
THE CONCEPT OF NON-CONVENTIONAL TRADEMARKS

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INTRODUCTION

Trademark plays a significant role in company's daily operations and trade by identifying the products and services along with its origin. It gives the face to the brand name along with a personality and image to portray to the general public at large. As the business and trade is rapidly expanding in this globalization era, there is a need to have a paradigm shift from the traditional logos and symbols to the non-conventional marks as their trademarks. As trade and the concept of market is expanding at a faster pace, the innovation should also go a level beyond. The idea of trademarks from the typical ones to the non-conventional ones is one such measure. The history of trademark has always seen signs, logos and symbols as its face but now the shift needs to take place to take innovation to another level.

To survive in the market for a longer run, businesses are rapidly increasing their inventive and imaginative mechanisms to identify a product and differentiate their products. Adding a distinctive odour to a product, a touch which is distinctive from the others, a different packaging of a product, a shape which could be a multi-dimensional one, a moving image, a sound which is distinctive from the other existing companies, or a specific colour or a colour combination as a trademark was initiated in the course in order to draw attention of the modern and quirky customers.

For example, Coca Cola Bottle's shape, the purple packaging of the widely popular Cadbury chocolate and Britannia biscuit with a four-string musical note. Such marks are not the traditional marks but are covered under the category of Non-Traditional or Non-Conventional Marks wherein they are trying to steal the attention of the public with a catchy note.

"The paradigm shift which has happened over the years is to become a distinctive brand to be remembered by the public at large for a longer period of time and be distinct in such a manner that it looks appealing to the sense organs of the human beings.

CONCEPT OF NON-CONVENTIONAL TRADEMARKS

A non-traditional trademark is the one that is different from the scope of the definition of the trademark given under Section 2(z)(b) of the Trademark Act, 1999 and is not falling under any category of the traditional trademarks such as words, logos and traditional symbols or the combination of such elements.

These marks can include motion marks, moving marks, shape marks, smell marks, taste marks, sound marks, feel marks, touch marks. The Common parameter in all such marks is that all these marks do not possess the requirement of graphical representation because it is not possible to put such marks on the piece of paper or any platform, they can only be seen and felt and remembered in a memory for a long period of time.

Although the term "non-conventional trademark" lacks a definite and a precise definition, we can conclude its meaning from the WIPO Standing Committee Report, which has clearly stated that: "The kinds of marks that are now thought to be capable to be registered"

Words and figurative which have a graphical representation are not the only elements that could fulfil the criteria of a trademark as per the TRIPS Agreement. Moreover, there are certain signs and symbols which are visual in nature but also there are signs which are non-visual in nature but still possess the capacity to differentiate one goods and services from the other goods and services. Infact, the signs which are non-conventional in nature will possess more distinctiveness as compared to the conventional or the traditional marks.

Therefore, due to the lack of a definite and a precise definition, such marks can be characterized as non-conventional trademark which do not fall under the category of the usual definition of trademark under The trademark Act, 1999

Some jurisdictions have well recognised these trademarks due to their special features that would influence customers and their perception towards a product. The marketing expert claims that "a customer is more likely to purchase a product if they hear a pleasant, familiar, and comforting sound or scent associated with it."

HISTORICAL OVERVIEW AND DEVELOPMENT OF NON-CONVENTIONAL TRADEMARK

The history of trademark goes back to the ancient time, where they were only used to identify

very less number of goods and services and contained few symbols and words in their ambit. Now that, trade, business and commerce has rapidly grown and so is the ambit of trademark has also expanded. Such trademarks are also referred to as “modern marks” because these are associated to modern business and its legal protection. The contemporaries have also risen to great level, so its important to have such modern marks in the domestic law. Since 19th century, non-conventional marks have a been the source of attention as they deploy a certain pattern which is not accepted by the domestic law of our country. It can also be said as a new marketing tactic to stay in the mark and compete with competitors in the marks at a larger and wider scale. It has taken some time to actually register such marks and grant them legal protection in various parts of the world. For example, In the year 1830, colour trademarks were the first to be registered by Tiffany Company for their blue packaging of their jewellery boxes, Also, Coca Cola bottle shape had also sought legal protection for its distinctive shape which has become the most well liked and well-known brand amongst various countries in the world..

