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BOTTELING THE EVANESCENT: NAVIGATING INTELLECTUAL PROPERTY FRAMEWORK IN FRAGRANCE INDUSTRY

AUTHORED BY - KHUSHI KASHYAP
B.A, LL.B(H), 7TH SEMESTER
AMITY UNIVERSITY PATNA, BIHAR

ABSTRACT

Intellectual property law has traditionally protected things that can be seen, heard, written down or physically represented. Words, logos, artistic works, musical compositions, inventions and designs can all be identified and placed within familiar legal categories. Smell is different. It cannot be seen, it disappears into the air and its perception can vary from person to person. At the same time, smell can be commercially valuable, strongly connected with memory and capable of becoming associated with a particular brand.

This creates an unusual legal question: **can a smell itself become intellectual property?**

The question has become particularly important for the fragrance industry. A perfume may derive most of its commercial value from its scent, yet the law does not necessarily treat the scent itself in the same way as it treats a trademark, artistic work or patented invention. The problem becomes even more complicated when one fragrance resembles another. Is that legitimate inspiration, ordinary competition, or unlawful copying?

Indian law is now entering relatively unexplored territory. The Trade Marks Act, 1999 does not expressly prohibit olfactory marks, but its traditional requirement of graphical representation created a major obstacle. This changed significantly in November 2025 when the Indian Trade Marks Registry accepted for advertisement Sumitomo Rubber Industries' application for a floral fragrance or smell reminiscent of roses applied to tyres. The application used a scientific seven-dimensional representation of the scent, demonstrating how technology may help convert an otherwise subjective sensory experience into something capable of legal identification.

This development, however, does not mean that every commercially successful perfume can now claim ownership over its fragrance. Trademark protection is concerned with source identification, not with giving a business permanent control over a sensory experience.

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Copyright law also provides no clear basis for treating a perfume's smell itself as a protected work. Patent law may protect a qualifying novel and inventive fragrance composition, but the requirement of disclosure may make this route unattractive to fragrance houses. Trade-secret protection may therefore remain particularly relevant for confidential perfume formulas.

This paper argues for a balanced approach. Indian intellectual property law should protect a fragrance when it functions as a genuine source identifier, protect confidential formulas through appropriate means and protect qualifying technological innovation through patent law. At the same time, ordinary scent concepts such as rose, vanilla, citrus or sandalwood should remain available for legitimate competition. The law should protect what has actually been appropriated, rather than allowing ownership over smell as a sensory experience.

Keywords: Olfactory trademark, scent mark, perfume, fragrance, intellectual property, Trade Marks Act, 1999, copyright, patent, trade secrets, TRIPS, competition.

INTRODUCTION: WHEN INTELLECTUAL PROPERTY CANNOT BE SEEN

Imagine entering a store without seeing the name of a perfume, its bottle or its packaging. You simply smell it. Within seconds, you recognise the brand.

The situation may sound unusual, but the commercial use of smell is not new. Fragrance can create recognition, trigger memory and influence how consumers experience a product. For some businesses, therefore, smell is more than an additional feature. It can become part of the identity of the brand itself.

This raises a surprisingly difficult question for intellectual property law:

If a business can protect a name, logo, sound or design because it identifies the source of its goods, why should a sufficiently distinctive smell automatically be treated differently?

At first glance, the answer seems straightforward. A trademark essentially performs a source-identifying function. If a smell can perform that same function, there appears to be no obvious reason why it should be excluded merely because it is perceived through the nose rather than the eyes.

The real difficulty, however, lies in representation.

A word can be written. A logo can be drawn. A sound can be recorded. A shape can be represented visually. But how does one put a smell on a public trademark register in a way that is clear enough for the proprietor, competitors, courts, examiners and consumers to understand?

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This was one of the central problems highlighted in *Sieckmann v. Deutsches Patent- und Markenamt*, where the Court of Justice of the European Union imposed demanding requirements of clarity, precision, objectivity, accessibility, intelligibility, durability and self-containment for the representation of non-visible marks.

India has now taken an important step towards addressing this difficulty.

In November 2025, the Indian Trade Marks Registry accepted for advertisement an application by Sumitomo Rubber Industries for a "floral fragrance / smell reminiscent of roses as applied to tyres." The application was supported by scientific representation developed with researchers from IIIT Allahabad. The scent was mapped using seven characteristics: floral, fruity, woody, nutty, pungent, sweet and minty.

