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# NON-TRADITIONAL TRADEMARKS IN INDIA: LEGAL RECOGNITION AND EVIDENTIARY CHALLENGES

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## ABSTRACT

The evolution of modern branding has transformed trademarks from simple word and device marks into multi-sensory commercial identifiers, compelling legal systems to reconsider the scope of trademark protection. In India, the expansive definition of a “mark” under the Trade Marks Act, 1999 has opened the door to the recognition of non-traditional trademarks, including shape, sound, colour combinations, motion, pattern, and hologram marks. Despite this statutory inclusivity, their practical registration and enforcement remain legally complex and evidentially demanding.

This paper undertakes a doctrinal and analytical study of the legal recognition of non-traditional trademarks in India, examining statutory provisions, registry practices, and judicial interpretation. Particular attention is paid to the requirement of graphical representation, the doctrine of functionality under Section 9(3), and the heightened burden of proving acquired distinctiveness or secondary meaning. While instances such as the registration of sound marks indicate progressive administrative developments, the protection of colour, shape, and other sensory marks continues to face restrictive scrutiny due to competition policy concerns and the risk of overbroad monopolisation.

The paper argues that although Indian trademark law is structurally capable of accommodating non-traditional marks, the evidentiary threshold operates as a significant limiting mechanism. By analysing the tension between commercial innovation and market fairness, this study highlights the need for clearer doctrinal standards and calibrated evidentiary guidelines. It concludes that the future of non-traditional trademark protection in India depends on harmonizing statutory interpretation with evolving branding realities while preserving the competitive foundations of trademark law

**Keywords:** Non-Traditional Trademarks; Unconventional Trademarks; Indian Trademark Law; Trade Marks Act 1999; Graphical Representation Requirement; Functionality Doctrine; Acquired Distinctiveness; Competition Policy; Multi-Sensory Branding; Intellectual Property Enforcement.

## INTRODUCTION

“Kya swaad hai zindagi mein.”<sup>1</sup>

For those who grew up in India in the late twentieth century, such expressions were never merely advertising slogans; they are fragments of lived experience. Certain sounds, colours, and visual motifs became inseparable from the nostalgia of childhood evenings, television interludes, festive gatherings, and shared cultural rhythms. These impressions endure not as conscious recollections, but as sudden sensory awakenings - what literary discourse describes as the “Proustian moment”<sup>2</sup>

In “In Search of Lost Time”,<sup>3</sup> Proust famously recounts how the taste of a madeleine dipped in tea releases an involuntary flood of childhood memories from Combray. This phenomenon - where sensory stimuli unlock deeply embedded emotional memory - illustrates that perception is not merely cognitive; it is affective and associative. Modern branding operates precisely within this psychological terrain.

In an era of immersive branding, jingles linger longer than taglines, colour palettes evoke loyalty beyond logic, and product shapes communicate identity without words. The evolution of marketing from visual distinctiveness to multi-sensory resonance has compelled trademark law to confront a critical question: what truly constitutes a “mark”?

Historically, Indian trademark protection centred upon visible identifiers - names, logos, symbols, or device marks. Yet, as branding strategies increasingly appeal to sound, colour, motion, and spatial configuration, the law has been drawn into reconsidering the boundaries of proprietary identity. Sensory marketing has thus catalysed a doctrinal shift, urging jurisdictions such as India to engage with non-traditional trademarks, particularly sound and colour marks, while navigating the delicate balance between emotional imprint and legal exclusivity.

Section 2(1)(zb) of the Trade Marks Act, 1999,<sup>4</sup> defines what is meant by a ‘trademark’ as follows:

“...a mark which is capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may, in particular, consist of shapes of goods, their packaging, and the combinations of colours.”

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<sup>1</sup> Ogilvy & Mather, *Cadbury Dairy Milk: Asli Swad Zindagi Ka* [Television commercial] (India: Cadbury India, 1994).

<sup>2</sup> Santhana Krishnan K.G., *The Relevance of Dreams in the Proustian World*, 9 *Indian Journal of Applied Research* 9 - 11 (Apr. 2019).

<sup>3</sup> Marcel Proust.

<sup>4</sup> *Trade Marks Act, No. 47 of 1999*, § 2(1)(zb), India Code (1999).

The definition is, on first glance, at once expansive and progressive. However, there is a hidden and restrictive criterion inherent in it - namely, the criterion of graphical representation.

The requirement of graphical representation is a legacy of an age when trademarks were thought of as signs - inscriptions - that could be displayed and inscribed on paper, catalogued and recorded, and reproduced with exactitude. It was a requirement of legal certainty - a requirement that ensured a trademark was represented clearly and could thus be bounded and defined. In other words, it was a requirement of limitation - a requirement that ensured a trademark could be monopolised and limited. Thus, it was not merely a procedural requirement but a structural one - one embedded in the very theory of trademarks.

But we live in a world where communication is not limited to the visual - where brand identification is as likely to be conveyed through a sound repeated for three seconds, a particular gradient of colours, or a recurring pattern of movement as it is through a logo. We live in a world where the consumer is likely to encounter a brand before encountering its name, where brand identification is likely to take place before brand identification is even cognitively processed.

This evolution puts pressure on the classical emphasis placed on graphical representation. If a sound mark is reduced to musical notation, or a motion mark is reduced to static frames, the law is trying to translate sensory experience into visual representation. The question then arises: is this representation capturing the true essence of the mark, or is the law merely taming the mark into a form that is more amenable to administration by the registry?

Trademark jurisprudence in India suggests a tentative but perceptible shift in this area. The law remains committed to the idea of graphical representation, but administrative practice is increasingly accepting technological tools such as audio files and digital submission, suggesting a degree of flexibility in interpretation.

This progression towards a less rigidly conservative approach does not mean that the protections afforded by the law are abandoned, but that there is an increasing recognition that the need for certainty in the law of trademarks must be balanced with the need to adapt to the modes of communication that are prevalent in the contemporary world of brands. In the digital world, the need to represent may not be bound by the traditional means of ink and paper, but may instead be found in the reproducibility, accessibility, and objective clarity that such means may be able to achieve.

The real issue, therefore, is not that the non-traditional mark may not be represented, but that the law may be willing to rethink the very nature of what representation means without abandoning the core

principles that underlie the law of trademarks.<sup>5</sup>

### **EXPANDING TRADEMARK SUBJECT MATTER IN A MULTI-SENSORY AGE**

For decades, people and businesses have tried to tap into the evocative potential of scents. The scent of a certain cologne can instantly evoke the presence of one's father. The scent of a certain fragrance can make the past and the present collapse into one another within the span of mere seconds. Even before the term "sensory branding" became fashionable, the cultural industries have been experimenting with the psychology of scents. For instance, the 1950s witnessed the advent of cinematic innovations such as AromaRama and Smell-O-Vision, which sought to incorporate scents into the theatre experience, enhancing the audience immersion. The more recent technologies such as 4DX take this idea one step further by adding motion seats, wind, rain, and scents to the cinematic experience.

