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BEYOND THE VISUAL REGISTER: OLFACTORY TRADE MARKS IN INDIA AFTER SUMITOMO RUBBER INDUSTRIES

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ABSTRACT

Trademark law has traditionally been organised around signs that can be seen, recorded and readily compared on a public register. The emergence of sensory branding, however, has challenged that visual architecture. Olfactory trademarks are particularly difficult because smell is perceptual, unstable, difficult to describe in words and historically resistant to objective representation. This paper examines the Indian position following the Controller General of Patents, Designs and Trade Marks' acceptance, for advertisement, of Sumitomo Rubber Industries Ltd.'s application No 5860303 for a 'Floral Fragrance / Smell Reminiscent of Roses as Applied to Tyres' on 21 November 2025. The paper treats the development as an important doctrinal event, but distinguishes acceptance for advertisement from final registration. It argues that the decision does not abolish the statutory requirement of graphical representation under section 2(1)(zb) of the Trade Marks Act, 1999. Instead, it can be understood as a technologically adaptive interpretation under which a sensory sign may be represented through a scientifically constructed graphical model capable of objective verification. The paper compares this approach with the pre and post-Sieckmann position in the European Union, the United Kingdom, the United States and Australia. It also analyses distinctiveness, functionality, public notice, opposition, enforcement and evidentiary difficulties. Particular attention is given to the seven-dimensional olfactory vector model developed with scientific assistance, and to the question whether scientific objectification genuinely solves the legal problem identified in Sieckmann or merely relocates it. The paper concludes that India should preserve the possibility of olfactory protection while adopting clear administrative standards for representation, distinctiveness, non-functionality, disclosure and infringement assessment. The Sumitomo development should therefore be regarded neither as an unrestricted recognition of smell marks nor as a departure from statutory text, but as an important experiment in moving Indian trade mark doctrine from visual formalism towards functionally defined, technology-neutral representation.

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Keywords: *olfactory trademarks; smell marks; graphical representation; Sumitomo Rubber Industries; non-conventional trademarks; distinctiveness; functionality; Indian trademark law; Sieckmann.*

INTRODUCTION

Trademark law has historically been anchored in the visual domain. Words, logos, symbols, labels and devices have formed the traditional vocabulary of source identification. The statutory architecture of modern trademark systems, including that of India, reflects this visual bias. Section 2(1)(zb) of the Trade Marks Act 1999 defines a trademark as a mark capable of graphical representation and capable of distinguishing the goods or services of one person from those of others.[1] The requirement of graphical representation, inherited from European legislative models, was conceived as a mechanism to ensure clarity, certainty and public notice.[2]

However, the contemporary marketplace increasingly privileges multi-sensory branding. Businesses now invest in sound signatures, motion marks, colour schemes, shapes and increasingly, ***scents***. Sensory branding operates on the premise that consumer memory and emotional association are not confined to visual perception.[3] In saturated markets, differentiation through non-visual stimuli has become commercially significant. The law, however, has struggled to accommodate these developments within doctrinally coherent boundaries.

Among non-conventional marks, olfactory trademarks have posed the most persistent conceptual difficulty. Unlike sound marks, which can be represented through musical notation or digital waveform files, scent marks resist conventional forms of depiction. The principal obstacle has been the graphical representation requirement. In *Ralf Sieckmann v Deutsches Patent- und Markenamt*, the Court of Justice of the European Union held that a smell mark must be represented in a manner that is clear, precise, self-contained, easily accessible, intelligible, durable and objective.[4] The Court rejected chemical formulae, written descriptions and scent samples as inadequate.[5] The *Sieckmann* criteria effectively rendered smell mark registration nearly impossible in the European Union prior to legislative reform in 2017, which

[1] Trade Marks Act 1999, s 2(1)(zb).
[2] Council Directive (EC) 89/104 to approximate the laws of the Member States relating to trade marks [1989] OJ L40/1.
[3] Martin Lindstrom, *Brand Sense: Sensory Secrets Behind the Stuff We Buy* (Free Press 2005).
[4] *Ralf Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737, para 55.
[5] ibid paras 69-73.

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removed the express requirement of graphical representation.[6]

Indian trademark law has not undergone a similar statutory amendment. Section 2(1)(zb) continues to require graphical representation. Until 2025, no smell mark had been successfully registered in India. The acceptance of *Sumitomo Rubber Industries Ltd.*'s application for a "Floral Fragrance/Smell Reminiscent of Roses as Applied to Tyres" therefore represents a doctrinal inflection point.[7] The applicant overcame the graphical representation barrier by submitting a scientifically developed seven-dimensional olfactory vector model, translating sensory perception into verifiable data. The Trade Marks Registry accepted this representation as satisfying statutory requirements and found the scent to be inherently distinctive and non-functional in relation to tyres.

This development raises a fundamental legal question: has India reinterpreted the meaning of "graphical representation" without amending the statute? If graphical representation is no longer confined to visual depiction but extends to scientifically reproducible data capable of objective verification, the conceptual foundation of the requirement has shifted. Such a shift has implications not only for smell marks but for the broader landscape of non-conventional trademarks, including taste, texture and haptic identifiers.

This project undertakes a doctrinal and comparative analysis to examine whether the Sumitomo registration represents an incremental administrative accommodation or a substantive reconfiguration of trademark doctrine in India. It argues that the decision reflects a purposive reading of section 2(1)(zb), aligning the graphical representation requirement with its underlying objectives of legal certainty, public notice and objective identification, rather than its literal visual connotation. In doing so, India appears to have functionally adopted a post-visual standard akin to that introduced in the European Union after the 2017 reforms, albeit without explicit legislative modification.

Government of India
Ministry of Commerce & Industry
Department for Promotion of Industry and Internal Trade
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INTELLECTUAL PROPERTY INDIA

Class Details | Well Known Marks | Prohibited Marks | Vienna Code Classification | International Non-Proprietary Names(INN) | Help |

COMPUTER GENERATED TM-SEARCH REPORT

Search Criteria : Wordmark	Search String : Floral Fragrance	Class : 12	Search Date : 26-Feb-2026

APPL NO	CLASS	CONFLICTING MARK	JOURNAL No	PROPRIETOR NAME	PROPRIETOR ADDRESS	STATUS	Image
5860303	12	FLORAL FRAGRANCE/ SMELL REMINISCENT OF ROSES AS APPLIED TO TYRES	2236	SUMITOMO RUBBER INDUSTRIES, LTD.	6-9, 3-chome, Wakinohamacho, Chuo-ku, Kobe, 651-0072, Japan	Opposed	

APPLICATION DATE : 23/03/2023 USER DATE :
GOODS/SERVICES : Tyres for vehicles.

[7] Application No 5860303, Sumitomo Rubber Industries Ltd, 'Floral Fragrance/Smell Reminiscent of Roses as Applied to Tyres' (accepted 21 November 2025).