Another lucrative example of a single-color trademark registration is Owens Corning Corporations insulating product's "dyed pink color." Because the customers liked the pink insulation to such level that they got word mark “PINK” registered in its own name. Eventually in the year 1985, the court registered the specific pink colour in the name of the company so that no other person/company can use such shade of pink for their goods and services.

In reference to sound marks, in the year 1950, NBC registered the very first sound mark in its own name. To add even more, Metro-Goldwyn-Mayer Corporation (MGM) got “Lion Roar” registered as its sound mark for the announcement of the starting of the film. In addition to these, there are countless examples of modern trademarks which have been registered. However, Evolution in the business strategies, advancement in the technology has changed the perception of the customers through creative and innovative techniques of branding which is appealing to humans and their sensory organs.

RATIONALE FOR PROTECTION OF NON-CONVENTIONAL MARK

- A trademark that is unconventional is just as significant as one that is conventional. These are crucial, particularly for youngsters and others with visual impairments, as well as in societies with low literacy rates, where individuals struggle to read or understand what is written on the product so that they can quickly recognize it by its color, shape, or scent. In the case of *V.K. Industries v. H. Mehta*, Registrar of

Trademarks, it was noted from an Indian perspective that : " *The need for a dual protection i.e. protection both to the manufacturer and the customer, is essential in a developing country like India and other under-developed countries in the world because the mass of the people in such countries belong to illiterate, uneducated or the semi-educated class who would not be able to distinguish the product of a manufacturer... and would have to depend on some sort of a mark whether consisting of a name, a word, a device or a representation with a view to distinguish the goods of a particular manufacturer ., in which they may be interested from those of the others and the chances of deception, particularly of ordinary man with average and imperfect recollection, are almost proverbial in such societies.*"

For instance, it is typically observed that youngsters frequently request that a chip package have a specific color packing, or that illiterate individuals frequently visit stores and want a specific color packaging for toothpaste or detergent powder—for instance, green detergent or blue detergent, which stands for the well-known "Surf Excel," or the "Tide detergent powder" in a light green packet. Thus, it can be demonstrated that color does serve as a source indicator. Color is crucial for product identification, particularly in nations like India with low literacy rates and populations that are ignorant or semi-educated.

- Another reason is that, in contrast to the idea of a traditional trademark, a trademark's visual distinctiveness alone is not necessary to establish a positive perception of the brand among consumers. Since non-traditional trademarks are multimodal, they can also draw in a larger range of customers to sway their choice to buy. Unconventional trademarks give products a visual value that increases their customer appeal and eye-catchingness. For instance, as customers, we are frequently drawn to the exquisite coffee brown smooth wrapping of Cadbury Bournville Chocolate or the eye-catching packaging of the well-known Ferrero Rocher chocolate and is able to recognize it as the product's source indicator.
- Non-traditional trademarks inspire companies to create fresh, original branding strategies and approaches. hence supporting intellectual property law's main goal. By submitting an application for these unconventional trademarks; By contacting a new buyer or emerging markets, a business endeavor can enhance its own benefits.

- In the interest of international trade, these contemporary trademarks must be protected. It will serve as a catalyst for economic growth in the area of international trade and commerce in the age of globalization. For instance, the doors' distinctive opening design, In addition to drawing in a diverse clientele from all over the world to purchase that specific vehicle, Lamborghini also promotes technology transfer and makes investments in both the domestic and international markets. A number of nations, including Sri Lanka, Japan, Australia, the United States, the European Union, and India, have acknowledged the need of protecting non-traditional trademarks. A coherent system for the recognition and protection of non-conventional trademarks should exist in light of international conventions and agreements, especially the TRIPS agreement.