While the experiments have been varied with respect to their success, one common factor has been the acknowledgment of the fact that human perception and memory are both multi- and meta-sensory. In the present day, with the market becoming increasingly saturated and visual clutter diminishing the effectiveness of brand logos and slogans, businesses are not just competing for visibility and awareness, they are competing for memory and brand imprint. The ability to differentiate and the ability to be remembered have both become essential for businesses. The non-traditional trademarks arise out of this reality and the resultant need for businesses to differentiate and be remembered. Non-traditional trademarks go beyond the traditional name and logo and include sound, colors, scents, motion, texture, shapes, positional identifiers, and all those features which can be perceived and which can signify the business or the brand. The law therefore has to deal with the reality that brand identity and trademarks have transcended the visual and have entered the realm of the sensory. The law therefore has to balance the acknowledgment of non-traditional trademarks with the need to keep the competitive freedoms alive<sup>6</sup>. The recognition of scent as a potential trademark exposes the law to one of its most intricate challenges. Unlike sound, which may be reduced to notation, or colour, which may be coded digitally, smell resists stable visual abstraction. Its essence lies in experience rather than depiction. This difficulty directly engages the requirement of graphical representation: how does one confine, define, and publish a

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<sup>5</sup> Gautham Balaji, *Traditional Trademarks in India: Challenges, Milestones, and Future Prospects*, Depenning (July 9, 2025), <https://depenning.com/blog/securing-non-traditional-trademarks-in-india-challenges-milestones-and-future-prospects/> (last visited Mar. 3, 2026, 20:07 pm).

<sup>6</sup> Laurence Minsky, Colleen Fahey & Caroline Fabrigas, *Inside the Invisible but Influential World of Scent Branding*, *Harvard Business Review* (Apr. 11, 2018), <https://hbr.org/2018/04/inside-the-invisible-but-influential-world-of-scent-branding> (last visited Mar. 3, 2026, 17:15).

fragrance in a manner that is clear, precise, self-contained, durable, and objective? Attempts in comparative jurisdictions to describe scents through chemical formulae, verbal descriptions, or samples have revealed the inadequacy of traditional representational tools. A chemical composition does not communicate the perceptible odour; a verbal description lacks objectivity; deposited samples deteriorate. The challenge is not merely procedural - it is ontological. Scent is inherently experiential.

Even if representational hurdles are overcome, the evidentiary burden of establishing distinctiveness remains formidable. Smell is often perceived as functional - masking odours, enhancing product appeal, or signalling freshness. In such cases, the doctrine of functionality intervenes. If a fragrance serves a utilitarian or aesthetic purpose intrinsic to the product itself, granting exclusive rights risks conferring competitive advantage beyond source identification. The applicant must therefore demonstrate that the scent operates not as product enhancement, but as a badge of origin - a task requiring compelling evidence of acquired distinctiveness and consumer association.

At a deeper level, however, the debate over scent marks invites engagement with cognitive science and memory theory. Neuroscientific research indicates that olfactory stimuli are uniquely linked to the limbic system - the brain's centre for emotion and memory - explaining why smells evoke particularly vivid recollections. Unlike visual stimuli, which undergo layered cognitive processing, scent often triggers immediate emotional recall. This psychological reality strengthens the argument that smell can, in principle, function as a powerful source identifier. If a consumer consistently associates a particular fragrance with a single commercial source, the core objective of trademark law - distinguishing goods in the marketplace - may well be satisfied.

Yet herein lies the doctrinal tension. The very intensity with which scent binds memory could justify exclusivity, while its ubiquity in functional product design cautions against monopolisation. The law must therefore operate with calibrated restraint. Recognition cannot rest upon emotional potency alone; it must be anchored in demonstrable distinctiveness, non-functionality, and competitive neutrality.

In this sense, scent marks represent the frontier of non-traditional trademark jurisprudence. They compel courts and registries to translate sensory psychology into legal criteria, to balance immersive branding against market access, and to reconcile the human dimension of memory with the structural discipline of intellectual property law.

And that is precisely the point at which the tension in the doctrine emerges. The very strength with which scent attaches to memory may be seen to underpin the case for exclusivity, while the ubiquity with which scent is used in functional product design serves as a reminder that there should be no monopolisation.

In this sense, scent marks are the very vanguard of non-traditional trademarks as a legal doctrine. They require that the law engage with the science of perception, that the law balance the immersive nature of scent with the imperative of accessibility, and that the law reconcile the humanistic aspect of memory with the formalistic approach to intellectual property law.

## **EVOLUTION OF MODERN BRANDING**

As industrialisation gradually reshaped India's economic landscape, commerce evolved from localised exchange to organised competition. With mechanised production and expanding markets came a new urgency: identity. Businesses required symbols capable not merely of marking goods, but of distinguishing reputation in increasingly crowded marketplaces. Protection of names, signs, and commercial insignia thus became indispensable to sustaining goodwill and consumer trust.

The earliest trademark disputes in India were addressed under Section 57 of the repealed Specific Relief Act, 1877,<sup>7</sup> through injunctions enforcing negative covenants, supplemented by principles under the Registration Act, 1908.<sup>8</sup> These remedies, however, were fragmented and inadequate for a rapidly modernising economy. Recognising this lacuna, the colonial administration enacted the Trademarks Act, 1940,<sup>9</sup> modelled upon British legislation. Subsequent consolidation through the Trade and Merchandise Marks Act, 1958<sup>10</sup> and eventually the Trade Marks Act, 1999, reflected India's gradual transition from inherited statutory frameworks to a comprehensive and internationally harmonised trademark regime.

Yet the statutory evolution of trademark law mirrors a deeper commercial transformation - the evolution of branding itself. Traditional trademarks once centred upon visible identifiers: words, devices, numerals, and labels affixed to goods. However, modern branding operates within a sensory and experiential economy. Identity today is conveyed not only through logos, but through product shapes, motion sequences, colour palettes, packaging contours, textures, and even scent. Non-conventional trademarks - encompassing shape, movement, smell,

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<sup>7</sup> Specific Relief Act, No. 3 of 1877, § 57 (India) (repealed).

<sup>8</sup> Registration Act, No. 16 of 1908, India Code (1908)

<sup>9</sup> Trade Marks Act, No. 16 of 1940, India Code (1940)

<sup>10</sup> Trade and Merchandise Marks Act, No. 43 of 1958, India Code (1958).

outline, and texture - arise from this broader understanding of brand communication.

Initially, the recognition of such marks was constrained by strict formal requirements, most notably the insistence upon graphical representation, crystallised in the jurisprudential standards commonly associated with the Sieckmann criteria. These demanded precision, clarity, durability, and objectivity in representation, thereby limiting the registrability of sensory marks. However, contemporary regulatory developments, including Article 4(b) of the European Union Trade Mark Regulation (EUTMR)<sup>11</sup> reflect a conceptual shift from rigid graphical depiction toward broader requirements of clear and precise subject-matter identification. The emphasis has moved from form to certainty.

In India, while filings continue to be dominated by traditional word and device marks, interest in non-traditional trademarks is steadily emerging. Businesses operating in saturated digital and consumer markets increasingly seek distinctive sensory identifiers to create emotional differentiation. The relatively modest number of such applications does not reflect insignificance, but rather the evidentiary and doctrinal caution with which they are examined.

