
SMELL AS TRADEMARK: LEGAL, PRACTICAL AND EVIDENTIARY CHALLENGES TO OLFACTORY MARK REGISTRATION IN INDIA

Thoshithashree A N Chowdary, School of Law, CHRIST (Deemed to be University)

ABSTRACT

The recent acceptance of the smell mark “Floral Fragrance/ Smell Reminiscent of Roses as Applied to Tyres” by the Trade Mark Registry of India marks a significant, yet highly debatable, development in the country's intellectual property jurisprudence. Although the Registry allowed the registration under the inclusive definition of a "mark" in Section 2(1)(m) of the Trademark Act, 1999, recognizing olfactory marks presents profound legal, practical, and evidentiary hurdles. This paper examines the primary challenges associated with smell mark registration, particularly focusing on the inherent subjectivity and variability of human olfactory perception. Unlike visual or auditory marks, scents are heavily influenced by personal genetics, cultural background, and environmental factors like temperature and humidity. This subjectivity severely undermines the core trademark requirements of consistent consumer recognition and objective distinctiveness. Furthermore, the paper highlights the inadequacy of graphical representation for odors. While the Registry accepted a 7-dimensional vector representation, such models fail to account for real-world environmental variables and subjective human experiences, thereby falling short of the clear, precise, and objective criteria established in the landmark Sieckmann case. Finally, the article explores the complexities of enforcing olfactory trademarks, noting the absence of universally accepted objective metrics to determine infringement or likelihood of confusion in a courtroom. Ultimately, until scientific advancements can provide universally stable representations of odor, the practical viability of smell marks in India remains ambiguous and largely symbolic.

Keywords: Distinctiveness, Graphical Representation, Olfactory Marks, Sieckmann Criteria, Vector Representation.

Introduction

The Trade Mark Registry of India has accepted the application for registration of the smell mark “*Floral Fragrance/ Smell Reminiscent of Roses as Applied to Tyres*” under Class 12. This application was initially objected to under Section 9(1)(a) and Section 2(1)(zb) of the Trademark Act, 1999, on the grounds of lack of distinctiveness and absence of graphical representations. The Registry conducted multiple hearings and concluded that the application for registration complied with the conditions of graphical representation and distinctiveness, and allowed the application to proceed with the advertisement.

However, this acceptance raises serious questions of future implications in the registration of smell marks. Although trademark law globally continues to evolve and tries to accommodate non-conventional trademarks, the registration of smell has consistently posed conceptual, technical, and evidentiary difficulties because, unlike words or sounds, a smell mark is intangible, highly subjective, and not capable of being accurately graphically represented.

In 2008, India recognized the non-conventional mark of sound, but this was only possible because musical notation and audio files give out more stable notations. Moreover, now the Trade Mark Rule, 2017 gives guidelines for registration of a sound mark and graphical representation, under Rule 26(5), further facilitating the registration of a sound mark. However, no such framework exists for smell marks. Odors are unstable, subjectively and highly influenced by a variety of factors. Unlike trademarks, which are visual or auditory, smell marks rely on a consumer’s ability to recognize a scent belonging to the brand. This article aims to highlight the major drawbacks and challenges that are likely to arise with the recognition of smell as a trademark.

Recognition Of India’s First Smell Mark

In the order dated 21st November, 2025, the Trade Mark Registry of India permitted registration of the smell mark “*Floral Fragrance/ Smell Reminiscent of Roses as Applied to Tyres*” under Class 12. This application was initially objected to under Section 9(1)(a) and Section 2(1)(zb) of the Trademark Act, 1999, on the grounds of lack of distinctiveness and absence of graphical representations.

The Registry, based on the submission of the Applicant and the amicus curiae, held that the

Trademark Act, 1999, doesn't explicitly state or prohibit smell marks from being registered. Instead, Section 2(1)(m) of the Trademark Act, 1999 provides an inclusive definition of the term "mark" covering a wide category of marks that can be recognized. Thus, the inclusive nature of the definition renders registration of smell marks as permissible under the Act.