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CONCEPTUAL FOUNDATIONS OF TRADEMARK PROTECTION

Trademark protection is justified primarily on economic and consumer protection grounds. Classical economic theory posits that trademarks reduce consumer search costs by enabling quick identification of product origin.[8] By serving as reliable indicators of source, trademarks facilitate efficient market functioning and incentivise producers to maintain consistent quality.[9]

Central to trademark law is the concept of distinctiveness. A mark must distinguish the goods or services of one undertaking from those of others.[10] Distinctiveness may be inherent, as in arbitrary or fanciful marks, or acquired through use. The more arbitrary the association between mark and product, the stronger its capacity to function as a source identifier.

The functionality doctrine operates as a limiting principle. Features that are essential to the use or purpose of a product, or that affect its cost or quality, cannot be monopolised through trademark law.[11] This doctrine prevents trademark protection from encroaching upon patent-like subject matter and preserves competition. In the context of scent marks, *functionality* presents a critical barrier. A fragrance integral to the nature of a perfume, air freshener or deodoriser would ordinarily be considered functional and therefore ineligible for trademark protection.

Non-conventional marks challenge traditional trademark theory in two ways. First, they stretch the boundaries of perceptibility. The classical model presupposed visual recognition; modern branding acknowledges multisensory engagement. Secondly, they test the limits of representation and notice. A core objective of trademark registration is to provide public clarity regarding the scope of exclusive rights. If a mark cannot be precisely represented, third parties may be unable to ascertain the boundaries of protection.

Olfactory marks occupy a particularly complex position. Smell is inherently subjective and influenced by cultural and physiological factors. Descriptions of scent are often metaphorical rather than precise. Unlike colour or shape, scent lacks stable visual correlates. These characteristics explain judicial reluctance to accept olfactory marks absent rigorous standards of objectivity and clarity.

The Sumitomo registration must therefore be evaluated against this theoretical backdrop. The question is not merely whether a scent can distinguish goods, but whether the statutory mechanisms designed to ensure certainty and competition can accommodate such sensory

[8] William M Landes and Richard A Posner, 'Trademark Law: An Economic Perspective' (1987) 30 Journal of Law and Economics 265.
[9] ibid.
[10] Trade Marks Act 1999, s 9.
[11] *Qualitex Co v Jacobson Products Co* 514 US 159 (1995).

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identifiers without doctrinal distortion.

THE REQUIREMENT OF GRAPHICAL REPRESENTATION: ORIGINS, PURPOSE AND DOCTRINAL EVOLUTION

The requirement that a trademark be "capable of graphical representation" did not emerge as a mere drafting formality. It was historically conceived as a structural safeguard to ensure clarity, legal certainty and public notice within the trademark system. In European trademark harmonisation, Article 2 of Council Directive 89/104/EEC required that a trademark be capable of being represented graphically, thereby institutionalising the visual bias of registration systems.[12] This formulation was replicated in several national statutes, including the United Kingdom Trade Marks Act 1994, and subsequently influenced the drafting of section 2(1)(zb) of the Indian Trade Marks Act 1999.[13]

The graphical representation requirement served at least three identifiable functions:

First, it ensured precision and clarity. A registered mark defines the scope of exclusive rights. If the mark cannot be represented with sufficient precision, competitors cannot ascertain the boundaries of protection. This undermines the principle of legal certainty.[14]

Secondly, graphical representation facilitated publication and accessibility. Trademark registers are public instruments. Third parties must be able to inspect and understand registered marks without subjective interpretation.[15]

Thirdly, the requirement promoted objective assessment by examining authorities and courts. A representation fixed in graphical form reduces the risk of evidentiary ambiguity in infringement or invalidity proceedings.[16]

The traditional model assumed that representation would be visual in nature: words, logos, shapes or stylised devices. However, as applicants began to seek registration of non-visual signs, the courts were compelled to interpret the graphical representation requirement more rigorously.

THE *SIECKMANN* DOCTRINE

The leading authority on the representation of smell marks is the decision of the Court of Justice

[12] Council Directive (EC) 89/104 (n 2) art 2.
[13] Trade Marks Act 1994 (UK), s 1(1); Trade Marks Act 1999 (India), s 2(1)(zb).
[14] *Sieckmann* (n 4) para 50.
[15] ibid para 52.
[16] ibid para 48.

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of the European Union in *Ralf Sieckmann v Deutsches Patent- und Markenamt*.[17] The applicant sought to register a scent described as "balsamically fruity with a slight hint of cinnamon" in respect of various services. To support the application, he submitted (i) a chemical formula, (ii) a written description, and (iii) a sample of the scent.

The Court rejected all three forms of representation and articulated what have become known as the *Sieckmann* criteria. It held that graphical representation must be clear, precise, self-contained, easily accessible, intelligible, durable and objective.[18] These requirements were derived from the underlying objectives of the Directive: ensuring that the register accurately defines the scope of protection and that third parties can determine the extent of exclusive rights.

The Court reasoned that a chemical formula does not represent the smell itself but rather the substance producing it.[19] Moreover, few consumers would be capable of interpreting a chemical formula. A written description, the Court held, lacks sufficient precision and objectivity, as olfactory perception varies.[20] A physical sample was rejected because it is not durable or stable over time.[21]

The cumulative effect of the *Sieckmann* criteria was to render the registration of olfactory marks practically unattainable within the European Union prior to legislative reform. The decision prioritised legal certainty over commercial flexibility, reflecting judicial caution against expanding trademark subject matter without adequate safeguards.

POST-*SIECKMANN* DEVELOPMENTS IN THE EUROPEAN UNION

The rigidity of the graphical representation requirement attracted sustained criticism from scholars and practitioners who argued that technological advances could provide alternative means of precise representation.[22] In response, Regulation (EU) 2017/1001 amended the European Union Trade Mark Regulation to remove the express requirement of graphical representation.[23] Article 4 now requires that a mark be represented "in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor."[24]

[17] *Ralf Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737.
[18] ibid para 55.
[19] ibid para 69.
[20] ibid para 71.
[21] ibid para 73.
[22] Annette Kur, 'The EU Trademark Reform 2015-2016: A Review' (2017) 48 IIC 1.
[23] Regulation (EU) 2017/1001 (n 6).
[24] ibid art 4.

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Although the textual requirement of graphical representation was removed, the *Sieckmann* criteria were not wholly abandoned. Rather, they were reinterpreted as functional standards applicable to any form of representation.[25] Digital sound files, multimedia files and other technologically neutral formats are now accepted. Nevertheless, smell marks remain rare in the European Union, as applicants continue to struggle with demonstrating objective and precise representation.

This reform signals an important doctrinal shift: the law no longer insists on graphical depiction per se, but on objective identifiability and clarity. The emphasis has moved from form to function.

THE UNITED KINGDOM

The United Kingdom, while influenced by European jurisprudence, has adopted a similar interpretative approach. Prior to Brexit, the UK Intellectual Property Office applied the *Sieckmann* criteria.[26] Notably, Sumitomo Rubber Industries had previously secured registration in the United Kingdom for a rose-scented tyre mark.[27] The UKIPO accepted the representation after determining that it met the clarity and distinctiveness requirements.

Post-Brexit, the United Kingdom retains a representation requirement framed in terms similar to the EU's reformed standard, focusing on clarity and precision rather than purely graphical depiction.[28] However, olfactory registrations remain exceptional, reflecting continued institutional caution.