Internationally, institutions such as the World Intellectual Property Organization have undertaken comparative studies on non-traditional trademarks, signalling global recognition of their growing relevance. The expansive definition of “mark” under the Trade Marks Act, 1999 provides structural space for this evolution. The question is no longer whether the law can accommodate modern branding, but how it will calibrate protection to preserve both innovation and competition.

Thus, the trajectory of Indian trademark law - from colonial injunctions to multi-sensory branding - reflects more than statutory amendment. It reveals an ongoing dialogue between commerce and law, where each industrial transformation compels the legal system to reconsider what it means to identify, to distinguish, and ultimately, to own a brand in the modern marketplace.

Nevertheless, modern developments in regulation, like Article 4(b) of the EU Trade Mark Regulation (EUTMR), indicate a move from the strict graphical representation to a broader concept of clear and precise identification of subject matter. The focus has shifted from form to certainty.

Regarding India, although there remains a preponderance of filing applications in the form of

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<sup>11</sup> Council Regulation 207/2009, 2009 O.J. (L 78) 1 (EC) (as amended) (EUTMR).

word marks and device marks, there remains a growing interest in non-traditional marks. For instance, in a highly saturated digital world, business entities require unique identifiers that appeal to the senses. Although the numbers of non-traditional trademark applications in India remain relatively low in number, this does not indicate that they hold no significance. In fact, it simply points to the fact that evidence of non-traditional trademark applications in India remains limited. In addition, the fact that the Trade Marks Act, 1999, includes an expansive meaning of the term "marks" provides structural space for non-traditional trademark development.

The question being posed in modern India is not whether there remains space for non-traditional trademark development; rather, it remains how it will be calibrated to protect innovation and competition. In conclusion, the development of trademark law in India from colonial times to the modern concept of non-traditional trademark identification remains more than simply statutory change. In fact, it points to the broader concept of an ongoing dialogue between business and law. In essence, with every change in business process, trademark law in India has been forced to re-examine its very meaning of identification, distinction, and ownership.

### **THE EMERGENCE OF NON-TRADITIONAL TRADEMARKS**

One of the primary pre-conditions for the registration of trademarks in India is that the mark must be capable of graphical representation, both physical and digital. The rationale for this pre-condition has been the need for precision and administrative certainty - the mark must be depicted with sufficient clarity to enable the scope of the exclusive right it represents to be defined. Yet, while ensuring legal certainty, this pre-condition has also been found to be problematic for non-traditional marks whose essence exceeds visual representation.

It would seem that the Indian system of trademarks is presently witnessing a degree of evolution. The Trade Marks Registry has started accepting sound marks, which include distinctive audio identifiers for brands such as Yahoo and Allianz. The rationale for this seems to be the acknowledgment that brand identity can be found not just in visual signification, but also in the audio experience. The judicial pronouncement on this issue has also been expansive: the Delhi High Court has recognized the distinctive configuration of Zippo lighters as capable of functioning as a source identifier, thus acknowledging the possibility of three-dimensional shapes being registrable.

To complement this, the revised Registry guidelines now specifically deal with non-traditional

trademarks. By differentiating between “visible signs,” which include “colour combinations and three-dimensional trademarks,” and “non-visible signs,” which include “sound and scent,” the Registry has attempted to provide clarity while at the same time adapting to the changing face of trademarks.

The interesting aspect in all this is that this evolution takes place in a comparative context that is in a state of flux. While Indian law on trademarks traditionally follows British legislative models, recent developments point to subtle differences. While British law is gradually coming in line with European Union model legislation on regulation, India is gradually developing its own context-driven approach to trademarks, blending traditional legislative models with its own economic realities.

The picture that emerges is that of evolutionary development rather than revolution, recognizing that trademarks must evolve with innovations in branding while at the same time not undermining the basic tenets of certainty, fairness, and balance in competition.<sup>12</sup> The growing recognition of non-visual marks in India can be traced to international obligations as well. Article 15(1) of the TRIPS<sup>13</sup> agreement states that “any sign, or combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings shall be capable of constituting a trademark.” The broadness of this statement is deliberate. The article does not restrict itself to visual marks. Moreover, there is no express mention of graphical signs. The purposive interpretation of this article supports the recognition of non-visual marks as being within the purview of trademark law as long as they perform the fundamental task of identification.

Indian law is slowly aligning itself with the interpretive flexibility of the TRIPS agreement. Rule 26(5) of the Trade Marks Rules<sup>14</sup> states that in cases of the application for the registration of a sound mark, the applicant can submit an MP3 recording not exceeding thirty seconds in length. In addition to this, the applicant can submit a graphical representation of the sound in the form of musical notation. In this instance, the law attempts to give expression to sound.

The placement of colour marks, however, suggests a more circumspect approach. Although the Trade Marks Act specifically includes combinations of colours as registrable, single colours

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<sup>12</sup> Gautmi Goel & Dr. Kanika Tyagi, *Beyond Traditional Boundaries: Protection of Non-Conventional Trademarks in Modern Commerce*, 5(3) *Int'l J. of Advanced Legal Research* (Feb. 2025), <https://ijalr.in/volume-5-issue-3/beyond-traditional-boundaries-protection-of-non-conventional-trademarks-in-modern-commerce-gautmi-goel-dr-kanika-tyagi/> (last visited Mar. 3, 2026, 22:47 pm).

<sup>13</sup> Article 15(1), *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*.

<sup>14</sup> Rule 26(5), *Trade Marks Rules, 2017* (India).

themselves are not specifically addressed. However, a more stringent evidential standard is imposed on single colours, where they must have acquired secondary meaning and been identified solely as coming from a single source. Furthermore, it is necessary for the applicant to show that it is not fulfilling any function, either visually or functionally, for the product itself. This more detailed approach is likely a reflection of the judiciary's concern for ensuring that too great a degree of exclusivity is not granted for single colours, and as a result, there is less scope for other players in the market.

This suggests that, despite the space created for non-visual signs under international law and national procedure, there is a circumspect approach towards their use and protection. Clearly, there is a willingness to extend the language of what is considered protectable under trademark law, but only where there is clear evidence of distinctiveness and where monopoly is not extended to functionality. In dealing with these issues, Indian law continues its balancing act of ensuring that there is sufficient scope for new forms of branding, without compromising the core principles that underpin its approach.

#### **i) Non-Visual: The Sensory Trademarks**

Trademarks traditionally relied on audio-visual elements such as a logo, slogan, typography, and advertising for brand recall. However, with information overload and ubiquitous digital connectivity, audio-visual distinctiveness may not cut it. Brands are increasingly turning to sensory marketing, where they use sight, sound, smell, taste, and touch to create engaging brand experiences for consumers.

This is where the study of non-visual trademarks becomes important. Trademarks are no longer limited to sight, and with branding moving beyond audio-visual elements, it is important to consider how law responds to new ways of perceiving.

Across the world, according to the World Intellectual Property Organization, there are more protectable signs than words and pictures. Trademarks are classified as registrable signs under modern scholarship, where signs are categorized as those that are visually perceivable and those perceivable through other senses, including audio, olfactory, gustatory, and tactile signs.