Further, Section 2(1)(zb) of the Trademark Act, 1999 provides that a trademark must be capable of being graphically represented and capable of distinguishing the goods or services of one person from those of others. In this aspect, the Registry accepted the 7-dimensional vector representation submitted by the applicant as satisfying the requirement of a graphical representation under Section 2(1)(zb) of the Trademark Act, 1999.

In assessing distinctiveness, the Registry relied on consumer perception and observed that tyres do not naturally smell like roses, and the smell of roses is a well-known smell, thus consumers can easily form an association with the good and source of goods in relation to the smell.

This order raises serious questions pertaining to the registration of smell marks, as a variety of factors were not taken into practical consideration by the Registry, leading to ambiguity regarding the future registration of smell marks in India.

Subjectivity And Variability Of Olfactory Perception

Humans no doubt are triggered by smell, but not all humans have the same perception of smell. Olfactory perception is one of the most subjective of all human senses, as it is shaped by a multitude of factors, such as culture, memory, emotional association, genetics, familiarity, and prior exposure to the smell. Unlike sounds or sights, smells are inherently personal, molded by cultural history and biological difference. The same thing perceived as pleasant by one individual may be perceived as unpleasant or even imperceptible by another. A smell that signifies a specific source for one may not even be perceptible to another, owing to personal variations that cannot be overcome, for example, anosmia to musk.

Moreover, odor changes or is affected by environmental factors, such as humidity, air quality, and temperature, making it more subjective. This subjectivity undermines the most basic requirement and function of a trademark, which is enabling consumer recognition by being objective and consistent. Trademark law functions on the assumption that consumers perceive the mark in almost the same manner; the inherent variability and subjectivity of olfactory

perception weaken the legal viability of the mark.

Challenges Of Proving Distinctiveness

The Registry accepted the applicant's assertion that the scent functions as a distinguishing factor and as a source identifier. However, this acceptance is conceptually flawed as distinctiveness requires that the mark indicate the source and is uniformly perceived as such by the consumer. But what happens when this very smell is perceived in different ways? Though in this case the applicant argues that the smell is a well-known smell of roses, which is known to the consumer, but how should one navigate the dilemma of registration and proving the distinctiveness of not a well-known smell, such as the smell of spicy woody amber with mineral undertones?

A trademark cannot be registered if it lacks distinctiveness. In the case of smell marks, a scent that is distinctive for one product may not be distinctive for another, again highlighting the subjectivity of perception of the smell mark. This raises the question of whether trademark law can extend to the protection of a subjective olfactory perception of a non-traditional mark?

Various studies have proved that an individual forms olfactory associations based on personal memories or past exposure to such smells. In order to prove distinctiveness, it must be shown that a consumer is able to link the smell with goods, but in the case of complex smells or unusual smells, the consumer would be unable to link such a smell to the product or goods. Thus, the criteria of distinctiveness, if not impossible, becomes difficult to prove in practice.

The Problem Of Graphical Representation And Inadequacy Of Vector Representation

The Sieckmann Case is a guiding precedent in the case of determining the adequacy of the graphical representation in cases of olfactory mark registration. The European Court of Justice held that a verbal description, a chemical formula, or an odor sample does not qualify as a graphical representation. Instead, a graphical representation must be clear, precise, self-contained, easily accessible, intelligible, durable, and objective.

Although the present case cites the Sieckmann Case, the Registry relies heavily on the submitted Vector Representation by the applicant, failing to note the limitations of such a representation.

This raises several concerns, as Vector Representations, though being a scientifically and technologically advanced representation, cannot be considered as 100% accurate or reliable due to the inherent subjectivity of olfactory perception. They fail to take into consideration real-world factors such as temperature, humidity, odor of the background, and human olfactory perception, thus giving an inaccurate representation, which undermines the requirements of being intelligible or precise.

The representation assumes the odor in a clean and odorless environment, which is an unrealistic assumption, as there are background odors or competing odors that affect the smell of the subject good, thus leading to mixing of smells. This creates unpredictable variations that the vector representation fails to account for. In such a case, a consumer would not be able to adequately distinguish the smells or necessarily smell the mark that has been trademarked.