THE UNITED STATES

The United States has long adopted a more flexible approach to non-conventional marks. The Lanham Act does not contain a graphical representation requirement equivalent to that in European law.[29] In *In re Clarke*, the United States Patent and Trademark Office recognised a plumeria blossom scent applied to sewing thread as registrable.[30] The key criterion was distinctiveness and non-functionality, rather than graphical representation.

American jurisprudence places significant emphasis on the functionality doctrine. In *Qualitex Co v Jacobson Products Co*, the Supreme Court held that a colour may be registered as a

[25] Kur (n 22).
[26] UKIPO Manual of Trade Marks Practice, para 3.1.
[27] UK Trade Mark No 00002001416 (Sumitomo Rubber Industries Ltd).
[28] Trade Marks Act 1994 (UK) s 1 as amended.
[29] Lanham Act 15 USC §1051 et seq.
[30] *In re Clarke* 17 USPQ2d 1238 (TTAB 1990).

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trademark provided it is non-functional and has acquired distinctiveness.[31] Although the case concerned colour rather than scent, it articulated the principle that trademark protection may extend to any sensory sign capable of distinguishing goods, subject to the functionality limitation.

The United States model demonstrates that the absence of a graphical representation requirement does not necessarily undermine legal certainty, provided that distinctiveness and functionality are rigorously assessed.

AUSTRALIA

Australian law permits registration of scent marks, but successful registrations are rare.[32] Applicants must demonstrate both non-functionality and distinctiveness, and provide a representation sufficiently precise to define the scope of rights. Examples such as eucalyptus-scented golf tees and cinnamon-scented furniture illustrate that registration is possible, though exceptional.[33]

Australia's cautious but open approach reflects a middle path between European rigidity and American flexibility.

DOCTRINAL IMPLICATIONS FOR INDIA

Indian trademark law retains the express requirement that a mark be capable of graphical representation.[34] Unlike the European Union, India has not amended its statute to remove this language. Therefore, the acceptance of a smell mark must be reconciled with the textual mandate of section 2(1)(zb).

The central doctrinal question is whether graphical representation should be interpreted literally (requiring visual depiction) or purposively (requiring objective, clear and precise representation regardless of medium).

The *Sieckmann* judgment suggests that the true function of graphical representation lies in ensuring clarity, precision and objectivity. If those functional objectives can be achieved through scientific modelling that translates scent into reproducible data, the statutory purpose may arguably be fulfilled even in the absence of traditional visual depiction.

This interpretative tension sets the stage for a deeper analysis of the Sumitomo registration.

[31] *Qualitex Co v Jacobson Products Co* 514 US 159 (1995).
[32] Trade Marks Act 1995 (Cth) (Australia) s 17.
[33] IP Australia Trade Marks Office Manual of Practice and Procedure, Part 8.
[34] Trade Marks Act 1999 (India) s 2(1)(zb).

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Did the Trade Marks Registry effectively adopt a functional equivalent of the post-2017 European standard without legislative amendment? Or does the acceptance of a scientific olfactory vector remain consistent with a broad reading of graphical representation as encompassing any visually expressible data representation?

THE SUMITOMO REGISTRATION: FACTUAL MATRIX AND LEGAL REASONING

In November 2025, the Indian Trade Marks Registry accepted Application No 5860303 filed by Sumitomo Rubber Industries Ltd for registration of a scent mark described as "Floral Fragrance/Smell Reminiscent of Roses as Applied to Tyres" in Class 12.[35] The application was filed on a proposed-to-be-used basis and sought protection for tyres for vehicles.[36] This marked the first recorded acceptance of an olfactory trademark in India.

At first glance, the application appeared to confront two formidable statutory barriers. The first was section 2(1)(zb) of the Trade Marks Act 1999, which requires that a mark be capable of graphical representation.[37] The second was section 9(1)(a), which prohibits registration of marks devoid of distinctive character.[38] Given the inherent difficulties associated with scent marks, the Registry initially raised objections under both provisions.

Objections under Section 2(1)(zb): Graphical Representation

The principal objection concerned the capacity of the scent to be represented graphically. As discussed earlier, Indian law has not removed the express requirement of graphical representation.[39] The applicant therefore bore the burden of demonstrating that the scent could be represented in a manner consistent with statutory requirements.

Sumitomo responded by submitting a scientifically developed seven-dimensional olfactory vector model. The model purported to translate the scent profile into quantifiable parameters capable of being reproduced and verified through objective testing. Rather than relying solely on a written description, the applicant sought to ground the representation in measurable scientific data.

The acceptance of this representation is doctrinally significant. The Registry appears to have

[35] Application No 5860303, Sumitomo Rubber Industries Ltd, 'Floral Fragrance/Smell Reminiscent of Roses as Applied to Tyres' (Trade Marks Registry, India, accepted 21 November 2025).
[36] ibid.
[37] Trade Marks Act 1999, s 2(1)(zb).
[38] Trade Marks Act 1999, s 9(1)(a).
[39] Trade Marks Act 1999, s 2(1)(zb).

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reasoned that graphical representation does not necessarily require a pictorial depiction of the scent, but rather a representation capable of being visually expressed and objectively verified. If the olfactory vector can be reduced to a chart, graph or data matrix, it arguably satisfies the formal requirement of graphical representation while fulfilling the functional objectives of clarity, precision and objectivity.

Unlike in *Sieckmann*, where chemical formulae were rejected on the ground that they describe the substance rather than the smell,[40] the olfactory vector model was framed as representing the perceptible scent profile itself. This distinction, though subtle, is critical. The Registry's acceptance suggests that scientific modelling has advanced sufficiently to convert sensory perception into reproducible data, thereby addressing concerns about subjectivity and instability.

Objections under Section 9(1)(a): Distinctiveness

The Registry also examined whether the scent was capable of distinguishing the applicant's goods from those of others. Section 9(1)(a) prohibits registration of marks which are devoid of distinctive character.[41] In the context of scent marks, distinctiveness poses acute difficulties because many fragrances serve functional or aesthetic purposes.

In this case, the scent was applied to tyres. The Registry appears to have accepted that a rose-like fragrance bears no functional nexus to the essential purpose of tyres. Unlike perfumes, deodorants or scented candles, tyres do not ordinarily possess fragrance as a functional attribute. The fragrance was therefore treated as arbitrary in relation to the goods.

This arbitrariness strengthens the case for inherent distinctiveness. Trademark doctrine traditionally accords stronger protection to marks that are fanciful or arbitrary in relation to the goods.[42] A rose fragrance applied to tyres does not describe their quality, composition or purpose. Nor does it enhance their performance. The absence of functional necessity allowed the Registry to treat the scent as a potential badge of origin rather than a utilitarian feature.

The fact that the application was accepted on a proposed-to-be-used basis further underscores the Registry's willingness to treat the scent as inherently distinctive rather than requiring proof of acquired distinctiveness through use.

[40] *Ralf Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737, paras 69-73.
[41] Trade Marks Act 1999, s 9(1)(a).
[42] Lionel Bently and Brad Sherman, *Intellectual Property Law* (5th edn, OUP 2018) 921.