Of these, auditory marks are the most developed. They indicate origin based on music or other sounds, jingles, slogans, and other audio clips. MGM's<sup>15</sup> roar is a quintessential example of an

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<sup>15</sup> *Metro-Goldwyn-Mayer Lion Corp. v. OHIM*, Case R 781/1999-4 (Fourth Bd. App. OHIM Aug. 25, 2003) (EU).

auditory mark. Yahoo!'s yodel was registered as an auditory mark in 2008, followed by Nokia<sup>16</sup>, ICICI Bank jingle, and Airtel music, among others, in India.

It is subject to the same conditions of distinctiveness and non-functionality as other forms of marks. In other words, it is subject to distinctiveness and non-functionality requirements. For a sound to qualify for registration, it should either inherently possess distinctiveness or acquire it over a course of time, and the consumer should associate it with one and only one brand on hearing it. Also, it should not be functional. These requirements are similar to those applicable to other forms of marks.

The emergence of sound marks is a welcome sign of the law's willingness to confront reality. However, it naturally gives one pause and prompts one to pose other questions. For instance, if sounds can be protected for identification and reproduction, what about scents, textures, and tastes? Expanding protection for auditory marks may set a precedent and create new avenues for other forms of non-visual marks, and it is for the law to draw its boundaries.

#### **ii) Gustatory Marks**

Taste marks, as a type of non-visual trademarks, present the philosophically most challenging case. The difficulty with taste marks lies in the fact that taste, as a sense, cannot be separated from the product. The central problem with taste marks is distinguishing the inherent taste of the product from the developed taste. The essence of the product and the taste mark must be differentiated. The difficulty with taste marks lies in the fact that the flavor of the product is not just an additional element; it is the essence of the product.

Taste marks also clash with the functionality doctrine. The functionality doctrine holds that trademarks cannot be registered if the mark describes the product's intrinsic utility or essential characteristic. The registration of taste marks would be tantamount to the monopolization of the very element the consumer desires. The rejection of attempts such as those advanced by Eli Lilly & Co.<sup>17</sup> underscores judicial reluctance to recognise flavour as a registrable trademark. The courts have refused to register taste marks, which underlines the reluctance to recognize taste marks as trademarks. The rationale for the rejection of taste marks as trademarks is the functionality of taste. The courts have held that taste marks cannot be a watchdog of origin

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<sup>16</sup> P. Manoj, *Yahoo Awarded India's First Sound Mark; Nokia in Queue, Livemint* (Jan. 30, 2025), <https://www.livemint.com/HomePage/5z2B1NQUy3YyPkpRDp789M/Yahoo-awarded-India8217s-firstsound-mark-Nokia-in-queue.html> (last visited Mar. 3, 2026, 22:05 pm).

<sup>17</sup> *Eli Lilly & Co. v. OHIM*, Case R 120/2001-2 (Second Bd. App. OHIM Aug. 4, 2003) (EU).

independent of functionality because taste influences consumer preference, product utility, and market position.

Taste marks also present difficulties of representation. Taste marks cannot be graphically depicted as visual marks and sound marks. The difficulty with taste marks lies in the fact that taste cannot be equated with chemistry. The representation of taste marks would not be easy. Even if representation is not a difficulty with taste marks, the difficulty of acquired distinctiveness would arise. The difficulty with taste marks would be the demonstration of acquired distinctiveness. The demonstration of acquired distinctiveness would require the demonstration of the taste mark as a source identifier as opposed to the taste of the product.

Taste marks mark the limits of the expansion of trademarks. The expansion of trademarks into taste marks presents the limits of the law on trademarks. The law on trademarks resists the expansion into taste marks because the law on trademarks holds that trademarks do not extend to the essential characteristics of the product. The law on trademarks holds that trademarks extend only to the identity of the product and not the essence of the product.

### **iii) Olfactory Marks**

Of all human senses, smell is arguably one of the most powerful. Smell bypasses cognitive thinking and directly connects with memory and emotional centers of the brain. This is why a familiar smell can evoke instant emotions of comfort, joy, and desire. Keeping this human psychology in mind, many companies have tried to associate their products with distinct and recognizable smells, not only for greater consumer enjoyment but for creating brand loyalty and emotional association. In a highly competitive market flooded with visual imagery, smell is a more subtle and intimate way of differentiating products.

It is only logical, therefore, for unconventional trademarks having a particular smell or fragrance to find a place under the broader concept of smell marks. If a particular smell consistently identifies products of commercial origin with consumers, it would fulfill the basic requirement of a trademark of distinction. One of the earliest instances of the possibility of protecting a scent mark was when Clarke's Osewez was granted a registration for scented yarn thread, arguably the first instance of a scent mark being formally registered as a trademark.<sup>18</sup> The scent was described as a "high impact, fresh floral fragrance reminiscent of Plumeria Blossoms"- distinctive, if used in connection with the embroidery yarn and thread

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<sup>18</sup> *In re Clarke's Osewez*, 17 U.S.P.Q.2d (BNA) 1238 (T.T.A.B. 1990).

The fragrance was found distinct and non-functional and would operate as a badge of origin for the product. However, it is worth noting that instances of registration of smell marks are extremely few and far between, and it is apparent that there is a degree of doctrinal circumspection regarding the protection of olfactory trademarks. Although smell is arguably one of the more powerful human senses, its legal acceptability is based on its distinctiveness and non-functionality.

#### **iv) Tactile Marks**

Perhaps, the most understated yet complex aspect of branding lies in touch. While sight and sound can be appreciated from a distance, touch, on the other hand, calls for physical proximity to the product in question. The texture, the smoothness, the softness, or the embossed nature of the product may, in some cases, play a vital role in the perception of the consumer, yet touch mark infringement is perhaps the least invoked non-traditional trademark.

Non-traditional trademarks that pertain to the touch or feel of the product, often referred to as touch marks, refer to the texture or composition of the product or its packaging. Theoretically, if the texture or composition of the product is such that it has the power to identify the goods or services of one business enterprise from another, then such a product may be said to have the inherent power to act as a distinguishing mark, such as the velvet feel of the bottle, the unique ridges on the grip, or the embossed design.

However, the hurdles set by the law are daunting. Texture and functionality frequently coincide. For instance, the rubberization of a grip facilitates functionality, while a matte finish minimizes glare, and a raised texture improves handling. Where texture meets functionality, the functionality doctrine will deny it protection. Even where functionality is not at play, the difficulty of representation arises. How does one graphically depict texture and make it sufficiently clear and objective? Photographs, cross-sections, and written descriptions seek to achieve approximation, though none adequately replicate the sense of touch.

Additionally, the burden of establishing acquired distinctiveness for a touch mark requires that the texture be shown to be associated with the product as a badge of origin, as opposed to an aspect of the product's quality. Such a burden is particularly onerous since the sense of touch will frequently be exercised subsequent to purchase and therefore not be indicative of source at the time of purchase.