The significance of the development lies not simply in the fact that a smell was accepted. It lies in the fact that science was used to address a problem which had previously appeared almost impossible for trademark law to solve.

WIPO's account of the development describes the Sumitomo application as India's first smell mark and explains that its representation combined scientific characterisation with legal requirements of clarity and objectivity.

But the development also creates a more difficult question. The issue is no longer merely:

"Can India trademark a smell?"

The more important question is:

"What exactly does the law protect when it protects a smell?"

That distinction is fundamental.

A trademark protecting a particular scent does not necessarily mean that its proprietor owns every fragrance that resembles it. Trademark law protects the source-identifying function of a mark. It is not supposed to create an unlimited monopoly over an aesthetic or sensory experience.

The real challenge, therefore, lies at the intersection of trademark distinctiveness, functionality, copyright, patents, trade secrets, competition and constitutional freedoms.

THE FIRST PROBLEM: HOW DO YOU PUT A SMELL ON A REGISTER?

The Trade Marks Act, 1999 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.

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The wording is important. The Act does not expressly say that a trademark must be visible to the human eye. Yet the requirement of graphical representation historically created serious problems for marks that exist outside the visual world.

A smell may be perfectly recognisable to a human being and still be difficult to represent legally. Consider descriptions such as:

- "a fresh floral fragrance";
- "a warm vanilla smell"; or
- "a scent reminiscent of roses."

These descriptions may help a person imagine the smell, but they do not necessarily identify one precise and reproducible sensory sign.

A competitor looking at the register should be able to understand what it is not allowed to use. A court should be able to determine what has been protected. A trademark examiner should be able to compare the mark with another application.

A vague verbal description cannot easily perform these functions.

This was one of the central problems in *Sieckmann*. The Court rejected attempts to represent a smell through a chemical formula, written description and deposited sample because they failed to provide the required certainty and objectivity.

India's recent development is significant precisely because it approaches the problem differently. Instead of asking whether smell can somehow be forced into an old-fashioned visual format, the Sumitomo matter demonstrates that scientific methods may allow the sensory characteristic to be represented in an objectively identifiable form. This is an important shift in thinking.

The law does not necessarily have to make smell visual. It has to make the protected subject matter sufficiently identifiable.

INDIA'S FIRST STEP INTO THE WORLD OF SCENT MARKS

The Sumitomo application was filed on 23 March 2023 as Trade Mark Application No. 5860303 in Class 12 for a floral fragrance or smell reminiscent of roses applied to tyres. The application was accepted for advertisement on 21 November 2025.

The unusual nature of the mark is immediately apparent.

A rose-like fragrance and a tyre do not naturally belong together. That unusual combination is legally significant because it helps separate the scent from the ordinary function of the product.

The scent was represented using a seven-dimensional sensory model involving floral, fruity, woody, nutty, pungent, sweet and minty characteristics.

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The development is important for two reasons.

First, it demonstrates that the absence of the word "smell" from the traditional language of trademark legislation does not necessarily end the discussion.

Second, it shows that technological development can change what is practically possible in trademark law.

The law often develops around the technology available at a particular point in time. A mark that could not be adequately represented twenty years ago may become capable of objective representation as scientific methods improve.

However, the Sumitomo development should not be overstated.

The acceptance of one olfactory mark does not mean that all fragrances are now registrable in India.

In fact, the nature of the goods makes a major difference.

A rose-like smell applied to tyres is unusual. A rose fragrance sold as perfume is not. In the first situation, the scent can potentially operate as an unusual badge of origin. In the second, the fragrance is arguably the very thing the consumer is purchasing.

That difference may become one of the most important questions for future Indian trademark disputes.

CAN A PERFUME OWN ITS OWN SMELL?

This is where the issue becomes much more complicated. There are really two different questions:

First: Can a smell function as a trademark?

After the Sumitomo development, the answer in India appears to be yes, at least in principle.

Second: Can a perfume manufacturer obtain exclusive rights over the fragrance that makes up its perfume?

That question cannot be answered so easily.

The basic purpose of trademark law is source identification. If a smell merely tells consumers where a product comes from, protecting it can make sense.

But what happens when the smell is the product?