Odor is a personal perception that cannot be perceived uniformly; thus, it cannot be given a universal representation through a vector model. As mentioned in the above paragraphs, different people perceive odor differently, as it is a sensory activity. A vector model captures only the chemical properties and doesn't take into account these differences of culture, genetics, emotions, or associations, further making it a subjective graphical representation of the smell.

Olfactory marks, which are inherently non-visual, are excluded from registrability, not due to a statutory prohibition, but because of the lack of a feasible medium of representation. These inaccuracies of subjectivity and imprecision in the graphical representation again defeat the purpose of registration of a trademark, as well as undermine the requirements of a graphical representation to be clear, precise, self-contained, easily accessible, intelligible, durable, and objective.

Enforcement Challenges In Cases Of Olfactory Trademark Infringement

Even if a smell mark is registered, how would one prove that the same has been infringed? The whole purpose of registering a trademark is to monopolize the scent or smell, or in this case, the perception. The question that arises is how one would prove a trademark infringement in this case. One cannot compare a smell in a courtroom without a standard and objective olfactory metric. Moreover, how would one determine similarity or likelihood of confusion among consumers for a subjective olfactory mark? Courts cannot rely on consumer perception due to

high subjectivity, owing to both personal and environmental factors. Chemical similarity cannot necessarily always equate to perceptual similarity. Two scents with different chemical compositions can smell different while conversely having chemically similar compositions. These factors pose serious concerns when a trademark infringement case arises.

Conclusion: The Practical Improbability of Smell Mark Registration in India

Despite the Registry's acceptance of the rose-scented tyres mark is a noteworthy development in the trademark jurisprudence in India; it raises significant technical, practical, and evidentiary challenges.

The main purpose of trademark law is to protect marks that are stable, objective, and consistently perceivable by consumers. Smell marks, by contrast, are inherently subjective and highly variable due to physiological, cultural, and environmental factor differences. Their distinctiveness cannot be reliably assessed nor graphically represented in a manner that satisfies the criteria laid down in the *Sieckman Case*.

Even technologically advanced solutions, such as vector representations, cannot produce a universally acceptable graphical representation of the mark, as they only capture chemical compositions and ignore real-world realities of consumer olfactory perception. Further, the evidentiary burden in proving an infringement of a smell mark poses significant challenges, as there is no universally accepted olfactory metric or standard to compare smells.

Thus, while the law theoretically allows smell marks, their practical registrability is still ambiguous. Unless scientific advancement produces a universally stable and objective representation of odor, smell marks will continue to face formidable legal backlash, making their recognition more symbolic than functional.

References

1. Andreas Keller & Leslie B. Vosshall, *Olfactory Perception of Chemically Diverse Molecules*, 17 BMC NEUROSCI. 55 (2016), <https://doi.org/10.1186/s12868-016-0287-2>.
2. Sneha Singh, *Trademarking the Smell of Success: Can Non-Traditional Marks Survive Indian Law?*, CIIPR RGNUL (Aug. 18, 2025, updated Aug. 19, 2025), <https://www.ciiprrgnul.com/post/trademarking-the-smell-of-success-can-non-traditional-marks-survive-indian-law>.
3. Rishi Vardhan K.T. & Gokul Priya N., *The Viability of Smell Mark: Challenges in Registration and Enforcement*, 6 INT'L J. MULTIDISCIPLINARY RES. (IJFMR) (No. 6) (Nov.–Dec. 2024), <https://www.ijfmr.com/papers/2024/6/31646.pdf>.
4. Richard C. Gerkin & Alexander B. Wiltschko, *Digitizing Smell: Using Molecular Maps to Understand Odor*, GOOGLE RESEARCH BLOG (Sept. 6, 2022), <https://research.google/blog/digitizing-smell-using-molecular-maps-to-understand-odor/>.
5. Tanoy Debnath et al., *Comparing Molecular Representations, E-Nose Signals, and Other Featurization, for Learning to Smell Aroma Molecules*, (Aug. 11, 2023), <https://doi.org/10.1371/journal.pone.0289881>.
6. Stavroula Karapapa, *Registering Scents as Community Trademarks*, 100 TRADEMARK REP. 1335 (2010).
7. Case C-273/00, Sieckmann v. Deutsches Patent- und Markenamt, 2002 E.C.R. I-11737.