Touch marks demonstrate the reach and the limits of non-traditional trademark law. They demonstrate the desire of brand management to reach out and connect with the most intimate

of human senses, while the law seeks to keep brand protection grounded in the principles of distinctiveness, non-functionality, and competitive equity.

### **THE CENTRAL TENSION: RECOGNITION VS RESTRAINT**

Trademark law evolves through a careful calibration between two competing imperatives: the recognition of new forms of commercial identity and the restraint of proprietary overreach. Nowhere is this dialectic more visible than in the doctrine of deceptive similarity, particularly when applied to non-visual trademarks.

Deception may arise in relation to the goods themselves, their trade origin, or their commercial connection. The Supreme Court in *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories*<sup>19</sup> clarified that similarity need not be confined to visual resemblance; it may manifest in phonetic, visual, or structural forms, assessed with reference to the essential features of the mark. Crucially, the inquiry must be undertaken from the perspective of a person of average intelligence and imperfect recollection. This formulation reflects judicial realism: consumers do not engage in meticulous comparison but rely upon memory, association, and overall impression.

When extended to non-visual trademarks, this doctrinal foundation acquires renewed significance. Sensory marks - such as sounds, scents, textures, or other experiential identifiers - resist traditional modes of comparison. Their similarity cannot be determined through visual inspection; rather, it must be evaluated through auditory recall, conceptual resonance, or experiential memory. In such cases, the risk of consumer confusion may be subtler yet equally potent. Recognition of these forms signals an acknowledgment that modern branding transcends the visual domain.

However, the expansion of recognisable subject matter inevitably triggers the countervailing principle of restraint. The broader the categories of protectable signs, the greater the risk of uncertainty, overbreadth, and monopolisation of functional or commonplace sensory features. The law must therefore guard against granting exclusive rights that distort competition or restrict legitimate market participation.

The requirement of graphical representation under the Trade Marks Act, 1999 operates as a structural manifestation of this restraining instinct. By mandating that a trademark be capable of graphical depiction, the statute seeks to ensure definitional clarity and administrative

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<sup>19</sup> *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories*, AIR 1965 SC 980 (India).

certainty. Representation functions as a boundary-setting device: it translates intangible sensory phenomena into fixed, examinable forms. In doing so, it protects the public domain by preventing indeterminate claims.

Yet this safeguard carries exclusionary consequences. Article 15(1) of the TRIPS Agreement adopts a broader formulation, permitting “any sign” capable of distinguishing goods or services to qualify as a trademark, without mandating visual perceptibility. India’s insistence upon graphical representation reflects a deliberate policy choice favouring procedural discipline over expansive openness. While such discipline enhances certainty, it may simultaneously constrain recognition of signs that function effectively as source identifiers but resist precise visual articulation.

The tension becomes particularly pronounced in the case of tactile or olfactory marks, where the act of representation may fail to capture the experiential essence of the sign. If representation becomes the gatekeeper of recognition, inherently non-visual marks risk exclusion from registration - not because they lack distinctiveness, but because they defy conventional modes of depiction. The law, in seeking clarity, may inadvertently narrow the scope of innovation.

At the same time, the relaxation of representational thresholds without corresponding safeguards could invite subjectivity and evidentiary chaos. Sensory similarity is inherently more difficult to measure than visual resemblance. Courts would be compelled to rely upon expert testimony, consumer surveys, and experiential demonstrations, increasing litigation complexity and unpredictability. Thus, restraint serves not merely as conservatism, but as institutional prudence.

The Trade Marks Rules, 2017 reflect incremental adaptation by clarifying certification processes for certain non-traditional marks. Nevertheless, the decisive filter remains distinctiveness - particularly acquired distinctiveness established through robust evidence of consumer association. This evidentiary burden operates as a balancing mechanism: recognition is possible, but only upon proof that the sign has transcended functionality and achieved source-identifying significance.

Indian trademark jurisprudence therefore embodies a calibrated equilibrium. It does not categorically reject non-visual trademarks, nor does it embrace them without qualification. Instead, it situates their protection within a structured regime of representation, distinctiveness, and anti-confusion principles. The central question is not whether sensory signs deserve

recognition in principle, but whether their protection can be structured in a manner that preserves consumer clarity and competitive neutrality.

In navigating non-visual trademarks, the law performs a delicate constitutional function within the marketplace: it legitimises innovation while policing excess. Recognition ensures that evolving branding practices are not artificially constrained. Restraint ensures that the grant of exclusivity does not encroach upon the commons of sensory experience. It is within this dynamic interplay - not at either extreme - that the legitimacy and future trajectory of non-visual trademark protection in India must ultimately be located.<sup>20</sup>

### **CONCEPTUAL AND STATUTORY FOUNDATIONS OF NON-TRADITIONAL MARKS**

Under the conceptual and legislative parameters of non-traditional marks, Section 2(1)(zb) of the Trade Marks Act, 1999, defines the essential parameters of the term “trademark” as one which is capable of graphical representation and which distinguishes the goods or services of one person from those of others. It is interesting to note that the term also specifically includes the shape of goods, packaging, and combinations of colors. However, the twin parameters of representation and distinctiveness act as a theoretical filter for the balance to be maintained with respect to innovation and fair competition.

### **THE TRADITIONAL FUNCTION OF TRADEMARK LAW**

Trademark law has traditionally been grounded in its primary role, which is to identify the commercial source of goods and services and to prevent consumer confusion. The law of trademarks, as a legal device, has traditionally functioned to act as a symbol of origin, providing assurances to consumers with respect to the quality of the product, but also providing traders with the ability to create goodwill in the marketplace. This has traditionally been achieved by the visual display of words, names, symbols, labels, and other such indicia that are visible to the consumer and are associated with the product or its packaging. The visual nature of the law of trademarks has traditionally been grounded in the physical nature of the market, which has been the case with respect to the development of the modern economy.

However, with the development of the modern economy and the increasing importance that is afforded to intellectual property rights, the role that trademarks play has evolved but not altered in its traditional sense. The law of trademarks continues to act as a device to differentiate

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<sup>20</sup> Lisa P. Lukose, *Non-Traditional Trademarks: A Critique*, 57 *J. Indian L. Inst.* 197, 197–215 (2015).

products in the marketplace and to act as a repository of commercial identity, but the manner in which this is achieved has evolved to include non-visual symbols such as sounds, shapes, scents, textures, and movements, which all act to create consumer association with the product and to create brand recognition. These non-traditional symbols act to achieve the traditional role that the law has afforded to the visual display of symbols, but they do so in a manner that does not achieve the traditional means of visual perception or display.

The emergence of non-traditional trademarks challenges the traditional visual nature that has been associated with the law of trademarks, which, although not reflected in the Indian legislative framework, is reflected in the practical application of the law, which has traditionally been grounded in the visual nature of the mark. This, however, leads to the deeper question of the manner in which the traditional role that the law has played in the identification of source can be altered without fundamentally undermining the underlying foundations that the law has traditionally been grounded in.

