
RETHINKING TRADEMARK PROTECTION BEYOND VISUAL MARKS

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ABSTRACT

Trademark law primarily protects signs that help consumers identify the source of goods and services. Traditionally, this protection has focused on visually perceptible marks such as words, logos, and symbols. However, contemporary branding practices increasingly rely on non-visual elements including sound, shape, scent, and motion to distinguish products and services in the marketplace. These developments raise important questions about the ability of existing trademark frameworks to accommodate forms of branding that do not operate primarily through visual perception.

This article examines the concept of non-traditional trademarks and analyses the challenges associated with their recognition under Indian trademark law. It highlights how statutory requirements relating to graphical representation, distinctiveness, and consumer perception create practical barriers for non-visual marks. While briefly referring to developments in other jurisdictions, the article focuses on the Indian legal position to demonstrate the continued dominance of visual standards in trademark registration and enforcement.

The article argues that a strict visual approach limits the adaptability of trademark law to evolving commercial practices. It suggests the need for a more flexible and functional approach to trademark protection that recognises the source-identifying role of non-visual marks while maintaining legal certainty.

Keywords: Non-Traditional Trademarks; Non-Visual Marks; Trademark Law; Graphical Representation; Indian Trademark Law

Introduction

In the modern economy, intellectual property plays an increasingly important role in commercial value creation, particularly through trademarks.¹ Trademarks help consumers identify the source of goods and services and allow businesses to distinguish their products in competitive markets.² Traditionally, trademark law has focused on visually perceptible signs such as words, logos, symbols, and labels.³ This focus developed when trademarks were primarily visible signs placed on physical goods and their packaging.

Over time, branding practices have changed. Businesses now use non-visual elements such as sounds, shapes, scents, and motion to create brand recognition and consumer association.⁴ These elements often perform the same source-identifying function as traditional trademarks, even though they are not easily perceived or represented visually. As a result, the distinction between traditional and non-traditional trademarks has become increasingly relevant.

Indian trademark law formally recognises a broad definition of a trademark, yet its application continues to reflect a strong visual orientation. Requirements relating to graphical representation, distinctiveness, and clarity have made it difficult for non-visual marks to obtain legal protection.⁵ While certain categories, such as sound marks, have received limited recognition, other non-traditional marks remain uncertain or largely excluded.

Concept and Scope of Non-Traditional Trademarks

Non-traditional trademarks refer to signs that do not fall within the conventional categories of word marks, logos, or graphic symbols. Instead, these marks rely on sensory perception beyond sight, or in combination with it, to distinguish goods or services in the marketplace. Common examples include sound marks, shape marks, colour marks, motion marks, and scent or smell marks. Despite their unconventional form, such marks may perform the core trademark

¹ World Intellectual Property Organization, What Is Intellectual Property? (WIPO), <https://www.wipo.int/about-ip/en/>

² World Intellectual Property Organization, What Is a Trademark? (WIPO), <https://www.wipo.int/trademarks/en/>.

³ Trade Marks Act, 1999, § 2(1)(zb) (India).

⁴ World Intellectual Property Organization, Non-Traditional Trademarks, https://www.wipo.int/trademarks/en/trademarks/non_traditional_trademarks.html/

⁵ Trade Marks Act, 1999, § 2(1)(zb); see also Manual of Trade Marks Practice and Procedure (Office of the Controller General of Patents, Designs and Trade Marks, India).

function of indicating the commercial source of goods or services.⁶

Among non-traditional marks, sound marks have received the widest recognition internationally. Musical sequences, jingles, or distinctive sounds associated with particular products or services are capable of creating strong consumer associations. Shape marks protect the three-dimensional configuration of a product or its packaging where the shape itself functions as a source identifier rather than serving a purely functional purpose. Colour marks and motion marks similarly rely on consumer perception developed through consistent use.⁷

