
UNVEILING THE OLFACTORY SIGNATURE: A CRITICAL ANALYSIS OF THE LEGAL CONCEPT OF THE SMELL TRADEMARKS IN INDIA

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ABSTRACT

All across the world, rules that protect trademarks are continuously being updated and revised. The breakthroughs and advancements that have been seen in the field of trademarks in recent times are classified as "non-conventional trademarks." These trademarks embrace not only the senses of taste, smell, and sound, but also other senses. The process of registering smell markers is viewed differently by various administrations depending on the country. Since it is an ever evolving concept in the current world, this paper will be going into what the concept is first, then it will be looking into the scenario/ position which smell trademarks are at in India, so as to understand the situation with regards to an international, as smell trademarks are the next big advantage companies can enjoy in the global competition. And then finally the paper will look into the registration for the marks and as well as the different arguments which have been extended globally towards such smell mark registrations (both in favor as well as against), so that for a nation like India which has a lot of progress to achieve in it in the future, is able to get a better idea about it, and thus be able to go for it with a better and calculated approach.

INTRODUCTION

In the modern era, the world is continuously expanding. In an effort to profit on the accelerating pace of globalization, technological advancement, and commercialization, businesses and trade associations are engaged in a ruthless competition to appeal to the senses of smell, taste, and hearing of customers. The sense of smell has been considered the most important sense for a very long time because it is the sense that people use on a daily basis. The discovery that particular aromas have the ability to affect people's states of mind has been of great use to a great number of businesses in terms of generating a great deal of revenue.¹

When most people refer to conventional trademarks, they mean ocular trademarks, which comprise colors, pictures, and other visually identifiable symbols. But in recent years, new kinds of trademarks that engage other senses—sight, sound, touch, smell, and so on—have surfaced.² Despite their widespread use in international trade, the requirement for territory-specific registration renders these non-ocular trademarks invalid on a worldwide scale.

Conventional marks have historically been safeguarded by India's Trade Marks Act, 1999, and include labels, brand names, words, packaging, product shapes, and color combinations.³ New marks, on the other hand, are becoming increasingly popular as a method of determining the origin of goods and services when business sectors and time periods undergo change. Using these markings to market and brand things is a contemporary and fashionable approach to do so. The term "unconventional trademarks" refers to these types of trademarks since, in comparison to regular marks, they are relatively new. Marks that reflect motion, sound, shape, gesture, texture, or even just one color are examples of non-traditional symbols that are beginning to be recognized and registered as trademarks in a number of nations. During the registration process, however, there are also difficulties associated with taste and smell markers, which are not visual signals. The trademark's distinctiveness, the necessity of its visual depiction, and the mark's functional purpose all give rise to problems.⁴

¹ Abhijeet Kumar, "Protecting Smell Marks: Breaking Conventionality" JIPR

² Neeti Suri, "Single Colour Mark: It's Registrability in the United States and the United Kingdom"

³ The Trade Marks Act, 1999

⁴ AKANKSHA CHOUDHAR, Position of Smell Marks and Taste Marks: India vs Developed Nations, International Journal of Law Management & Humanities, 2022

SMELL TRADEMARKS

An olfactory mark is a way to distinguish one product from another that shares the same scent. The ability to identify an object by its scent has been around for quite some time. But the scent or aroma was not recognized or even protected as a trademark until much later.⁵

Scent trademarks allow a person to claim ownership of a specific aroma. The practice of adding odors or fragrances to items in order to distinguish them from competing products gave birth to the notion of smell marks. The factory sense is one of humans' most powerful senses for remembering information. It is now feasible to register a fragrance mark, but only if the scent can be represented graphically. We have a maelstrom of registration problems here. Attempts to describe such an odor must be accurate enough to eliminate any potential of confusion. Furthermore, it cannot be a naturally occurring odor that requires documentation.⁶

POSITION IN INDIA

Following the implementation of the Trade Marks Act of 1999 in India, the country's registration rates for distinctive trademarks have fallen behind those of other developed nations, particularly the United States of America, the United Kingdom, and the member states of the European Union. According to the draught manual for the Trade Marks Act, which is called the Manual for Trademark Practice & Procedure, this is the manner in which India has followed the example set by the European Union.