#### **DISTINGUISHING TRADEMARKS FROM PATENT AND DESIGN PROTECTION**

Trademark protection should be clearly differentiated from patent and design protection on the basis of purpose, subject matter, and duration. While trademark protection protects signs used to identify and differentiate the business source of goods and services, thus avoiding consumer confusion, under patent law, inventions are protected through time-limited exclusivity over functional and technical progress, while design law protects the aesthetic qualities or look of a product. While patent and design rights are time-limited, protecting innovation, trademark rights can exist forever, provided the mark continues to perform the role of identification.

#### **GRAPHICAL REPRESENTATION AND DEFINITE SUBJECT MATTER**

Three-dimensional shape marks and single or solid colour marks are the more defined areas within the overall scope of non-traditional trademarks. However, the protection of these marks has always been subject to the conditions of graphical representation and definite subject matter. The courts have acknowledged the fact that without well-defined parameters, the registration of these marks would amount to an unwarranted monopoly over the shape or colour, which would be used by all and would go against the principles of fair competition.<sup>21</sup> The Trade Marks Act, 1999, also supports the structural discipline. Section 2(1)(zb) states that a trademark includes a mark which is capable of graphical representation and which can

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<sup>21</sup> Rachna R. Kurup & Nimita Aksa Pradeep, *Non-Conventional Trademarks in India: The What, The Why and The How*, 1(01) *E-Journal of Academic Innovation and Research in Intellectual Property Assets* (Dec. 2020).

distinguish one person's goods or services from the goods or services of others, which includes shapes, packaging, and combinations of colours. Section 2(1)(m) also states that the term "mark" would include devices, brands, labels, names, signatures, and words. However, the graphical representation ensures that the subject matter of the mark is precise and objectively determinable. The Draft Manual also acknowledges the fact that certain categories of non-traditional trademarks, such as shapes, colours, sounds, and smells, require more scrutiny to ensure that the mark is represented with clarity and precision and has a definite and non-functional character.

### **PRECISION, CERTAINTY, AND ENFORCEABILITY**

The emergence of non-conventional marks is bound to raise issues of precision and certainty in trademark law as it is inevitable that with such marks, issues of infringement will also be raised and will be on the higher side, especially when such marks are similar and are likely to cause confusion between competing marks. Thus, it is not just recognition of such marks that is important but also such marks having sufficient precision and certainty in definition so that the scope of exclusive rights is clearly understood.

The litigation process in such marks is inherently complex as it is not just a matter of proof of acquired distinctiveness through evidence but also of assessing consumer perception and market context through surveys and expert opinions as is required in non-traditional marks. The complexity of such marks is such that it is difficult to assess and define them as legal subject matter without sufficient precision and certainty.

The constraints of distinctiveness and graphical representation are inherent in trademark law and are also relevant in non-traditional marks in India as it is inevitable that such marks will be required to be clearly identified as having a source-identifying function and will be required to be clearly represented as marks on paper or on a computer screen as is required under trademark law in India. The subjective nature of such marks also raises issues of certainty and precision as it is inevitable that such marks are perceived subjectively and such perception cannot be uniform.

The legitimacy of non-traditional marks is not just about conceptual recognition of such marks but also about ensuring precision and certainty in definition and enforcement.

### **REPRESENTATIONAL CHALLENGES IN SHAPE, SOUND, COLOUR AND MOTION MARKS**

The Draft Manual of Trade Marks Practice and Procedure tries to reduce such uncertainty by clearly

explaining different modes of representation, especially in respect of sound marks. Musical notations with or without words can be submitted as graphical representation in compliance with Rule 26(5) of the Trade Marks Rules, 2017, together with an MP3 recording of thirty seconds or less.

However, such issues of representation continue to plague the other non-conventional marks as well. Shape marks are required to be represented in such a manner that it clearly defines its contours and excludes functionality. For color marks, it is required to be clearly identified with internationally recognized color codes. Motion marks are required to be submitted in visual frames that are able to convey a sense of movement with definitional certainty. These marks are technically challenging but still relatively easier as they involve a visual component.

However, much greater difficulties are encountered with sensory marks such as scents, tastes, and textures because they cannot be reduced into a universally accepted graphical form that is likely to satisfy the requirements of precision and certainty as mandated by statute. The requirement of graphical representation is therefore seen as a structural hurdle in terms of registrability that is not necessarily driven by issues of distinctiveness but by the inability of such marks to be represented objectively.

The Indian Trade Marks Rules of 2017 are limited in terms of making specific provisions regarding non-conventional marks and are relatively clearer in terms of procedural guidelines for sound marks. However, beyond such procedural clarity, the lack of uniformity is likely to lead to inconsistencies in terms of examination and is likely to result in higher rates of refusal.

While it is true that such marks are not specifically mentioned in the statute and therefore cannot be said to be directly covered under it, it is also true that such marks cannot be said to be outside its purview as well because such a position would be contrary to the requirements of international best practices and therefore a purposive approach is still mandated.

Nevertheless, major obstacles persist in India. The major obstacle in India remains graphical representation. Although shape, color, and motion marks can be represented in a relatively precise form on the register, smell, taste, or texture marks cannot be standardized in a graphical form. In addition, the absence of uniform examination criteria for non-traditional marks results in higher refusal rates. A purposive interpretation of the existing provisions in conformity with international norms is required to strike a balance between dynamic branding practices and legal requirements of clarity and certainty.

As far as Indian law is concerned, unconventional trademarks are governed by special doctrinal

and procedural restrictions, as follows:

### **1. Criteria of distinctiveness and acquired distinctiveness:**

Indian courts have been found to take a relatively stringent approach towards the establishment of distinctiveness. While in *N.R. Dongre v. Whirlpool Corporation*, the Supreme Court accepted the distinctiveness of the mark associated with 'Whirlpool', on the basis of wide recognition amongst consumers, thus showing early signs of recognition of trans-border reputation. However, in *ITC Limited v. Philip Morris Products S.A.*, the Court emphasized the necessity of robust evidentiary backing of distinctive character. Such data as consumer surveys, data on expenditure on advertisements, etc., have been found to be of critical importance in establishing acquired distinctive character, especially in cases involving non-conventional marks.

### **2. Evidentiary value:**

Great emphasis has been placed on the necessity of the requirement of 'graphical representation'. This is essential in order to ensure clarity and definitional certainty. Thus, in *Swizzels Matlow Ltd.'s Application (No. 2)*, the necessity of such accurate graphical depiction was emphasized, so as to enable traders and consumers alike to clearly ascertain the ambit of the registered mark. However, under the Indian statutory framework, this assumes greater significance, as under Section 29 of the Trade Marks Act, 1999, infringement is analyzed on the basis of the registered mark's graphical representation. Thus, ambiguity in such depiction can prove detrimental, placing the onus of evidence at an undesired disadvantage.

### **3. Miscellaneous:**

Additional difficulties are posed by the inherently subjective and technical character of non-conventional marks, especially those relating to smell and taste. Limited Indian authority on the matter does not make matters easier. Besides, the absence of a universal global framework on procedure does not allow for comparative reliance, as jurisdictions are forced to rely on broad principles under the TRIPS agreement, or judicial interpretations, on a case-by-case basis.<sup>22</sup>

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<sup>22</sup> Vrinda Chaturvedi, *Charting the Unconventional: Recognition and Challenges of Unconventional Trademarks in the Indian IPR Regime*, NLIU Cell for Studies in Intellectual Property Rights (Apr. 2, 2024), <https://csipr.nliu.ac.in/miscellaneous/charting-the-unconventional-recognition-and-challenges-of-unconventional-trademarks-in-the-indian-ipr-regime/> (last visited Mar. 4, 2026, 01:39am).