A perfume manufacturer is not selling an ordinary object and adding smell merely to distinguish its brand. The fragrance is the central commercial attraction.

If trademark protection were granted too broadly in such a situation, it could effectively give a business control over an important product characteristic for an indefinite period.

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That creates a problem.

Trademark rights can potentially be renewed indefinitely. Patent rights, by contrast, are time-limited and are granted in exchange for disclosure. The two systems serve different purposes.

A company should therefore not be able to obtain what is effectively perpetual control over a fragrance simply by describing that fragrance as a trademark.

The distinction can be put simply:

A smell may function as a trademark, but that does not mean the smell itself should automatically become property.

This is particularly important in the perfume industry, where many fragrances naturally belong to broad olfactory families such as floral, woody, citrus, oriental or musky.

The law should prevent consumer confusion without preventing competitors from creating products within the same general sensory space.

THE REAL TEST: DOES THE SCENT IDENTIFY THE BRAND?

Distinctiveness should therefore remain at the heart of any Indian approach to olfactory trademarks.

Section 9 of the Trade Marks Act contains absolute grounds for refusal, including lack of distinctive character.

For a smell mark, the practical question should be:

When a consumer encounters this smell, does it tell them who made the product, or does it simply tell them what the product is like?

Consider two examples.

Example One: Rose-Scented Tyres

A tyre normally does not need to smell like roses.

If one manufacturer consistently gives its tyres a particular rose-like fragrance and consumers begin associating that unusual smell with the manufacturer, the scent may perform a genuine source-identifying function.

Example Two: Rose Perfume

A consumer encountering a rose perfume is unlikely to treat the smell of roses itself as evidence that the product comes from one particular manufacturer.

The scent is the product characteristic.

The same smell can therefore have different legal significance depending upon the goods with which it is associated.

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This demonstrates an important principle:

Distinctiveness is contextual.

A smell that may function as a trademark for tyres may be incapable of functioning as a trademark for perfume.

The United States provides an interesting comparison. In *In re Clarke*, the Trademark Trial and Appeal Board accepted the principle that a non-functional, arbitrary scent could operate as a trademark for thread and yarn.

The significance of the case is not that every scent deserves protection. Rather, it illustrates the distinction between a fragrance used to identify a product's commercial source and a fragrance that merely forms part of the product itself.

India can draw from this distinction without simply copying another jurisdiction's approach.

WHAT COPYRIGHT CANNOT CAPTURE

Copyright may initially appear to offer another route.

A perfumer does not simply mix ingredients randomly. Creating a fragrance can involve experimentation, skill, selection and careful combination. It is therefore tempting to argue that the resulting scent should be treated as an original artistic creation.

The difficulty is statutory.

Section 13 of the Copyright Act, 1957 protects copyright in specified categories of works. Section 2(c), for example, defines “artistic work” in terms of categories such as paintings, sculptures, drawings, engravings, photographs and works of artistic craftsmanship.

A fragrance itself does not comfortably fit within these categories. There is also a deeper conceptual problem.

Copyright protects expression in recognised forms. It does not generally create a monopoly over an idea, method or functional result.

A perfume formula therefore raises a difficult question: is the smell itself an artistic expression, or is it the sensory result of a chemical composition?

Indian copyright law presently does not provide a clear statutory basis for treating the olfactory experience of a perfume as a copyright work.

This does not mean that everything associated with a perfume is unprotected. Copyright may protect:

- artwork appearing on a perfume bottle;
- original labels;

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- advertising artwork;
- photographs;
- packaging artwork;
- literary descriptions where independently protectable; and
- other original artistic elements connected with the fragrance.

The important distinction is that **copyright in the label is not the same as copyright in the smell**.

Indian fragrance litigation has historically reflected this distinction. Cases involving perfume businesses have generally concerned trademarks, labels, artwork, packaging and passing off rather than ownership of the fragrance itself.

PROTECTING THE FORMULA, NOT THE FRAGRANCE

Patent law presents a different possibility.

Section 2(1)(j) of the Patents Act, 1970 defines an invention in terms of a new product or process involving an inventive step and capable of industrial application. A technically novel fragrance composition may therefore raise patent questions if it satisfies the statutory requirements.

But patent protection comes with a price:

disclosure.

A fragrance company seeking a patent must disclose the invention sufficiently for the patent system to operate.