In India, there have not been many unusual marks that have been registered.⁷ But, in the last fifteen years, there have been some notable advancements in the field of unusual trademarks in India, and the government is gradually moving towards incorporating unorthodox marks within its trademark rules. Sections 2(1)(zb) and 2(1)(m) of the Trade Marks Act demonstrate that the definition of trademark has been enlarged to cover forms, packaging, and color combinations.⁸

On the other hand, it seems that there is a dearth of information regarding smell markers in Indian law. As far as we can determine, there has been very little progress made in terms of offering protection against smell markings. Furthermore, as stated in Section 3 of the Draft

⁵ PRERANADAS, A Comparison of Laws on Olfactory Marks vis-a-vis the National and the International Sphere, International Journal of Legal Science and Innovation

⁶ Recognition of Smell as A Trademark in India, AMLEGALS

⁷ Dev Gangjee, "Non-Conventional Trade Marks in India", JSTOR

⁸ Trade Marks Act, 1999

Manual, a trademark is defined as any mark that can be visually displayed and is utilized to separate the goods or services of one individual from those of another individual. However, throughout the entire process of registration, great consideration must be given to characteristics such as shape, color, sound, and scent. Furthermore, Rule 25 (12) (b) of the Trademark Rules, 2002 specifies pictorial representation, whereas Rules 28 and 30 require the representation to be durable on paper. As a result, this presents a considerable disadvantage in recognizing scent marks as legal trademarks in India.⁹

Olfactory or fragrance trademarks in India are not covered by the Act. The idea does not rule out olfactory markers; however, it is difficult to visually represent these indicators. For information on how to register a trademark in India, the Trade Marks Registry released a Draft Manual on Trade Marks in 2009. It provided light on trademarks for "fragranced goods," which are only eligible for registration if they can be visually represented and set apart from competing items.¹⁰

According to the Draft Manual, "Based solely on scent, consumers of such fragranced goods are unlikely to attribute the origin of the products to a single trader." For the purposes of trademark registration, regardless of the circumstances, a mark that is not "graphically represented" will not be regarded as such.¹¹

This criteria of consideration are a result of a landmark European court case. It was the case of *Sieckmann v. German Patent and Trade Mark Office*¹². The European Court of Justice ruled in this case that in order to register an odor as a trademark, it is necessary for it to be graphically represented and have the ability to differentiate the products or services of one company from those of another.

The Trademark Regulation of India continues to stress that a trademark must be able to be represented graphically. Nonetheless, prior conventions and treaties have been held wherein the registration of a trademark has been granted without regard to the need for a pictorial representation of the brand.¹³ Thus, it may be concluded that the present framework of Indian

⁹ PRERANADAS, A Comparison of Laws on Olfactory Marks vis-a-vis the National and the International Sphere, *International Journal of Legal Science and Innovation*

¹⁰ Mridula Bhat†, The Case of Unconventional Trade Marks — Does the Trade Marks Act, 1999 Need Reform?

¹¹ Manual of Trade Marks, 2009

¹² *Sieckmann v. German Patent and Trade Mark Office*, 2002

¹³ Garry Trillet, "Registrability of smell colour and sounds: how to overcome the challenges dressed by the requirements of graphical representation and distinctiveness within European Union Law?"

trademark rules does not accommodate the use of smell marks. Given the availability of alternate descriptions, like the one accepted by the EU, the inflexibility of visually depicting a trademark can be reevaluated. The fragrance mark is only one of many unusual trademarks that have emerged from such alternate descriptions.¹⁴

JUDICIAL OUTLOOK

Since the idea of smell markings is novel to the Indian subcontinent, its development would be gradual. The *Delhi High Court*, in *Cadbury India Limited & Ors. v. Neeraj Food Products*¹⁵ asserted that it was simple to see why most refusals to register non-traditional markings, particularly smell marks, occurred globally. When it comes to olfactory signs, a chemical formula, a textual description, the deposit of an odors sample, or any combination of those things won't be enough to satisfy the graphic representation standards.