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Non-Functionality and Competition Concerns

Although the Trade Marks Act 1999 does not contain an explicit functionality doctrine in the same form as United States law, Indian jurisprudence recognises that features essential to the nature of the goods or necessary to obtain a technical result cannot be monopolised through trademark registration.[43] In assessing the Sumitomo application, the Registry implicitly concluded that the fragrance did not perform a technical or performance-enhancing function.

This reasoning aligns with the principle articulated by the United States Supreme Court in *Qualitex Co v Jacobson Products Co*, which held that features essential to the use or purpose of a product are not eligible for trademark protection.[44] By treating the scent as non-functional and arbitrary, the Registry avoided encroaching upon competition policy concerns.

The Role of Scientific Representation

The most innovative aspect of the application lay in its reliance on scientific objectification. Historically, courts have rejected scent samples as insufficient because they degrade over time and lack durability.[45] Written descriptions have been criticised for subjectivity. Chemical formulae fail to capture perceptible qualities. The seven-dimensional olfactory vector appears to have been designed to overcome each of these criticisms simultaneously.

By translating scent into stable data parameters, the applicant provided a representation capable of archival storage, replication and comparative analysis. This approach resonates with the functional understanding of representation articulated in post-2017 European reform: the mark must be represented in a manner enabling authorities and the public to determine the clear and precise subject matter of protection.[46]

The Indian Registry, without statutory amendment, appears to have adopted a similar functional standard.

FROM VISUAL DEPICTION TO SCIENTIFIC OBJECTIFICATION: THE DOCTRINAL TRANSFORMATION OF GRAPHICAL REPRESENTATION IN INDIA

The acceptance of the Sumitomo smell mark invites a reconsideration of what "graphical representation" means within the Indian statutory framework. While the textual requirement in

[43] *Qualitex Co v Jacobson Products Co* 514 US 159 (1995).
[44] ibid 165.
[45] *Sieckmann* (n 40) para 73.
[46] Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union Trade Mark [2017] OJ L154/1, art 4.

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section 2(1)(zb) remains unchanged, the interpretative approach adopted by the Trade Marks Registry suggests a significant shift in emphasis from visual depiction to scientific objectification.

To understand the magnitude of this development, it is necessary to evaluate whether the seven-dimensional olfactory vector model satisfies the functional criteria traditionally associated with graphical representation, particularly those articulated in *Sieckmann*.[47]

RE-EXAMINING THE *SIECKMANN* CRITERIA

The Court of Justice in *Sieckmann* held that a mark must be represented in a manner that is clear, precise, self-contained, easily accessible, intelligible, durable and objective. These requirements were not arbitrary formalities; they were derived from the need to ensure legal certainty and define the scope of exclusive rights. Each of these elements warrants examination in the Indian context.

Clarity and Precision

A written description such as "floral fragrance reminiscent of roses" would, standing alone, likely fail the precision requirement. Olfactory perception varies widely across individuals. However, a multidimensional vector model purports to assign quantifiable values to specific scent attributes. If the representation identifies measurable parameters that can be consistently replicated, it arguably achieves a degree of precision unavailable to metaphorical description.

The key doctrinal question is whether precision must be perceptual or scientific. *Sieckmann* appeared to require perceptual clarity, but it was decided at a time when advanced olfactory modelling technologies were not widely recognised. If scientific modelling now allows for consistent reproduction of scent profiles, the requirement of precision may be satisfied through technological means.

Self-Containment and Accessibility

In *Sieckmann*, the Court rejected scent samples because they were not durable and required sensory engagement. A vector representation, by contrast, can be stored, archived and accessed digitally. Provided that the registry makes the data publicly available in intelligible format, the accessibility requirement may be met.

However, intelligibility presents a nuanced challenge. A complex vector model may be scientifically precise yet opaque to the average consumer. The Court in *Sieckmann* emphasised intelligibility to competent authorities and the public. The Indian approach appears to prioritise

[47] *Sieckmann* (n 40) para 55.

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intelligibility to examining authorities and experts rather than laypersons. Whether this suffices doctrinally depends on how one interprets the purpose of publication: is it intended for general consumer comprehension or for legal and commercial actors capable of technical evaluation?

Durability and Objectivity

Durability was central to the rejection of scent samples in *Sieckmann*. A digital vector model does not degrade over time. It can be preserved indefinitely in registries. Objectivity is arguably enhanced by reliance on scientific measurement rather than subjective description.

In this respect, the Indian acceptance arguably satisfies the core functional concerns identified in *Sieckmann* more effectively than the earlier European applications that relied on chemical formulae or samples.

Graphical Representation as a Medium-Neutral Concept

The statutory language in section 2(1)(zb) requires that a trademark be "capable of being represented graphically". It does not mandate that the mark itself be visual. This distinction is doctrinally important.

A graph, chart or matrix is inherently graphical even if the underlying subject matter is non-visual. Scientific data is routinely expressed in graphical form. If the olfactory vector is translated into a visual matrix or plotted representation, it technically satisfies the literal meaning of "graphical".

Under this interpretation, the Indian Registry has not eliminated the requirement of graphical representation; it has expanded the range of what may constitute such representation. The representation remains graphical in form, even though the mark is sensory in nature.

This reading aligns with the principle that statutory interpretation should accommodate technological progress unless expressly prohibited. It also avoids the need for legislative amendment, unlike the European Union's explicit removal of the graphical requirement in 2017.

Alignment with Post-2017 European Reform

Although India has not amended its statute, the practical effect of the Sumitomo registration mirrors the European Union's post-reform position. Article 4 of Regulation (EU) 2017/1001 now requires that a mark be represented in a manner enabling authorities and the public to determine the clear and precise subject matter of protection.

The focus has shifted from graphical form to functional clarity. By accepting a scientifically reproducible representation, the Indian Registry appears to have adopted a similar functional

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standard. The decisive criterion is not visual depiction but objective identifiability.

This convergence is doctrinally significant. It suggests that Indian trademark law is evolving through interpretative adaptation rather than legislative reform.

Implications for Future Non-Conventional Marks

If graphical representation is satisfied through scientific objectification, the door potentially opens to other sensory marks, including taste or texture marks, provided they can be translated into reproducible data models. However, such expansion would encounter additional doctrinal constraints.

Taste marks, for example, are likely to confront the functionality barrier more frequently than scent marks. Texture marks may raise evidentiary and competition concerns. The Sumitomo registration therefore establishes a precedent not merely for scent marks but for the broader interpretative flexibility of section 2(1)(zb).

Nevertheless, caution is warranted. The Registry's acceptance does not automatically guarantee judicial endorsement. Courts may scrutinise whether the representation genuinely fulfils the clarity and precision objectives of the statute.

DISTINCTIVENESS, FUNCTIONALITY AND ENFORCEMENT CHALLENGES

While the reinterpretation of graphical representation constitutes the most visible doctrinal shift, the long-term viability of olfactory trademarks in India will depend on three additional considerations: distinctiveness, functionality and enforceability.

Inherent Distinctiveness and Arbitrary Association

The acceptance of the rose fragrance for tyres appears grounded in its arbitrariness. Trademark law traditionally protects marks that bear no descriptive or functional relation to the goods. In this case, fragrance is *not intrinsic* to tyre performance. This strengthens the case for inherent distinctiveness.