For a perfume house, this creates a practical choice.

Patent

Disclose the invention and obtain time-limited exclusivity.

Trade Secret

Keep the formula confidential and preserve protection for as long as the secrecy can realistically be maintained.

For many fragrance businesses, the second option may be commercially attractive. A perfume formula can contain:

- particular ingredient combinations;
- precise proportions;
- proprietary accords;
- blending sequences;
- maturation procedures;

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- stabilisation techniques;
- sourcing information; and
- specialised production methods.

These are much closer to the traditional concept of confidential commercial information than the smell itself.

The important point is therefore that **the formula and the smell should not automatically be treated as the same legal object**.

The smell is the sensory result. The formula is the confidential technological or commercial information that produces it.

TRADE SECRETS: THE QUIET PROTECTION BEHIND THE PERFUME

India does not presently have a comprehensive standalone statute dealing exclusively with trade secrets.

Nevertheless, confidential information may receive protection through contractual obligations, equitable principles and judicial remedies.

The decision in *American Express Bank Ltd. v. Priya Puri* is relevant because the Delhi High Court recognised that confidential information may possess commercial or economic value and that trade secrets may include formulas, technical know-how or distinctive business methods.

This reasoning fits naturally within the fragrance industry.

A perfume manufacturer may spend years developing a particular formulation. The commercially valuable asset may not be the abstract idea of a "woody fragrance." It may be the precise combination of ingredients, their proportions and the method used to achieve a particular result.

Protecting that information through confidentiality makes more sense than attempting to claim ownership over the human experience of smelling the finished product.

This leads to a more practical model:

Protect the formula through confidentiality. Protect the brand through trademark law. Protect the bottle and artwork through copyright or design law where applicable. Protect qualifying technical innovation through patent law.

Protect a genuine source-identifying scent through trademark law where the legal requirements are satisfied.

One branch of intellectual property law does not need to do everything.

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WHEN DOES COPYING A PERFUME BECOME INFRINGEMENT?

This is perhaps the question most likely to arise in the real world.

Suppose Perfume A becomes extremely successful. Another company launches Perfume B that smells remarkably similar but uses:

- a different name;
- different packaging;
- a different logo;
- a different bottle; and
- no confidential formula obtained from the original company. Has infringement automatically occurred?

Not necessarily.

Similarity alone does not automatically establish infringement.

Trademark infringement requires infringement of a protected trademark. Copyright infringement requires copying of a protected copyright work. Patent infringement requires infringement of valid patent claims. Trade-secret liability requires wrongful acquisition, use or disclosure of protected confidential information.

Passing off involves another set of requirements, including goodwill, misrepresentation and resulting or likely damage.

This means the law should distinguish between different forms of similarity.

1. Legitimate inspiration

A perfumer studies general market trends and independently creates a fragrance belonging to a similar olfactory family.

2. Legitimate competition

A competitor creates a fragrance that consumers consider similar, but no legally protected right has been appropriated.

3. Unlawful copying

A competitor obtains a confidential formula, reproduces a protected trademark, copies protected artwork or otherwise infringes an enforceable legal right.

The fact that consumers say:

“This smells like Brand X”

should not, by itself, determine liability.

Otherwise, trademark law could gradually become a tool for preventing legitimate competition.

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WHAT INDIAN COURTS HAVE PROTECTED SO FAR

Indian courts have dealt with several disputes involving perfumes and fragrance businesses. Historically, however, the focus has generally been on conventional intellectual property rights rather than ownership of smell itself.

In *Coty Germany GmbH v. Charanjeet Singh*, the dispute concerned perfume products and alleged copying of trademarks, labels, artwork, layout and design.

Similarly, in *M/s Laboratoire Garnier & Cie v. M/s Goyal Cosmetics*, the plaintiff sought protection concerning the GARNIER trademark, labels and associated artistic works in connection with cosmetic and perfume products.

In *Coty Germany GmbH v. Xeryus Retail Pvt. Ltd.*, trademark and copyright claims relating to Calvin Klein and associated fragrance products again demonstrated the conventional approach to fragrance-related IP disputes.

In *Meso Private Limited v. Liberty Shoe Ltd.*, the Bombay High Court considered competing perfume marks "Legend" and "Flirt", illustrating the application of ordinary trademark principles to perfume products.