Smell or scent marks represent one of the most contested categories of non-traditional trademarks. Unlike visual or auditory signs, scents are inherently subjective and difficult to describe with precision. Although a scent may function as a source identifier in certain contexts, its registration raises challenges relating to representation, stability, and uniform perception. These difficulties have led many trademark systems to approach scent marks with caution, often subjecting them to higher evidentiary thresholds.⁸

International trademark law has gradually acknowledged the legitimacy of non-traditional trademarks, albeit with varying standards. Jurisdictions such as the European Union and the United States permit registration of certain non-visual marks provided that they satisfy requirements of distinctiveness and clear representation. However, the acceptance of such marks remains uneven, reflecting an ongoing tension between legal certainty and commercial reality.⁹

The conceptual challenge posed by non-traditional trademarks lies in reconciling evolving branding practices with the need for clarity and predictability in trademark registration systems. While trademark law seeks to prevent confusion and ensure transparent registries, rigid adherence to traditional forms risks excluding marks that genuinely function as indicators of origin in contemporary markets. This tension is particularly evident in legal systems that continue to prioritise visual representation as a threshold requirement for protection.

⁶ World Intellectual Property Organization, https://www.wipo.int/trademarks/en/trademarks/non_traditional_trademarks.html

⁷ Graeme B. Dinwoodie & Mark D. Janis, *Trademark Law and Theory* 313–18 (Edward Elgar Publ'g 2014)

⁸ Case C-273/00, *Sieckmann v. Deutsches Patent- und Markenamt*, 2002 E.C.R. I-11737.

⁹ Barton Beebe, *The Semiotic Account of Trademark Doctrine and Trademark Culture*, 51 *UCLA L. Rev.* 621, 637–40 (2004).

Indian Legal Framework and The Visual Orientation of Trademark Law

The Trade Marks Act, 1999 provides a broad definition of a trademark and does not expressly exclude non-traditional marks from protection. Under section 2(1)(zb), a trademark includes any mark capable of being represented graphically and capable of distinguishing the goods or services of one person from those of others. On a plain reading, this definition appears flexible enough to accommodate non-traditional trademarks. However, in practice, the requirement of graphical representation has played a decisive role in shaping the scope of registrable marks in India.¹⁰

The requirement of graphical representation was originally intended to ensure clarity, precision, and accessibility of the trademark register. It enables both the registry and third parties to identify the subject matter of protection without ambiguity. While this requirement works effectively for word and logo marks, it creates difficulties for non-visual marks that cannot be easily captured in a static visual form. Smell marks, in particular, pose challenges because scents cannot be represented consistently or objectively through drawings, descriptions, or symbols.¹¹

Indian trademark practice reflects a cautious approach towards non-traditional marks. The Trade Marks Registry has recognised sound marks in limited cases, often requiring submission of musical notation along with an audio recording. This recognition indicates some willingness to move beyond purely visual marks. However, similar clarity does not exist for other categories such as scent, motion, or texture marks. Applications relating to such marks are frequently met with objections on grounds of vagueness, lack of clarity, or failure to satisfy the representation requirement.¹²

Judicial guidance on non-traditional trademarks in India remains limited. Indian courts have primarily dealt with disputes involving traditional word and logo marks, and there is little authoritative jurisprudence addressing the registrability of non-visual marks. In the absence of clear judicial standards or detailed statutory guidance, the registry continues to rely on conventional visual criteria when examining trademark applications. This has resulted in

¹⁰ Trade Marks Act, 1999, § 2(1)(zb) (India).

¹¹ Case C-273/00, Sieckmann v. Deutsches Patent- und Markenamt, 2002 E.C.R. I-11737.

¹² *Manual of Trade Marks Practice and Procedure*, Office of the Controller General of Patents, Designs and Trade Marks, India.

uncertainty for applicants and inconsistent outcomes in practice.