However, not all scent applications will enjoy similar arbitrariness. Fragrance in cosmetics, cleaning products or food items may be deemed functional or descriptive. The Sumitomo case should therefore not be read as a general endorsement of scent marks across industries.

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The Functionality Doctrine in Indian Law

Although the Trade Marks Act 1999 does not explicitly codify a functionality doctrine, Indian courts have recognised that features essential to the nature of goods or necessary to obtain a technical result cannot be monopolised. This principle parallels the reasoning of the United States Supreme Court in *Qualitex*.

The fragrance applied to tyres appears ornamental rather than functional. If, however, evidence were to show that scent masks unpleasant odours inherent in rubber composition, functionality arguments might arise. The Registry's acceptance implicitly assumes absence of such utilitarian purpose.

Evidentiary and Enforcement Complexities

The most complex challenge lies in enforcement. How does one prove infringement of a scent mark?

In traditional trademark litigation, comparison involves visual or phonetic similarity. In the context of scent, infringement analysis would require expert testimony, scientific comparison of olfactory vectors, and potentially consumer surveys to establish likelihood of confusion.

Durability of scent in market conditions also presents practical difficulties. Unlike logos, scent dissipates and may vary depending on environmental factors. Courts will need to develop evidentiary standards to assess similarity objectively.

The Indian Evidence Act 1872 does not preclude expert scientific testimony, and section 45 permits expert opinions in matters of science. However, courts will need to determine the weight accorded to competing olfactory analyses.

A LIMITED CRITICAL APPRAISAL

While the Sumitomo registration reflects progressive interpretative flexibility, certain concerns merit cautious examination.

First, the absence of legislative amendment may generate uncertainty. The European Union removed the graphical representation requirement through formal reform. India has retained the language. Future litigants may argue that administrative interpretation has stretched the statutory text beyond its intended scope.

Secondly, accessibility concerns remain. A complex scientific vector may be intelligible to experts but opaque to competitors lacking technical resources. If third parties cannot reasonably ascertain the boundaries of protection, the objective of public notice may be compromised.

Thirdly, the expansion of sensory trademarks raises competition concerns. Trademark law

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should not permit indefinite monopolisation of features that competitors may reasonably wish to use. The arbitrariness of fragrance on tyres mitigates this risk in the present case, but broader application may require careful judicial calibration.

Nevertheless, these concerns do not negate the doctrinal legitimacy of the Registry's interpretation. Rather, they underscore the need for principled judicial guidance in future disputes.

THE INDIAN STATUTORY FRAMEWORK: SECTION 2(1)(zb) IN CONTEXT

The central statutory provision remains section 2(1)(zb) of the Trade Marks Act, 1999. It defines a trade mark as a mark capable of being represented graphically and capable of distinguishing the goods or services of one person from those of others. The provision is important for two separate reasons. First, it establishes the conceptual possibility of protecting a sign that performs a source-identifying function. Secondly, it places graphical representation within the definition itself, meaning that representation is not merely a procedural filing requirement but part of the statutory conception of what may qualify as a trade mark. 48

The definition must nevertheless be read together with the absolute and relative grounds for refusal. Section 9(1)(a) excludes marks devoid of distinctive character, while section 9(1)(b) and (c) protect the descriptive and customary vocabulary of trade. Section 11 introduces a second layer of control through earlier marks and likelihood of confusion. Thus, even if a scent can be represented, representation alone cannot establish registrability.

The importance of this distinction is especially clear in the Sumitomo matter. The Registry was initially confronted not with a single abstract question—whether smell can ever be a trade mark—but with a composite examination involving representation and distinctiveness. 49 The legal significance of the order therefore lies in its treatment of these requirements as cumulative rather than substitutive: scientific representation opened the door to consideration of the sign; it did not eliminate the ordinary disciplines of trade mark law.

The statutory structure also demonstrates why a technologically adaptive interpretation need not be equivalent to judicial amendment. Section 2(1)(zb) does not expressly say that the mark itself must be visually perceptible. Its language concerns the capacity of the mark to be represented graphically. A smell may be non-visual while the record used to identify it may

[48]Ministry of Commerce and Industry, Trade Marks Registry, Application No 5860303, 'Floral Fragrance / Smell Reminiscent of Roses as Applied to Tyres' (Order dated 21 November 2025).
[49]Trade Marks Act 1999, ss 2(1)(zb), 9(1)(a), 18-23.

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nevertheless take a graphical form. The distinction between the sensory object and the register entry is therefore central to the Indian approach.

A purposive reading is also consistent with the institutional function of the Trade Marks Registry. The register exists to provide a reliable public record of proprietary claims. The question is consequently not whether the public can smell the register, but whether the register can communicate the subject matter of the claimed right with enough precision to permit examination, opposition, licensing and enforcement.

ACCEPTANCE, ADVERTISEMENT AND REGISTRATION: A NECESSARY LEGAL DISTINCTION

The terminology used to describe the Sumitomo development requires particular care. The Trade Marks Registry accepted Application No 5860303 on 21 November 2025 and directed its advertisement as an olfactory mark. 50 This is a landmark administrative acceptance, but it should not automatically be described as a completed registration. Under the Trade Marks Act, acceptance is followed by advertisement, during which an opposition may be filed; registration follows the statutory process thereafter. 51

This distinction is more than semantic. If the development is described as a final registration, the legal significance of the order may be overstated and the role of opposition and subsequent adjudication may be obscured. The more accurate proposition is that India has crossed the threshold of administrative acceptability for an olfactory mark. The decision demonstrates that the Registry is prepared, at least in an appropriate factual setting, to recognise a scent as capable of satisfying the statutory definition.

The procedural stage also affects the precedential weight of the decision. A Registry order is highly persuasive evidence of administrative practice, particularly when it records a detailed examination of representation and distinctiveness. It is not, however, equivalent to a binding judgment of a constitutional court. A future challenge may therefore test the meaning of graphical representation, the scope of administrative discretion, or the adequacy of the scientific model.

The distinction is particularly important for academic analysis because it allows the paper to make a narrower and more defensible claim: Sumitomo establishes an administrative pathway for an olfactory mark under the existing statute, rather than conclusively settling the doctrinal

[50]Trade Marks Act 1999, s 20. Acceptance and advertisement do not by themselves amount to final registration; opposition and subsequent registration remain governed by the Act.
[51]Trade Marks Act 1999, s 21.

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question for every future sensory sign. Contemporary commentary likewise describes the development as India's first accepted smell mark and highlights the continuing questions surrounding enforcement and the durability of the model. 52 53

THE SEVEN-DIMENSIONAL OLFACTORY VECTOR: SCIENCE AS LEGAL REPRESENTATION

The most distinctive feature of the Sumitomo application is the attempt to transform an olfactory experience into a reproducible scientific representation. The seven-dimensional model describes the scent through the dimensions of floral, fruity, woody, nutty, pungent, sweet and minty. The point of the model is not that these seven words somehow reproduce the subjective experience of a rose, but that they provide a structured coordinate system in which the claimed scent can be located and compared.