These cases reveal a broader pattern.

Indian law has been protecting the **commercial ecosystem surrounding perfumes** for years without necessarily treating the smell itself as the property at issue.

The Sumitomo development should therefore be understood as an important expansion of this existing framework rather than the creation of an entirely separate universe of fragrance law.

THE CONSTITUTIONAL QUESTION: HOW MUCH CAN THE LAW LET SOMEONE OWN?

Intellectual property rights do not operate in a constitutional vacuum.

The Constitution provides the broader framework within which statutory monopolies operate. Fragrance protection therefore raises questions involving Articles 14, 19(1)(g), 21 and 300A.

A. Article 19(1)(g): The Creator and the Competitor

Article 19(1)(g) guarantees the right to practise a profession or carry on an occupation, trade or business.

This matters in the fragrance industry because there are legitimate interests on both sides.

A fragrance creator has an interest in protecting genuine investment, innovation and commercial goodwill.

A competing perfumer also has an interest in carrying on a lawful business and creating products

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independently.

The legal system must therefore find a balance.

If protection becomes so broad that a business effectively controls an entire category of fragrance, competitors may be prevented from creating lawful products even when they have not copied a protected right.

Article 19(1)(g) therefore supports a cautious approach to expanding monopolies over sensory characteristics.

The aim should not be to eliminate competition. It should be to prevent genuine misappropriation while preserving legitimate commercial freedom.

ARTICLE 14: DOES TECHNOLOGY CHANGE THE EQUALITY QUESTION?

Article 14 guarantees equality before the law and equal protection of the laws. At first, this may seem unrelated to smell.

But consider a legal system that accepts sound marks, colour marks and shape marks while automatically excluding smell merely because older technology could not represent it.

The difference may require justification.

Equality does not mean that every sensory phenomenon must be treated identically. Smell is obviously different from sound or colour.

But the law should avoid arbitrary distinctions based simply on technological limitations. This supports the idea of **technological neutrality**.

The question should not be:

“Has the law traditionally recognised smell?”

It should be:

“Can this sensory sign satisfy the substantive requirements of trademark law?”

The Sumitomo development is important in this context because it demonstrates that scientific methodology can potentially bridge the gap between sensory perception and legal representation.

ARTICLE 21: SMELL, MEMORY AND PERSONAL EXPERIENCE

The connection between fragrance and Article 21 is more indirect.

Article 21 protects life and personal liberty and has been interpreted broadly to include dignity and aspects of personal autonomy.

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Smell occupies an unusual place in human experience. Fragrance can trigger memories, create emotional associations and form part of personal presentation.

That does not mean Article 21 creates a fundamental right to use any particular perfume. Its relevance lies elsewhere.

The law should be cautious about allowing private ownership to extend so far that ordinary sensory experiences become heavily controlled by individual businesses.

A smell that becomes part of ordinary social and cultural life should not easily become an exclusive private territory merely because a company has used it commercially.

ARTICLE 300A: DOES IP MEAN OWNERSHIP OF THE SMELL?

Article 300A provides that no person shall be deprived of property except by authority of law.

Intellectual property is intangible and can have significant economic value. However, it would be inaccurate to assume that every intellectual property interest automatically enjoys the same status as a fundamental right.

The more accurate position is that IP rights are primarily statutory rights. Their existence, scope and limitations depend upon legislation.

A trademark proprietor therefore cannot rely on a general constitutional concept of property to establish an unlimited right over a smell. The statutory basis must first exist.

The Constitution provides the framework within which that statutory right operates. It does not independently transform every commercially valuable sensory characteristic into private property.

TRIPS: ROOM FOR INDIA TO CHOOSE ITS APPROACH

India's approach must also be considered in light of the TRIPS Agreement.

Article 15 adopts a broad approach to trademark subject matter by referring to signs capable of distinguishing goods or services, while allowing Members to require visual perceptibility.

This provides countries with a degree of policy space.

India is therefore not required to grant protection to every commercially valuable fragrance merely because it is capable of being identified.

At the same time, international law does not prevent India from recognising non-traditional marks where domestic requirements are satisfied.

The broader purpose of intellectual property law must also be remembered.

IP law is not simply a reward system for creators. It also attempts to balance:

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- innovation;
- competition;
- consumer protection;
- dissemination of knowledge; and
- commercial incentives.

