sup>22</sup> *The contemporary issue of the non-conventional trademarks*, june 2, 2021, available at, <https://www.legal500.com/developments/thought-leadership/the-contemporary-issue-of-the-non-conventional-trademarks/> , June 2, 2021 (last visited on 23/02/2022)

<sup>23</sup> The Trademark Act, *supra* note 9

<sup>24</sup> *supra* note 15

<sup>25</sup> Government of India, *Manual of Trademark*, available at , [https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1\\_32\\_1\\_tmr-draft-manual.pdf](https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_32_1_tmr-draft-manual.pdf)



There is absence of clear definition of non-conventional marks like Smell, Sound etc. not only in India but also in International Conventions. Till now Smell as a trademark has not been recognized in India. There are difficulties in registration of Smell as a trademark in India due to lack of graphical representation criteria.

## **II. Recommendations**

- Sometimes a buyer's tendency to purchase certain items is based solely on the component of 'smell' so clear definition for non-conventional mark is necessary.
- In the present world the trade, commerce and business are growing day by day and they want their trademark including Smell Mark to be protected under law. So legal recognition of non-conventional marks is much needed.
- If non-conventional marks get the recognition by law the issues and problems relating to registration of said marks will be solved.
- Even the International conventions need to be more specific about non-conventional trademarks including Sound, Smell, taste, holographic mark etc. to overcome the problem of confusion regarding its registrability.
- India has never seen a Smell as a Trademark. Anyhow India has successfully recognized some non-conventional marks like Sound Mark, Color Marks. So Indian law and Judiciary has to interpret the Trademark in wider concept by considering non-conventional trademarks as a part of definition or include non-conventional trademarks into the definition specifically.

## **III. Conclusion**

After a few remarkable non-conventional trademarks like Sound Mark, the chances of recognition by law on Smell Mark as a legitimate one is yet to be encouraged and developed. Scented stick and perfume oil fragrances, Sandalwood may one day be recognised as trademarks and Indian law is forced to embrace the need for different forms of non-conventional marks to strengthen the recognition of smell marks, sound marks, combination of colors etc. Currently, Indian trademark law prohibits the registration of Smell as trademarks. Graphical representation rigidity can be reassessed. Moreover, alternate techniques of description might introduce a variety of non-conventional trademarks. Law can be specific about the definition of non-conventional marks and criteria to qualify for its

registration. Even the International Conventions have to take steps for the developments in the area of non-conventional marks.

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