The Controller General's account, as reported by WIPO, describes a mathematical vectograph prepared with scientific assistance from the Indian Institute of Information Technology Allahabad. The model was intended to bridge the gap between a perceptual sign and the legal requirement of objective representation. 54 The scientific approach was supplemented by analytical techniques and expert evidence directed at reproducibility, uniqueness and non-functionality.

This method should be distinguished from the chemical formula rejected in Sieckmann. A chemical formula identifies the chemical substance or composition that may produce an odour; it does not necessarily identify the sensory experience itself. A vector model, by contrast, attempts to describe the perceptual profile in a standardised coordinate system. The distinction is conceptually important because the legal object is the trade mark, not simply the physical ingredients used to produce it.

The model nevertheless raises a deeper question: does scientific measurability equal legal identity? A measurement system can improve repeatability without proving that every human observer will perceive the resulting scent as identical. Temperature, humidity, storage, concentration and individual physiology may affect perception. A scientifically stable representation may therefore identify the intended olfactory profile without eliminating every element of perceptual variation.

For this reason, the strongest legal claim for the seven-dimensional model is not that it makes

[52]Unnat P Pandit, 'India's first smell mark: Sumitomo rose-scented tires' WIPO Magazine (13 February 2026).
[53]Rohini Jadhao, 'India's First Olfactory Trade Mark: The Sumitomo Order' SCC Times (14 August 2026).

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smell perfectly objective. Rather, it can reduce the uncertainty that previously prevented a register from defining the boundaries of the claimed sign. Trademark law does not demand that every consumer experience a mark identically; it demands a sufficiently determinate subject matter for the exclusive right. The scientific model may satisfy that institutional need better than a metaphorical description or a physical sample.

RE-EXAMINING THE SIECKMANN CRITERIA IN LIGHT OF TECHNOLOGICAL CHANGE

Sieckmann remains the conceptual starting point because it explained why graphical representation was necessary: the representation must allow authorities and third parties to determine the precise subject matter of the exclusive right. The Court articulated the familiar requirements of clarity, precision, self-containment, accessibility, intelligibility, durability and objectivity. 55

Clarity and precision. A description such as ‘smell reminiscent of roses’ is vulnerable to ambiguity. Roses themselves vary, and the description can evoke a family of smells rather than one determinate sign. A numerical or graphical vector can narrow that range by specifying measurable coordinates. Its legal strength therefore lies in reducing the number of possible interpretations.

Self-containment. The representation should not require the examiner to obtain an external sample before understanding the claimed sign. A digital graphical record has an advantage over a physical sample because it can be stored and reproduced within the administrative record. Yet self-containment also requires that the methodology used to interpret the vector be sufficiently disclosed. A number without a defined scale, calibration method or reference framework may merely transfer the uncertainty to another technical document.

Accessibility and intelligibility. The scientific model presents the most difficult issue. A specialist may understand a seven-dimensional coordinate system while a small competitor may not. Accessibility therefore should not be reduced to online availability. The representation should be accompanied by enough explanatory material to allow a reasonably informed economic operator to understand what is claimed.

Durability. A physical scent sample can degrade, evaporate or change composition. A digital representation does not suffer from that problem in the same manner. Durability is therefore one of the criteria most clearly addressed by scientific objectification.

[55]Regulation (EU) 2017/1001, art 4; Commission Implementing Regulation (EU) 2018/626, art 3.

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Objectivity. The model is strongest here. If independent laboratories using the same methodology can identify whether a competing scent falls within the registered profile, the representation creates an evidentiary benchmark that a purely descriptive phrase cannot provide. Objectivity, however, depends on the transparency of the methodology and the reliability of the underlying measurements.

The post-2017 European framework makes this functional understanding especially significant. Regulation (EU) 2017/1001 no longer requires a mark to be represented graphically as such; instead, the representation must enable competent authorities and the public to determine the clear and precise subject matter of protection. 56 The EU's implementing regulation further emphasises use of generally available technology and the same seven functional criteria. 57

Yet the European position also supplies a caution against assuming that technological neutrality has solved the smell-mark problem. EUIPO guidance continues to state that smell and taste marks are not presently acceptable because generally available technology does not enable sufficiently clear and precise representation. 58 The Indian development is therefore not proof that science has universally solved olfactory representation; it is evidence that one national registry has accepted a particular evidentiary architecture as sufficient in a particular case.

COMPARATIVE JURISDICTIONS: WHAT INDIA CAN LEARN

The United States provides the clearest contrast with the European model. In re Clarke recognised that a non-functional fragrance could function as a mark for sewing thread and embroidery yarn, but the decision was strongly fact-dependent. The applicant demonstrated that the fragrance was not inherent to the goods, promoted the scented feature, and had achieved source recognition among customers and distributors. 59

The American approach consequently illustrates that the absence of a graphical representation barrier does not eliminate the need for evidence of trade mark function. The question moves from 'Can the scent be drawn?' to 'Does the scent identify source rather than merely provide an attractive product feature?' This is a useful lesson for India, where the representation threshold should not eclipse the source-identification function.

Qualitex provides a broader doctrinal analogy. Although the case concerned colour, the Supreme Court accepted that a sensory feature may serve as a trade mark where ordinary trade

[57]EUR-Lex, Regulation (EU) 2017/1001, art 4 and recital 10.
[58]EUIPO, Trade Mark Guidelines, Part B, s 9.3.11.2 (version in force in 2024-25).
[59]In re Clarke, 17 USPQ2d 1238 (TTAB 1990).

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mark requirements are met and the feature is not functional. The functionality principle prevents trade mark law from granting a perpetual monopoly over features needed for competition. 60

The United Kingdom historically followed the Sieckmann approach but has retained a representation framework concerned with whether the public and authorities can determine the subject matter of protection. UKIPO guidance continues to emphasise clarity, precision, self-containment, accessibility, intelligibility, durability and objectivity for non-traditional representations. 61 The UK experience therefore demonstrates both continuity and caution: formal recognition of non-traditional mark categories does not mean that every smell is practically registrable.

The European Union is even more instructive because it formally removed the graphical representation requirement. The reform demonstrates that the real policy objective was not visuality itself but legal certainty. India has reached a related result by interpreting 'graphical' more flexibly. The institutional paths differ, however: the EU changed the text, while India has relied on administrative interpretation.

Australia occupies an intermediate position. Its system permits unconventional signs, including scent marks in principle, but successful protection remains uncommon because applicants must still satisfy the ordinary requirements of distinctiveness and non-functionality and define the subject matter with adequate precision. The Australian experience reinforces the proposition that recognition in principle is less important than the operational criteria applied in individual cases.

The comparative lesson is therefore not that India should copy one jurisdiction. Rather, India can combine the strongest features of each model: the European emphasis on clarity and public notice; the American emphasis on source-identifying function and non-functionality; and the cautious Australian approach to exceptional sensory rights.

DISTINCTIVENESS: WHY THE TYRE CONTEXT MATTERS

The strongest substantive feature of the Sumitomo claim is the relationship between the scent and the goods. Section 9(1)(a) denies registration to marks devoid of distinctive character, while the broader section 9 framework prevents descriptive and customary signs from being monopolised. 62 A rose-like fragrance has no obvious descriptive relationship to tyres. That

[60]Qualitex Co v Jacobson Products Co, 514 US 159 (1995).
[61]United Kingdom Intellectual Property Office, Manual of Trade Marks Practice, 'The Examination Guide' (updated July 2025).