A fragrance regime that grants excessive exclusivity may therefore create problems even if the underlying protection is formally compatible with minimum international obligations.

THE GREY AREA: WHERE DOES INSPIRATION END AND IMITATION BEGIN?

The fragrance industry makes the boundary between inspiration and copying particularly difficult.

Unlike a word or logo, perfume does not have an obvious binary relationship with copying. A perfumer may create:

1. an entirely new fragrance;
2. a fragrance inspired by a general olfactory trend;
3. a fragrance containing similar notes;
4. a fragrance deliberately engineered to smell extremely similar to another; or
5. an exact reproduction of a confidential formula.

These situations should not automatically receive identical legal treatment. A useful way to understand the issue is through three levels.

Level One: The Olfactory Idea

Examples include:

- a vanilla perfume;
- a fresh citrus fragrance;
- a rose-based fragrance;
- a sandalwood fragrance.

These broad concepts should remain open to competition.

No business should be able to claim ownership over an ordinary scent concept simply because it has used that concept commercially.

Level Two: The Distinctive Olfactory Signature

A highly distinctive scent that is deliberately used as a source identifier and can be objectively represented may potentially qualify for trademark protection.

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Even then, protection should remain connected to the relevant goods and the source-identifying function of the mark.

Level Three: The Proprietary Formula or Technical Process

A confidential formula or qualifying technical invention may receive protection through trade-secret or patent law.

This three-level model prevents trademark law from becoming a substitute for patent protection.

THE DANGER OF A "BACKDOOR PATENT"

This is perhaps the most important policy concern.

Imagine that a company creates a commercially successful fragrance. The composition does not satisfy patent requirements.

The smell itself cannot clearly qualify for copyright protection.

The company nevertheless manages to register the fragrance as a trademark and continues renewing that trademark indefinitely.

The result could be a form of perpetual exclusivity over a fragrance that otherwise would have entered the competitive market after the expiry or failure of other forms of protection. That would undermine the carefully designed limits of patent law.

Patent law provides time-limited exclusivity in exchange for disclosure.

Trademark law serves a different purpose: protecting source identification and preventing consumer confusion.

The two objectives should not be confused. Therefore:

A scent mark should protect the source-identifying function of a scent, not create perpetual ownership over the underlying fragrance technology.

This distinction should guide both trademark examination and future judicial interpretation in India.

A PROPOSED LEGAL TEST FOR OLFACTORY TRADEMARKS IN INDIA

India would benefit from a structured approach to applications for scent marks.

An applicant seeking protection for an olfactory mark should ideally be required to establish the following:

1. Non-functionality

The scent should not be an essential or utilitarian characteristic of the goods.

2. Distinctiveness

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The scent should either be inherently distinctive or have acquired distinctiveness through substantial use.

3. Source Identification

There should be evidence that consumers associate the scent with a particular commercial source rather than simply with the product itself.

4. Objective Representation

The scent should be represented through a scientifically reproducible method capable of identifying the protected subject matter.

5. Public Accessibility

The representation should be sufficiently understandable to enable competitors and courts to determine the boundaries of the claimed right.

6. Stability

The represented scent should correspond to a sufficiently consistent characteristic rather than a temporary or commercially uncontrollable phenomenon.

7. Class-Specific Examination

A scent should not automatically receive protection across unrelated categories of goods.

8. Anti-Monopoly Safeguard

Registration should not prevent competitors from creating fragrances that merely belong to the same broad olfactory family.

9. Evidence of Consumer Association

Where distinctiveness is claimed through use, evidence may include consumer recognition, advertising, market presence and other relevant material.

10. Opposition and Cancellation

Third parties should have a meaningful opportunity to challenge a scent mark where it is descriptive, functional, non-distinctive or attempts to monopolise a common sensory characteristic.

Such a framework would allow India to recognise genuine innovation without creating an uncontrolled new category of private ownership.

DOES INDIA NEED A SEPARATE "SCENT MARK" CATEGORY?

Not necessarily.

Creating a completely separate statutory category may make the system more complicated than it needs to be.

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The existing definition of a trademark is broad enough to allow the law to evolve, particularly when the underlying purpose of trademark protection is kept in focus: distinguishing the goods or services of one person from those of others.