As a result, Indian trademark law continues to operate within a predominantly visual framework, despite statutory language that appears open-ended. The emphasis on graphical representation and visual clarity has restricted the development of non-traditional trademarks and has prevented the law from fully responding to changes in branding practices. This visual orientation forms one of the central barriers to the recognition and protection of non-traditional marks in India.

Challenges in Protecting Non-Traditional Trademarks

One of the principal challenges in protecting non-traditional trademarks lies in the requirement of clear and precise representation. Trademark law depends on certainty, both for the purposes of registration and for informing third parties of the scope of protection. While graphical representation is easily satisfied in the case of word and logo marks, non-visual marks often fail to meet this threshold. Scent marks, in particular, raise difficulties because they cannot be consistently or objectively represented through images, descriptions, or symbols. As a result, such marks struggle to satisfy the requirement of clarity and precision necessary for registration.¹³

A related challenge concerns the assessment of distinctiveness. For traditional trademarks, distinctiveness is commonly established through visual recognition and consumer association. In the case of non-visual marks, however, demonstrating that consumers perceive a sound, shape, or scent as an indicator of source rather than as a functional or aesthetic feature is considerably more complex. Non-traditional marks often require extensive evidence of acquired distinctiveness, including long-term use, consumer surveys, and market recognition. This places a higher evidentiary burden on applicants and limits access to protection primarily to well-established brands.¹⁴

Subjectivity further complicates the protection of non-traditional trademarks. Consumer perception of non-visual elements such as scent or texture may vary based on individual experience, cultural context, or environmental factors. Unlike visual signs, which are relatively

¹³ Case C-273/00, Sieckmann v. Deutsches Patent- und Markenamt, 2002 E.C.R. I-11737

¹⁴ Lionel Bently, Brad Sherman, Dev Gangjee & Phillip Johnson, *Intellectual Property Law* 880–83 (5th ed. 2018).

stable and uniformly perceived, non-visual marks may not produce consistent associations across different consumers. This variability raises concerns about predictability and enforceability, particularly in infringement proceedings where courts must assess the likelihood of confusion.¹⁵

Enforcement presents an additional obstacle. Even where non-traditional marks are recognised, identifying infringement can be difficult in practice. Detecting unauthorised use of a scent or a sound requires technical evidence and expert testimony, increasing litigation costs and complexity. These practical challenges discourage applicants from seeking protection for non-traditional marks and contribute to their limited use within the trademark system.¹⁶

Together, these challenges reflect a broader structural issue within trademark law. The existing framework is designed around visual identification and struggles to accommodate marks that operate through other sensory channels. Without clearer standards and more flexible approaches to representation and distinctiveness, non-traditional trademarks are likely to remain marginal within the Indian trademark regime.

Rethinking Trademark Protection Beyond Visual Marks

The difficulties associated with non-traditional trademarks do not arise uniformly across all categories of such marks. Certain non-traditional marks, particularly sound marks and shape marks, are capable of being represented with relative clarity through musical notation, audio recordings, or three-dimensional depictions. As a result, these categories have received limited but increasing recognition within Indian trademark practice.¹⁷ Their acceptance demonstrates that the requirement of graphical representation is not inherently incompatible with all non-visual marks.

Smell marks, however, continue to present greater challenges. Their protection has historically been resisted due to concerns relating to representation, objectivity, and consistency of perception. Nonetheless, recent administrative developments indicate a gradual shift in approach. In 2025, the Controller General of Patents, Designs and Trademarks accepted for

¹⁵ Barton Beebe, *The Semiotic Account of Trademark Doctrine and Trademark Culture*, 51 *UCLA L. Rev.* 621, 637–40 (2004).

¹⁶ Graeme B. Dinwoodie & Mark D. Janis, *Trademark Law and Theory* 332–35 (Edward Elgar Publ'g 2014).