KINDS OF NON-CONVENTIONAL TRADEMARK

The WIPO standing committee referring to trademarks on the law of trademarks, industrial designs, and geographical representation has conducted a thorough research on such non-traditional marks and they have classified such marks into visible and non-visible marks.

1. Colour Mark

Colour is such an important factor that it always holds the attention of the human mind. Colour is always able to grab the attention of the people, and businesses are constantly trying to use colour or colour combinations not only in their products but also in their packaging, advertising, and business. Colour plays a very crucial role in visually enhancing the product and its packaging and also from commercial perspective, colour is used to identify a product in relation to its distinctiveness. For example, The purple colour of Cadbury chocolate can be well identified only by just looking at its colour even if the name is written in any language. So the impact of the colour is of such nature that they play a very important role in distinguishing one goods and services from the other goods and services. Colour can be used in two ways, either a single colour or the combination of colours can also be trademarked for a good or service.

Various nations across the world have registered their trademark using combination of colours but problem persists in the single colour trademark and its registrability. Many business owners, traders have used a distinctive colour as their trademark in their occupation, trade and commerce involving pharmaceutical industry, apparels, accessories and many more. Countries

like United States, Australia, Japan, United Kingdom, Brazil etc have enough registrations using combination of colours for their trademark.

Although various jurisdictions have recognised the combination of colour by using it as trademark for their business including India. The problem lies where business nowadays want to register single colour as its trademark for their products because it becomes the face of the business and specially the product. For Example, Nivea cream's blue colour, Christian Louboutin red heels, purple packaging of Cadbury chocolate. Countries like Australia, Singapore, United Kingdom, New Zealand and many more have already recognised the principle of single colour to be used as trademark.

The attention here is towards the pharmaceutical industry where colour plays a very significant role. For instance, A pink liquid tonic will generally be understood as "Gelusil" which cures throat pain and cough. To add further, a white spherical shaped pill will always be understood as "paracetamol" which is used to cure fever at a very large scale. A country like India where the literacy rate is so low that people generally tend to take medicines without medication and any prescription, so to protect the public health at large, it is crucial to take into consideration the colour of the medicines or their packaging. If the colours in such an industry are not distinctive in nature, it would create chaos in the public affecting their health which is of utmost importance. Some medicines are so popular, that people tend to even forget their names but remember the physical appearance of it and consume it on such basis which eventually can lead to hazard if not taken properly. So, colour plays a significant role in the public health as well as the goodwill of the pharmaceutical industry.

A study has also revealed that colour also has a great impact on a person's/patient's mental health. The university of Bombay in India has determined that the colour of pill also plays a crucial role in actually wanting to consume the medicine, some people don't like the colour of the pill as it is associated with a particular taste which they may dislike and hence they don't consume it.

A landmark case of *AstraZeneca v. Dr. Reddy* concerns about non-conventional trademarks in the pharmaceutical sector, in this case, plaintiff which is a pharmaceutical company headquartered in the United States has sued the defendant for making the generic version of the tablet known as "Nexium" with the same purple colour. The court in this granted temporary injunction to the defendant considering it a trademark infringement issue for using the same

purple colour for their generic medicine. Another noteworthy example in the pharmaceutical industry is Blue Coloured “Viagra Tablets” which is registered in the European Union.

There is another study which illustrated pharmacist in a Indian hospital took a lot of time to make people understand about the tablet which was different in colour and shape but the salt was same and it was generic version of the same medicine.

2. Motion Mark

Motion marks also known as moving picture marks are type of non-traditional marks widely used in the multimedia sector in India. A series of drawings and images showing the trademark's components and how they work together are necessary to register a motion trademark. The word 'COLUMBIA' is shown over the top of the motion mark of Columbia, which is a registered trademark in the United States of America. A circular rainbow then surrounds the figure in the sky. Another example of a motion trademark is the "movement of Lamborghini car door," which is registered because to its distinctive opening mechanism, and Kraft Foods' moving picture trademark for chocolate, which is registered in the United Kingdom. Currently, moving picture trademarks are recognized in the US, the Russian Federation, Sweden, Norway, Singapore, and South Africa, among other nations.