*Dharampal Satyapal Ltd. v. Harnarain Das Gajanand*¹⁶: The *Delhi High Court*, in this particular instance, acknowledged the auditory characteristics of a bell as a registered trademark associated with the commercialization of paan masala. And *ITC Limited v. Nestle India Ltd.*¹⁷: In this instance, the *Delhi High Court* acknowledged as a non-traditional trademark the registration of a three-dimensional trademark in the form of a chocolate bar. While neither of these instances pertains specifically to olfactory trademarks, they do illustrate the judiciary's readiness to grant trademark protection to unconventional substances.

These cases indicate that Indian courts are amenable to recognizing non-traditional trademarks, including olfactory trademarks, so long as they are distinct, non-functional, and visually identifiable. As a result of the novelty of the concept within the legal framework of India, specific case law concerning smell trademarks is scarce.

REGISTRATION OF SMELL MARKS

When registration of scent marks is done, then there are two conditions that need to be fulfilled. If they are not, then the entire purpose of the process shall fail, thus making the jurisprudence

¹⁴ Intellectual Property and Technology Laws Society of NUJS, Smell Trademarks in India

¹⁵ *Cadbury India Limited & Ors. v. Neeraj Food Products*, 2007

¹⁶ *Dharampal Satyapal Ltd. v. Harnarain Das Gajanand* (2006)

¹⁷ *ITC Limited v. Nestle India Ltd.* (2012)

behind it irrelevant. The conditions are:

- A. For the scent of the product to bear any influence during the sale, it need to be available during that point, i.e. the consumer should have access to the scent whilst they are purchasing. If they need to wait till they have arrived at home and use it to know about the scent, then it has lost any influence and impact with regards to convincing the consumer to go for the product, even if they manage to have a very unique scent which can attract consumers and increase the sales.¹⁸
- B. Secondly, it's not only important that the consumers are able to differentiate between and recognize certain smells from each other. Just being familiar with the scent isn't enough. The consumers should also be able to relate the smell to the product, thus creating an identity of its own for the product with the help of the scent, and it also needs to be possible on a regular basis, thus ultimately upholding the purpose of the trademark.

These can also be termed as hurdles that come in the process of registration. And according to *Bettina Ellias*, most of the times, these conditions will be possible to be met, thus resulting in a failure of the process.

DISCUSSIONS PERTAINING TO SMELL TRADEMARKS

From the research so far we have understood that the field of smell as a mark is an evolving area of jurisprudence. In the countries mentioned above as well as many other nations, we can grasp that it has been recognized and accordingly nations have made their respective provisions. However, when one is to compare the standards that the nations have established respectively it is evident that there are contradictory aspects with regards to each of them. Therefore, uniformity towards the approach is one thing that needs to be achieved.

Now, during this, there have been certain arguments that have been provided by people when discussing about smell as a mark. Some have been in favor for such marks, with regards to this, the contributions of *J.E Hawes* (first to advocate for its protection) are most notable, and there

¹⁸ Ellias B, do scents signify source: An Argument Against Trademark protection for fragrances

have been arguments against such marks also, most notably by *Bettina Ellias*, who provided criticisms against Hawes.