What India needs more urgently is not another label but clearer examination standards. These could include:

- detailed guidelines for non-traditional marks;
- scientific standards for representing scent;
- procedures for submitting expert evidence;
- standards for assessing distinctiveness;
- stronger guidance on functionality;
- rules concerning infringement of scent marks; and
- mechanisms for expert evaluation.

The Sumitomo matter can provide an important starting point for developing such a framework.

A MULTI-LAYERED APPROACH TO FRAGRANCE PROTECTION

Instead of asking:

“Which single IP right protects a perfume?”

the better question is:

“Which part of the fragrance business asset has actually been copied?”

What is being protected?	Potential legal protection
Brand name	Trademark
Logo	Trademark / Copyright

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What is being protected?	Potential legal protection
Bottle design	Design law / Trademark where applicable
Packaging artwork	Copyright
Advertising artwork	Copyright
Technical fragrance process	Patent, where statutory requirements are met
Confidential fragrance formula	Trade secret / Confidential information
Distinctive source-identifying scent	Olfactory trademark, where requirements are satisfied
Goodwill	Passing off / Trademark law
General fragrance concept	Generally open to competition

This approach is legally cleaner because it does not force every aspect of a perfume into one category of intellectual property.

A perfume is not a single legal object.

It can contain several different forms of intellectual and commercial value.

The law should identify which one has actually been appropriated before deciding whether a legal remedy is available.

PASSING OFF: PROTECTION EVEN WITHOUT REGISTRATION?

Even when a scent itself is not registered as a trademark, passing off may become relevant in an appropriate case.

Passing off traditionally protects goodwill against misrepresentation.

A fragrance business may therefore have a claim where a competitor does not merely create a similar smell but copies the overall commercial presentation in a manner likely to make consumers believe that the competing product is connected with the original business. However, the essential elements cannot be ignored.

The claimant would need to establish matters such as:

- goodwill;
- misrepresentation; and
- damage or likelihood of damage.

The mere fact that two perfumes smell similar should not automatically satisfy these requirements.

Otherwise, every successful perfume could potentially prevent competitors from producing

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fragrances with similar characteristics.

That would move the law away from protecting goodwill and towards granting ownership over smell itself.

THE CONSUMER: THE THIRD PERSON IN THE DISPUTE

Fragrance disputes are often presented as a conflict between the creator and the copier. There is, however, a third stakeholder:

the consumer.

Trademark law exists partly because consumers need reliable indicators of commercial source. If a distinctive scent becomes strongly associated with a particular brand, protecting that association may prevent consumer confusion.

But excessive protection can create the opposite problem.

Imagine a company obtaining broad control over scents such as:

- vanilla;
- rose;
- sandalwood;
- citrus; or
- musk.

If such protection were granted simply because the company uses the scent commercially, competitors could be restricted from creating ordinary products that consumers should reasonably be free to buy and compare.

The law must therefore distinguish between two very different claims:

“This smell identifies my brand.”

and

“I own this type of smell.”

The first proposition fits comfortably within the logic of trademark law. The second does not.

THE CONSTITUTIONAL BALANCE: CREATOR, COMPETITOR AND CONSUMER

The issue can ultimately be understood as a balance between three sets of interests.

The creator's interests

- protection of genuine commercial investment;
- protection of confidential information;

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- freedom to innovate;
- protection of reputation and goodwill; and
- recovery of value from legitimate intellectual effort.

The competitor's interests

- freedom to carry on business under Article 19(1)(g);
- freedom to innovate independently;
- freedom to use ordinary descriptive concepts; and
- freedom from unjustified monopolies.

The consumer's interests

- accurate source identification;
- protection from deception;
- competitive prices; and
- access to a diverse range of products.

A sound fragrance-IP framework has to account for all three.

Protecting only the creator can produce excessive monopolisation. Protecting only competition can weaken incentives to innovate.

Ignoring the consumer can undermine the very purpose of trademark law.

The answer therefore lies somewhere between unrestricted copying and unrestricted ownership.

THE 2025 SUMITOMO DEVELOPMENT: WHAT IT SOLVES — AND WHAT IT DOES NOT

The Sumitomo development should be viewed as an important step, but not as the final answer. Its strongest contribution is methodological. It demonstrates that:

a technological limitation does not necessarily have to remain a legal limitation.