3. Hologram Mark

In order to prevent fraudulent misrepresentation, holograms—three-dimensional trademarks made using photographic techniques—are typically employed for security purposes on tickets or certain currencies. Although hologram marks are accepted in the United States and many European countries, they are challenging to register as trademarks because they constantly change color and appear differently depending on the angle, making it challenging to depict them on paper for registration purposes. "One possible approach to the representation of marks consisting of holograms is to describe it in as much detail as possible, providing visual views of the holograms in various frames with descriptions of angle and appearance," according to the report of the WIPO standing committee. Since descriptions of the visual impacts alone would not be permitted, using high resolution frames that avoid fading or picture overlapping may be a possibility.

4. Three Dimensional Mark

One of the most popular types of non-conventional trademarks is the three-dimensional

trademark, which allows for registration of a product's shape and packaging. In Japan, the Coca-Cola Company was able to register the Coca-Cola bottle in three dimensions. Customers can quickly recognize the shape of this Coca-Cola bottle, even if the wrapping is peeled off. Because of its distinctive design, consumers can quickly recognize that the bottle is from the Coca-Cola Company.

5. Shape Mark

This kind of non-traditional trademark can be a three-dimensional representation of the product, its container, or the mark's shape. Its appearance can comprise the product's entire packaging, as well as the color or mix of colors used on the product and packaging. These trademarks are characterized by the product's three-dimensional shape, packaging, graphic design, and even the look of a restaurant. The way a business or product is "dressed up" to enter the market is actually what it signifies.

The Coca-Cola bottle form is the most commonly registered shape mark. The triangular form of "Toblerone chocolate" is a trademark in the European Union. Because they are the most successful at drawing customers to a certain product or service, shape marks and trade dresses are the most widely used non-traditional trademarks in today's commercial world. For instance, appearance or trade dress is crucial in the food sector. People no longer visit restaurants to satiate their basic hunger because doing so would simply result in them paying a commodity price rather than the value-added price.

What keeps patrons coming back to a certain restaurant is its atmosphere, which makes it special and revolves around a group of people that work there while adhering to a dress code. Customers are inspired to return to the restaurant because of the appearance and feel of the menu or what is known as the business's trade dress.

6. Sound Mark

In today's business trend, sound marks have become very common to be associated with some goods and services. They have become the most typical form as there have been a lot of sound mark registrations around the world. For instance, four string melodic sound of Britannia, Lion's roar of MGM, barking of dog's sound in deluxe and many more such examples are some of the well-known marks that have been registered as trademarks across various nations in the

world.

A sound may be registered as a trademark if it sticks in the listener's memory and they can instantly connect it to a source of products or services, as long as the formalities are met. An acceptable sound can be registered and protected in the same manner as other conventional forms of marks, claims INTA. Sound can have a significant role in a product or service's branding. It assists customers in differentiating one service or product from another.

As long as it has a secondary meaning or factual distinctiveness, a sound mark can be made up of strings, notes, songs with or without lyrics, or familiar natural sounds. Most significantly, the question of factual distinctiveness is crucial to registration when it comes to well-known popular music, music that is closely linked to certain geographic areas, and nursery rhymes. Merrie Melodies theme tune, the spoken letters "AT & T," the sound "ooh it's so good," and the melody "sweet Georgia Brown" are a few well-known instances of sound markings that have been registered in the United States.

Currently, sound markings are recognized by the Office for Harmonization in the Internal Market (OHIM), Austria, Denmark, France, Germany, Ireland, Italy, Spain, Sweden, the United Kingdom, Norway, and Switzerland. According to the WIPO SCT committee, the sound mark may be conveyed through electronic filing, analogue or digital recording, written descriptions of the sound, or musical notation.