¹⁷ Trade Marks Act, 1999, § 2(1)(zb) (India); Office of the Controller General of Patents, Designs and Trade Marks, *Manual of Trade Marks Practice and Procedure* (India).

advertisement an application seeking protection for a scent mark described as a floral fragrance reminiscent of roses as applied to tyres.¹⁸ This marked the first instance in which an olfactory trademark application progressed beyond the examination stage in India.¹⁹

While acceptance for advertisement does not amount to registration, it is significant. It indicates that non-visual marks are not legally barred under the Trade Marks Act, 1999, provided that the statutory requirements of representation and distinctiveness are satisfied.²⁰ At the same time, the exceptional nature of this acceptance underscores the absence of settled standards governing the examination of smell marks and highlights the cautious approach adopted by the registry.

These developments point to the need for a more functional understanding of trademark protection. Rather than focusing narrowly on visual form, trademark law should assess whether a sign is capable of performing its essential function of indicating commercial origin. Comparative developments show that flexibility in representation so long as it is clear, precise, and accessible can preserve legal certainty while accommodating evolving branding practices.²¹

Greater clarity in administrative practice would further support this shift. Detailed examination guidelines addressing representation methods, evidentiary standards for distinctiveness, and category-specific concerns would reduce uncertainty for applicants and ensure consistent decision making. Judicial engagement with non-traditional trademarks may also play an important role in clarifying how existing statutory provisions should be applied to evolving forms of branding. Trademark protection beyond visual marks requires careful, gradual change rather than a complete shift in existing law.

Conclusion

Trademark law has traditionally been built around visually perceptible signs, reflecting earlier forms of trade and branding. However, contemporary commercial practices increasingly rely on non-visual elements such as sound, shape, and, in limited instances, scent to create brand

¹⁸ Vikrant Rana & Huda Jafri, *India's First Smell Trademark: CGPDTM Accepts Rose Fragrance for Tyres*, S.S. Rana & Co. (Nov. 24, 2025).

¹⁹ Trade Marks Act, 1999, § 20 (India) (acceptance and advertisement of trademark applications).

²⁰ Trade Marks Act, 1999, §§ 2(1)(m), 2(1)(zb) (India).

²¹ Case C-273/00, Ralf Sieckmann v. Deutsches Patent- und Markenamt, 2002 E.C.R. I-11737; Regulation (EU) 2017/1001, art. 4; Directive (EU) 2015/2436, art. 3(b).

recognition and consumer association. While Indian trademark law does not expressly prohibit the protection of non-traditional marks, its continued emphasis on graphical representation has limited their wider acceptance in practice.

Recent developments, including the acceptance of an olfactory trademark application for advertisement, suggest a gradual shift in administrative thinking. At the same time, the exceptional nature of such cases highlights the absence of clear and consistent standards governing the examination of non-visual marks. This uncertainty increases the evidentiary burden on applicants and restricts the practical use of non-traditional trademarks.

Looking ahead, the debate surrounding other forms of sensory trademarks, particularly taste marks, raises further questions about the future scope of trademark protection. Unlike sound or shape, taste is closely linked to the inherent characteristics of products and poses significant challenges in terms of representation, distinctiveness, and functionality. As discussions on taste trademarks continue to emerge in academic and policy circles, further research is needed to examine whether existing trademark frameworks can meaningfully accommodate such sensory signs without undermining core trademark principles.²²

To remain responsive to evolving branding practices, trademark law must adopt a more functional approach that focuses on the source-identifying role of a mark rather than its visual form. Gradual and measured reform through clearer administrative guidelines, scientific methods of representation, and judicial interpretation may offer a pathway for the future registration of sensory trademarks, while preserving legal certainty and consumer protection.

²² Case T-508/08, *August Storck KG v. OHIM*, 2010 E.C.R. II-0000; *In re N.V. Organon*, 79 U.S.P.Q.2d 1639 (T.T.A.B. 2006); World Intellectual Property Organization, *Non-Traditional Marks* (WIPO).