## **REPRESENTATION AS A DOCTRINAL FILTER**

In the realm of non-traditional trademarks, representation serves as a doctrinal threshold that conditions recognition upon clarity and precision. It ensures that exclusive rights are granted only when the subject matter is defined with sufficient certainty to permit identification, examination, and enforcement.

### **Sound Marks:**

To register a sound mark, applicants must comply with structured representational requirements. This includes submission of an MP3 recording, not exceeding thirty seconds, to provide an accurate auditory sample. Importantly, the sound must also be graphically represented - typically through musical notation where the mark consists of a melody. The combined requirement of audio recording and visual notation ensures that the mark is not left to subjective interpretation. By translating sound into an objectively ascertainable form, representation enables the registry and third parties to clearly determine the contours of protection.

### **Colour Marks:**

In the case of colour marks, representation operates with even greater rigour. Since single colours are not inherently distinctive, applicants must first precisely define the claimed shade, usually through an internationally recognised colour identification system such as Pantone. This technical specification confines the scope of exclusivity to a clearly demarcated hue, preventing ambiguity or overbroad claims.

Further, protection depends upon demonstrating acquired distinctiveness. Evidence such as market share data, advertising expenditure, duration and exclusivity of use, sales performance, and media acknowledgment is essential to establish that the colour has attained source-identifying significance in the minds of consumers.

Accordingly, representation functions as a filtering mechanism. It disciplines claims to non-traditional subject matter by demanding objective definability and evidentiary substantiation, thereby preserving legal certainty while permitting calibrated expansion of trademark protection.

## **FUNCTIONALITY AND DISTINCTIVENESS: STRUCTURAL RESTRAINTS ON EXPANSION**

Goods are often acquired on the basis of their visual appeal. In such situations, some of the

design attributes of a product could be construed as functionality if they are linked directly to the commercial desirability of the product or its competitive utility. The doctrine of aesthetic functionality is therefore a restraint on trademark rights when some design attributes improve marketability but fail to perform a source-identifying function and are still considered essential for fair competition.

However, it is also important to note that if such a test is applied widely, it could lead to a negation of trademark rights altogether. Thus, it is important to note that a design that is linked to visual appeal and also identifies its source and warrants a higher price is indicative of distinctiveness rather than functionality, and on the other hand, a design that improves appearance but does not identify its source could be denied trademark rights as it could lead to monopolistic practices.<sup>23</sup>

### **THE DOCTRINE OF FUNCTIONALITY UNDER SECTION 9(3)**

Even as jurisprudence is constantly developing in this arena, procedural and evidentiary hurdles still impede non-traditional marks in India. The key hurdle is that of graphical representation, which is especially problematic for marks such as smell, taste, or texture because such marks cannot be standardized with precision.

These issues are also highlighted by the doctrine of functionality as set out in Section 9(3) of the Trade Marks Act, 1999, which states that “a mark shall not be registered if it consists exclusively of shapes or other features of goods that are indicative of the nature of the goods or are necessary to obtain a technical result or give substantial value to the goods.” This is because trademark law should not be allowed to monopolize features that are needed by all competitors in order to be able to compete in the market.

With respect to color marks, it is therefore necessary for such marks to be shown not only to have acquired distinctiveness but also not to be generic or functional. For instance, a color such as red for fire extinguishers will not be allowed because it is performing a function or safety role rather than simply functioning as a trademark. The jurisprudence on color marks is also highlighted by the allowance of trademark protection for Christian Louboutin’s red sole because of its unique placement and contextual distinctiveness.

The doctrine of functionality under Section 9(3) is therefore a structural restraint on the allowance of non-traditional marks such as colors because such marks are only allowed as long

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<sup>23</sup> J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 7:63 (5th ed. 2021).

as they function as indicators of origin and do not implicate functionality or genericness.

### **UTILITARIAN AND AESTHETIC FUNCTIONALITY**

The doctrine of functionality acts as a final limit on the scope of protection afforded to trademarks, particularly with respect to product features and trade dress. In most cases, a competitive necessity test is applied to determine whether granting exclusive rights to a particular feature will impede competition. In cases where a particular feature is vital to the use, function, cost efficiency, or marketability of a product, it is deemed to be utilitarianly functional and therefore not eligible for protection under trademark law.

Utilitarian functionality refers to those product features that have a functional or utilitarian benefit to the product. For instance, a particular design element that improves the performance or reduces the cost of production of a product cannot be protected under trademark law because it impinges on the area that should be protected under patent law. Once the functionality of a particular feature is established, it overrides secondary meaning or consumer confusion and therefore renders the feature unprotectable.

Aesthetic functionality, on the other hand, refers to those features that have a functional or utilitarian benefit to the product in that their beauty or attractiveness is a major reason why consumers buy the product. In this case, a particular design element that forms the major appeal of a product and therefore forms a major reason why consumers buy the product can be denied protection under trademark law because granting exclusive rights to that particular element will give the owner a major competitive disadvantage in the market.

The doctrine of functionality therefore serves to maintain the line between the scope of protection afforded to trademarks and patents and to uphold the freedom of competition by restraining the monopolistic tendencies that are inherent in trademark law.

### **INHERENT AND ACQUIRED DISTINCTIVENESS**

One of the major problems with protecting non-traditional trademarks is finding a way to balance inherent and acquired distinctiveness with the need for specificity and exactness of representation. Trademark protection is based on the assumption that a mark is able to identify and set apart the goods and services of one party from those of other parties. For traditional word and logo trademarks, inherent distinctiveness is often easily discernible through visual inspection. However, for non-visual and pattern-based trademarks, these signs often fail to have inherent characteristics of identifying a particular source.

For example, scents, sounds, shapes, and repeating surface patterns are often not inherently distinctive of a particular source. They are often considered more for their beauty and functionality. As a result, there is a need for acquired distinctiveness, where evidence of long and uninterrupted use of the sign is necessary to prove its association with a particular commercial source.

Patterns are particularly tricky, as they may initially be considered more for beauty and less for trademark significance. However, if they become closely associated with a particular party, they may become more than mere decoration and acquire sufficient distinctiveness for trademark protection. Thus, there is a need for sufficient specificity and exactness of representation, as well as acquired distinctiveness, where evidence of association with a particular party is necessary for protection.

It is apparent that non-traditional trademarks are less likely to succeed based on inherent distinctiveness and more likely based on acquired distinctiveness, where there is sufficient evidence of association with a particular party and sufficient distinctiveness from other parties.