Now, some of the arguments which people have discussed about are provided below:

Arguments in Favor

1. The role of fragrance in today's market is not only to provide a smell to a product to sell, but also to provide a sense of distinction between it and other products.¹⁹ Since odors elicit associations in the brain that aid in recognition, their efficient registration will result in an increase in brand recognition.²⁰
2. The reason scents act as an effective trademark is due to the relationship which it has with regards to human memory. When one tries to think or recall back to an odor, they try and recall the product which is associated with the smell.²¹ And once an association has been established, it stays and can hardly be replaced and associated with a different product.
3. Consumers may develop a preference for one product over another due to the scent, which can activate the brain's emotional centers thus letting them have a more satisfying shopping experience as a result. Customers that are satisfied are more inclined to become repeated customers or in fact try different products of the brand.²²
4. Also, with respect to certain products, their quality can be determined by the customers through their smell. Thus, products which are of high quality, such as in the case of tea and coffee, can be determined through their smell, thus increasing their value. And in fact, smell is such a mark which can help even visually impaired or illiterate consumers in determining the good quality and value of a product.
5. And finally, having a successful registration will ensure that a successful product with its own unique fragrance does not suffer the problem of imitation.

¹⁹ Brown A & Grant A, *The Law of Intellectual Property in New Zealand*, 1989

²⁰ J.E. Hawes, *Fragrances as Trademarks*

²¹ Faye M H, *The Smell of Success: Trade dress protection for scent marks*, *Marquette International Property Law Review*, 1985

²² PRERANA DAS, *A Comparison of Laws on Olfactory Marks vis-a-vis the National and the International Sphere*, *International Journal of Legal Science and Innovation*

Arguments in Against

1. When registering the mark, the manufacturer of the product needs to establish that if similar scents are replicated, it can cause a situation of confusion. Protection from infringement is not sufficient for protection.²³
2. One of the biggest aspect is the practical technicalities which arise when registering. Without seeking expert help, distinguishing between similar blends is difficult and thus creates an issue when establishing scent marks.²⁴
3. The judicial administration of a component which has is so very subjective in nature with respect to peoples' perception towards it, is quite a difficult and unreliable task, thus creating challenges in there being trademarks.
4. Finally, when registering, how scents scan be described is an important aspect. Therefore, when there are instances where it's hard to describe a smell, it creates problems in the registration process.

CONCLUSION

The capacity to differentiate between products that are identical and the protection afforded by trademarks are both beneficial to consumers. The scope of trademark recognition has expanded beyond more conventional marks as a result of the improvements in modern civilization and technology. The evaluations of a large number of agencies, in addition to the national and international laws and regulations that were discussed before, illustrate that the idea of non-traditional trademarks is original and is still developing. There is still a degree of ambiguity around the protection of non-traditional marks in the realm of intellectual property. Because sounds, tastes, and scents are frequently significant aspects of goods, one could argue that monopolies should not protect them because, in contrast to traditional trademarks, they are usually not protected.²⁵

It is not possible to successfully register a trademark for a non-traditional mark simply due to

²³ Ellias B, Do scents signify source: An Argument Against Trademark protection for fragrances

²⁴ Ibid

²⁵ PRERANA DAS, A Comparison of Laws on Olfactory Marks vis-a-vis the National and the International Sphere, International Journal of Legal Science and Innovation

the fact that it cannot be physically or visually represented. On the other hand, there have been instances in which courts and authorities have registered non-traditional marks regardless of the circumstances. This was due to the fact that their brands were able to differentiate their related products from those of their competitors in a way that was both understandable and distinct. However, the rare risk that is connected with smell mark registration can be resolved by a combination of technology that is deployed by various Trademark Offices across the world and a robust body of case law. This risk stems from the absence of a visual depiction as well as the random and arbitrary nature of fragrance or smell.

In order for Indian firms to be able to register distinctive trademarks and compete on a global basis, the Trademark Act ought to incorporate smell and taste marks as an additional step towards distinguishing unusual trademarks. In order to overcome these problems and make it possible to register rare markings, it is necessary to develop precise standards for the visual representation, usefulness, and distinctiveness of these markings. As opposed to enacting a law that prohibits the registration of any and all unorthodox marks, it is vital to evaluate the registration of unconventional trademarks on an individual basis.²⁶

²⁶ AKANKSHA CHOUDHAR, Position of Smell Marks and Taste Marks: India vs Developed Nations, *International Journal of Law Management & Humanities*, 2022