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distance between sign and product supports the argument that the scent is arbitrary.

The tyre context matters because the same scent may be legally characterised differently when applied to different goods. A rose fragrance on perfume would be closely connected with the essential nature of the product. On a tyre, it is unexpected. A scent mark should therefore be analysed relationally, not in the abstract. The relevant question is whether the scent, as used with the specified goods or services, functions as a source indicator and whether competitors need the same feature for legitimate commercial reasons.

This approach also prevents Sumitomo from becoming an overbroad precedent. The decision should not be read as establishing that all fragrances are inherently distinctive. It demonstrates that a fragrance can be distinctive where the goods create a sufficiently arbitrary association and where the evidence supports source-identifying capacity.

A future applicant should therefore anticipate a higher evidentiary burden where scent is common in the relevant market. For cosmetics, food, beverages, cleaning products and air fresheners, consumers may perceive smell as an attribute of the product rather than as a badge of origin. In such markets, acquired distinctiveness may become more important than inherent distinctiveness.

FUNCTIONALITY AND THE COMPETITIVE BOUNDARY

Functionality is the principal policy safeguard against converting trade mark law into an indefinite substitute for patent protection. The American formulation in Qualitex is especially influential because it asks whether the feature is essential to the use or purpose of the product or affects cost or quality. 63

Indian law does not reproduce the American doctrine in identical statutory language, but the underlying competition concern is familiar. Section 9(3), for example, prevents protection for certain functional product shapes, and Indian trade mark doctrine generally resists attempts to use trademark rights to appropriate features that belong to the competitive commons. The same principle should govern sensory signs.

For Sumitomo, the absence of a technical connection between rose fragrance and tyre performance is significant. If the fragrance merely communicates source and does not improve grip, durability, safety or another technical characteristic, the competitive risk is comparatively low. If evidence later showed that the fragrance performs a functional role, the legal analysis would have to change.

The Registry should therefore require applicants to state expressly whether the sensory feature

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performs any utilitarian, technical, safety, masking or preservation function. This disclosure would make the functionality inquiry more transparent and would help prevent strategic relabelling of product features as trademarks.

ENFORCEMENT: FROM REGISTRATION TO A WORKABLE REMEDY

The practical test of an olfactory trade mark will arise after registration, not during filing. A registered right has value only if a court can identify the protected sign and determine whether another trader has used a sufficiently similar sign. Sections 27-30 of the Trade Marks Act structure the available protection and limitations, while section 29 provides the central statutory framework for infringement of registered marks. 64 65

Traditional infringement analysis benefits from relatively stable objects of comparison. A word can be placed beside another word; a logo can be reproduced; a sound can be played repeatedly. A scent is more complicated. Its perception can vary with concentration, packaging, temperature, storage and surrounding odours. The same fragrance may also be perceived differently by different individuals.

The solution should not be to abandon infringement protection. Instead, Indian courts can adopt a layered evidentiary approach. First, the registered representation should define the legal subject matter. Secondly, chemical and instrumental analysis may determine whether the defendant's product reproduces materially similar olfactory characteristics. Thirdly, trained expert evidence may explain the relationship between the measurements and human perception. Fourthly, where relevant, consumer evidence may establish whether the scent functions as a source identifier or creates confusion.

The Bharatiya Sakshya Adhiniyam, 2023 now governs expert opinion in Indian proceedings. Section 39 makes opinions of persons specially skilled in science or another relevant field relevant when the court must form an opinion on such a matter. 66 Section 40 further makes facts supporting or contradicting an expert opinion relevant. 67 These provisions provide a stronger current statutory basis for the evidentiary issues than the earlier reliance on section 45 of the repealed Indian Evidence Act, 1872.

A future court may therefore appoint or rely upon experts in olfactory science, analytical

[64]Trade Marks Act 1999, ss 27-29.
[65]Trade Marks Act 1999, s 30.
[66]Bharatiya Sakshya Adhiniyam 2023, s 39. The provision came into force on 1 July 2024.
[67]Bharatiya Sakshya Adhiniyam 2023, s 40.

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chemistry, sensory evaluation and statistical modelling. The critical requirement should be methodological transparency. Courts should prefer testing protocols that can be independently reproduced and should be cautious where experts merely provide subjective descriptions such as ‘very similar’ or ‘almost identical’.

Consumer surveys may have a supporting role, particularly where the dispute concerns acquired distinctiveness or likelihood of confusion. They should not, however, replace objective representation. A survey can show how consumers respond to a scent; it cannot by itself define the legal boundaries of the scent mark.

STATUTORY INTERPRETATION AND ADMINISTRATIVE LEGITIMACY

The Sumitomo development also raises a classic problem of statutory interpretation: how far may an administrative authority adapt an older statutory phrase to technological change? The literal argument is straightforward. Section 2(1)(zb) expressly uses the words ‘capable of being represented graphically’, and the legislature has not amended those words despite the European Union doing so in 2017.

The purposive argument is equally substantial. The function of representation is to define the subject matter of the right, facilitate examination, provide public notice and permit later enforcement. If a graphical scientific model performs those functions better than the traditional methods rejected in Sieckmann, insisting on an exclusively visual conception of representation may protect the form of the statute at the expense of its regulatory purpose.

A principled administrative approach should nevertheless respect the boundary between interpretation and legislation. The Registry should not declare that the phrase ‘graphical representation’ has ceased to matter. Instead, it should demonstrate how the particular representation remains graphical in form and why the scientific record fulfils the statutory purposes of clarity, precision and public notice.

This distinction makes the Sumitomo approach defensible. The Registry did not simply accept an odour sample as a trade mark. It required an evidentiary package capable of translating the sensory sign into a structured graphical record. The result can therefore be described as an expansion of the category of graphical representation rather than its abolition.

The broader comparative context supports this functional approach. The EU legislature expressly stated in 2017 that signs should be representable using generally available technology and not necessarily by graphic means, so long as the representation remains clear, precise, self-

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contained, accessible, intelligible, durable and objective. 68 India has not enacted the same wording, but the functional objectives are relevant in assessing whether a modern graphical representation can satisfy section 2(1)(zb).

PUBLIC NOTICE, ACCESSIBILITY AND THE RISK OF TECHNICAL EXCLUSION

One of the most serious objections to scientific olfactory representation is that it may create a technically accessible register without creating a practically accessible one. A large corporation may have access to laboratories, analytical instruments and specialist consultants. A small Indian manufacturer may not. If the scope of a registered scent can only be understood by expensive scientific testing, the register may become formally public but substantively opaque.

This concern is not an argument against scientific representation. It is an argument for layered disclosure. A registered olfactory mark should ideally contain, at minimum, a plain-language description, the graphical vector, the numerical parameters and the methodology by which the parameters were obtained. Where confidentiality concerns arise, the proprietary manufacturing formula need not be disclosed if the protected sensory profile can be defined independently of the formula.