If science can provide an objective method for representing smell, trademark law can begin to consider sensory marks using the same underlying legal principles applied to other marks.

But scientific representation solves only one problem. It does not automatically answer questions concerning:

- distinctiveness;
- functionality;
- consumer perception;
- scope of protection;
- infringement;

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- competition; or
- constitutional proportionality.

A mathematically represented scent may be objectively identifiable and still be unsuitable for trademark protection.

For example, even if technology could represent the smell of vanilla with extreme precision, that would not by itself justify giving one company exclusive rights over the smell of vanilla.

Therefore, India's future approach should not be:

"If we can represent it, we should protect it."

The stronger principle is:

"If we can represent it, we can now ask whether it deserves protection."

That distinction is crucial.

RECOMMENDATIONS

1. Develop dedicated examination guidelines

The Trade Marks Registry should issue clear guidance specifically dealing with olfactory and other non-traditional marks.

2. Establish scientific representation standards

The methodology used in the Sumitomo matter may provide a starting point, subject to scientific validation and technological development.

3. Require proof of source identification

Particularly for perfumes and cosmetics, applicants should demonstrate that consumers perceive the scent as identifying the brand rather than merely describing the product.

4. Apply a strong functionality principle

Where the scent performs an essential characteristic of the product, the claim should face heightened scrutiny.

5. Prevent trademark law from becoming a substitute for patent law

Trademark protection should not be used to obtain indefinite control over technological fragrance innovations.

6. Strengthen India's trade-secret framework

A clearer statutory framework concerning confidential information, trade secrets, misappropriation, exceptions and remedies would provide greater certainty for industries such as perfumery.

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7. Protect legitimate competition

Similarity between fragrances should not automatically amount to infringement. Independent creation should remain lawful unless another enforceable right has been infringed.

8. Encourage expert evidence

Future disputes may require evidence from:

- chemists;
- perfumers;
- sensory scientists;
- consumer researchers; and
- experts in olfactory technology.

9. Keep ordinary scents in the public domain

Basic sensory concepts such as rose, vanilla, citrus, sandalwood and lavender should not become private monopolies merely because they have commercial value.

10. Apply constitutional proportionality

Any expansion of fragrance-related exclusivity should be balanced against Article 19(1)(g) and the broader interest in fair competition.

CONCLUSION: YOU CANNOT OWN A SMELL — BUT YOU MAY OWN WHAT IT REPRESENTS

So, can a smell be stolen?

The answer is both **yes and no**.

A smell, simply as a sensory experience, should not become private property merely because a business finds it commercially valuable.

But the commercial identity created by a smell can potentially be protected.

The confidential formula that produces that smell can potentially be protected.

A qualifying technical innovation behind the fragrance may potentially be protected through patent law.

The bottle, artwork, packaging, logo and brand name may receive protection through the appropriate branches of intellectual property law.

The goodwill associated with the business may also be protected through trademark and passing-off principles.

The law therefore does not need to choose between two extremes: complete protection or complete freedom.

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It needs to ask a much more precise question:

What exactly has been appropriated?

This becomes particularly important following India's first accepted olfactory trademark. The Sumitomo development demonstrates that Indian trademark law is no longer necessarily limited by the assumption that a mark must be traditionally visible. Scientific methods may allow the law to recognise a sensory sign as objectively identifiable.

But the next stage will be considerably harder.

It is one thing to recognise a rose-like scent on tyres as a potential source identifier. It is another to determine whether consumers perceive the smell of a perfume as a badge of origin, whether the scent is functional, how similarity should be measured and how far the resulting exclusive right should extend.

The future of fragrance law should therefore not be about creating a new monopoly over smell. It should be about recognising sensory innovation **without privatising sensory experience itself**.

The most defensible principle is therefore this:

Intellectual property should protect the source-identifying function, confidential substance and genuine technological innovation of a fragrance — not the human experience of smelling it.

This approach protects commercial creativity without turning ordinary sensory experiences into private property.

Ultimately, the question **"Can a smell be stolen?"** is slightly misleading.

The better legal question is:

When does copying a smell amount to copying something that the law has chosen to protect?

That is the question Indian intellectual property law must now confront.

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D. Recent Indian Development

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The matter represents India's first accepted olfactory trademark and involved a scientific seven-dimensional representation of the scent.