The register should also identify the goods to which the scent is applied and the manner of application. Protection should not silently expand from a rose fragrance applied to tyres to every use of an allegedly similar rose fragrance in unrelated industries. The scope of the right must remain tied to the specification and the representation.

A PROPOSED INDIAN FRAMEWORK FOR FUTURE OLFACTORY APPLICATIONS

The Sumitomo order provides an opportunity to formulate a prospective framework rather than waiting for litigation to develop one case at a time. The first stage should be formal representation. The applicant should submit a reproducible graphical model supported by numerical data and a description of the measurement methodology.

The second stage should be distinctiveness. The applicant should identify whether the scent is inherently distinctive or whether acquired distinctiveness is claimed. Evidence may include advertising, consumer recognition, market surveys, length and extent of use, exclusivity of use and evidence that competitors do not ordinarily employ the scent as a product attribute.

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The third stage should be functionality. Applicants should disclose whether the scent contributes to product performance, masks a defect, improves durability, affects consumer safety or serves another utilitarian purpose. The Registry should treat a scent that is essential to the product's nature or commercial function with heightened scrutiny.

The fourth stage should address public notice. The representation must be available in a format that an ordinary trade mark professional can access without needing the applicant's permission. Where specialist interpretation is necessary, the register should include an explanatory key.

The fifth stage should address verification. The applicant should deposit sufficient reference material and testing protocols so that future comparison can be undertaken. The purpose is not to preserve an eternal bottle of perfume but to preserve the legal identity of the sign.

The sixth stage should address opposition. Because sensory marks may be difficult for competitors to evaluate, the opposition period becomes particularly important. Competitors should have access to the representation and enough technical information to challenge distinctiveness, functionality, prior rights or the scope of the claim.

Finally, the framework should recognise that the application process and infringement process are linked. If a representation is too vague to support reliable comparison at the time of registration, it is unlikely to provide a workable basis for enforcement later. The requirements of representation should therefore be designed with litigation in mind rather than treated as a purely administrative formality. 69 70

BROADER IMPLICATIONS FOR NON-CONVENTIONAL TRADE MARKS

The significance of Sumitomo extends beyond smell. If scientific representation can satisfy section 2(1)(zb) for an olfactory sign, applicants may ask whether taste, texture, temperature, movement, or other sensory characteristics can similarly be converted into reproducible graphical data. The answer should not be automatic.

Taste marks present a stronger functionality problem because taste is frequently part of the consumer experience of food, beverages and pharmaceutical products. Texture can also be functional where it contributes to grip, comfort, safety or usability. The legal framework should therefore remain technology-neutral without becoming subject-matter neutral. The ability to measure a characteristic does not itself make the characteristic appropriate for trademark protection.

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The better principle is that technology can solve the representation problem but cannot solve the substantive problems of distinctiveness and functionality. A scientifically measurable sign can still be descriptive, customary or necessary to competition. The Sumitomo development should consequently be treated as an evidentiary innovation, not as a general licence for sensory monopolies.

CRITICAL APPRAISAL OF THE SUMITOMO APPROACH

The decision is progressive, but it is not beyond criticism. The first concern is statutory legitimacy. Because section 2(1)(zb) remains unchanged, a court could adopt a narrower reading of graphical representation. The Registry's interpretation will be strongest if it can demonstrate that the representation remains graphical and that no statutory language expressly excludes scientific graphical models.

The second concern is scientific completeness. A seven-dimensional model may be useful as a coordinate system, but the paper should not assume that seven descriptors exhaust the chemistry or phenomenology of smell. The legal system should remain open to the possibility that a future scientific method will represent a scent more accurately. The register should therefore preserve methodological transparency and allow later expert evaluation without changing the protected subject matter retrospectively.

The third concern is public accessibility. A technologically sophisticated representation may create a new form of inequality between sophisticated rights-holders and smaller competitors. This can be mitigated by requiring plain-language explanations and public availability of the relevant parameters.

The fourth concern is enforcement. Until an Indian court tests an olfactory infringement claim, the practical scope of the right remains uncertain. The first litigation involving an olfactory mark will likely be more important than the first administrative acceptance because it will determine how scientific similarity, consumer perception and statutory infringement standards interact.

Recent commentary has similarly identified enforcement as the central unanswered question: a registered right without a reliable method of identifying the protected smell may remain difficult to enforce in practice. 71 This observation should not be taken as a reason to reject the Sumitomo experiment; it instead identifies the next stage of doctrinal development.

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CONCLUSION

The Sumitomo development marks an important moment in the evolution of Indian trade mark law because it confronts a problem that the statute was not drafted with contemporary technology in mind to solve. The Trade Marks Act, 1999 retains the language of graphical representation, yet the Trade Marks Registry has demonstrated that the phrase need not be confined to a visual depiction of the underlying sensory sign. The critical innovation lies in separating the non-visual nature of the mark from the graphical nature of its legal representation.

The paper has argued that the most defensible understanding of the Sumitomo approach is not that India has abolished graphical representation, but that it has interpreted the requirement functionally. The seven-dimensional olfactory vector provides a graphical and scientific means of identifying a sensory profile. Its significance lies in its potential to make the claimed subject matter reproducible, durable and capable of objective comparison. In that respect, it responds to the core concerns that made smell marks so difficult under the Sieckmann framework.

At the same time, the decision should not be described as a completed registration without qualification. The application was accepted for advertisement, and the statutory opposition and registration stages remain legally relevant. This procedural distinction matters because the eventual judicial and administrative treatment of the mark will determine how much precedential weight should be assigned to the order.

Comparative law reinforces the need for caution. The United States demonstrates that distinctiveness and non-functionality can be the central safeguards even without a graphical representation requirement. The European Union demonstrates that the graphical requirement can be removed while preserving the functional demands of clarity and precision. The United Kingdom illustrates continued caution in the treatment of smell marks, while Australian practice shows that formal openness does not translate into routine registration.

For India, the central lesson is therefore one of controlled technological adaptation. The Registry should accept sensory marks only where representation is sufficiently precise, the sign is capable of distinguishing the relevant goods or services, and the claimed feature is not functional or competitively necessary. The register should provide enough information for competitors and courts to understand the scope of the right. The evidentiary framework should also be updated to reflect the Bharatiya Sakshya Adhiniyam, 2023 and the growing role of scientific expert evidence.

The ultimate importance of Sumitomo is consequently broader than the scent of a rose on a tyre. It asks whether Indian trade mark law can preserve its traditional commitments to

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certainty, public notice and competition while allowing technology to change the means by which those commitments are achieved. A rigidly visual law would risk becoming disconnected from contemporary branding. An unrestricted sensory regime would risk uncertainty and private appropriation of functional product features. The appropriate path lies between these extremes.

India should therefore build upon the Sumitomo experiment by issuing clear administrative guidance for olfactory and other sensory applications, requiring standardised representation, transparent scientific methodology, careful distinctiveness analysis, explicit functionality disclosures and litigation-ready evidentiary records. If these safeguards are adopted, the movement beyond the visual register can occur without abandoning the principles that make trade mark law legitimate. The future of non-conventional trade marks in India should be technologically open, but doctrinally disciplined.

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