### **EVIDENTIARY THRESHOLDS AND SECONDARY MEANING**

The subjective nature of non-traditional trademarks makes it more difficult to prove acquired distinctiveness. The difficulty of establishing acquired distinctiveness for non-traditional trademarks also lies with the fact that the non-visual elements, such as scent and texture, are more subjective and require more persuasive documentation and evidence because the perception of consumers towards these elements varies depending on their individual experiences and exposure. These thresholds are encountered in -

#### **Proving acquired distinctiveness:**

The burden of establishing acquired distinctiveness for non-traditional trademarks is high because these marks rarely have the inherent capacity to be distinctive. The burden of proof for non-traditional trademarks requires the applicant to prove that the mark, whether it be sound, shape, color, scent, or texture, has acquired the capacity to identify a single business source among consumers.

#### **Measuring up to the graphical representation requirements:**

Another burden placed on the non-traditional trademarks is the necessity to define the mark with precision. The difficulty in defining the mark makes it challenging to prove the precise subject matter that has acquired the capacity for distinctiveness.

**Lack of uniform examination guidelines:**

The difficulty of establishing acquired distinctiveness for non-traditional trademarks also lies with the lack of uniformity in the examination process for sensory trademarks. The inconsistency makes it more challenging to prove acquired distinctiveness, as the burden of establishing the same becomes more evident and requires more documentation and evidence.

**Hesitancy of the Registry and the Courts:**

The hesitation of the Registry and the Courts to approve non-traditional trademarks also adds to the difficulty of establishing acquired distinctiveness. The burden of establishing acquired distinctiveness becomes more evident due to the conservative attitude of the Courts and the Registry towards non-traditional trademarks.

**DISTINCTIVENESS AS A REGULATORY BRAKE**

This concept of distinctiveness, acts as a check on the growth of unconventional trademarks. While trademarks like smell and taste, which are difficult to represent, have an even higher threshold of distinctiveness, since these are not likely to be inherently distinctive, the onus of showing acquired distinctiveness through compelling evidence of consumer recognition is on the applicant.

Furthermore, where trademarks like motion and multimedia, which can be represented through still images, are depicted, there is ambiguity in the examination of these trademarks, since there are no parameters set for such trademarks. This becomes problematic, especially while applying, since the applicant finds it difficult to define the trademark with precision. This also becomes problematic while conducting trademark searches, where there are no classification codes for unconventional trademarks, thereby increasing ambiguity.

Definitional clarity, therefore, becomes imperative in this context. Ambiguous and broad definitions undermine the concept of distinctiveness, since there is a likelihood of rejection at the time of registration, as well as limited protection at the time of registration. Additionally, there are no precedents, which further increases the conservatism of the Registry, thereby making the onus on the applicant to show compelling evidence of secondary meaning. Thus, the concept of distinctiveness, while acting as a qualifying requirement, also acts as a check on the growth of unconventional trademarks. By placing the onus on the applicant, Indian trademark law ensures that there is no premature appropriation of trademarks like smell, taste, and sound, which are likely to fall in the public domain.

## **REGISTRY PRACTICE, JUDICIAL APPROACH, AND COMPETITIVE CONCERNS**

Within the array of unconventional forms of trademarks, sound marks have arguably attained the firmest ground. Trademark registries have over time established viable criteria for their notation, and the judiciary has been more accommodating towards granting musical compositions, jingles, or distinct audio signatures that facilitate instant brand recall for consumers. Their success stems from the ability to create exacting definitions without compromising competitiveness.

Shape marks are subject to more scrutiny and consideration. Trademark registries and judiciary approaches consistently assess whether the three-dimensional form is actually utilized as a brand identifier or merely reflects a design consideration. Competitive concerns are more pronounced for these marks, as they must not preclude viable product forms nor create perpetual brand rights for characteristics more suited to design protection.

Colour and motion marks rely on demonstrable brand association based on consumer recall created through consistent and exclusive use. Although these are more likely to be accepted at the registry, they are subject to scrutiny at the judiciary level, where there is a risk of monopolies over characteristics that could reasonably be required for use by other competitors<sup>24</sup>Smell and scent marks continue to rank among the most contentious forms of unconventional trademarks, especially with regard to registry practices and case law. Unlike other forms of signs, which can be conveyed visually or audibly, scents are necessarily intangible, ephemeral, and highly subjective. However, defining them with sufficient accuracy for registration purposes is often extremely difficult, especially due to the representational challenges of translating scents into written descriptions or formulae.

Despite the obvious potential of scents for source identification, there are obvious concerns regarding stability, consistency of perception, and competitive balance. For instance, differences in human sensitivity and environmental conditions often affect the evaluation of distinctiveness. Trademark authorities often demand higher standards of evidence, especially with regard to acquired distinctiveness before considering them for protection.

## **EVIDENTIARY PATTERNS IN INDIAN PRACTICE**

Smell and scent marks continue to rank among the most contentious forms of unconventional trademarks, especially with regard to registry practices and case law. Unlike other forms of

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<sup>24</sup> Graeme B. Dinwoodie & Mark D. Janis, *Trademark Law and Theory* 313–18 (Edward Elgar Publ'g 2014).

signs, which can be conveyed visually or audibly, scents are necessarily intangible, ephemeral, and highly subjective. However, defining them with sufficient accuracy for registration purposes is often extremely difficult, especially due to the representational challenges of translating scents into written descriptions or formulae.

The conceptual issue surrounding non-traditional trademarks in India can best be understood through the prevailing patterns of evidence. With the development of branding techniques beyond words and signs, the Indian trademark regime must assess not only the ability of non-traditional trademarks to function as source indicators but also the ability of these marks to be proven as such within a framework of certainty and record-based clarity. As such, the Indian trademark regime has moved away from definitional breadth towards documentable proof.

Although the Trade Marks Act, 1999, defines non-traditional trademarks through an inclusive definition under Section 2(1)(zb), which includes "any mark capable of being represented graphically, which is capable of distinguishing goods or services," the trajectory of Indian trademark registration reveals an increasingly conservative approach towards evidence. Specifically, the requirement of graphical representation has had a significant impact on non-traditional trademarks. Although non-traditional trademarks are not excluded under the Act, the Indian trademark regime has been heavily dependent on the ability of the applicant to prove the clarity and distinctiveness of non-traditional trademarks.

There is limited judicial engagement with non-visual trademarks. Indian courts have traditionally dealt with word and device marks, leaving very little judicial authority on the standards of evidence required for non-visual trademarks. As such, the Indian trademark regime has traditionally relied on prevailing standards of visualization in assessing non-traditional trademarks. As such, non-traditional trademarks are increasingly scrutinized, with variable standards of examination and greater reliance on evidence. Thus, although the Trade Marks Act, 1999, reveals broad standards of definition, Indian trademark practice reveals consistency in the treatment of non-traditional trademarks. Specifically, non-traditional trademarks are recognized, but only through rigorous standards of clarity, distinctiveness, and definability. Thus, the Indian trademark regime reveals an increasingly conservative approach towards non-traditional trademarks, with discipline of evidence rather than definition being the primary mechanism of regulation.

## **IN THE INDIAN COURTS**

### **1. A.D. Padmasingh Isaac v. Aachi Cargo Channels Pvt. Ltd., AIR 2014 Mad 2 (Madras**

**High Court).**<sup>25</sup>

**Issue:**

Whether the defendant's use of the mark "Aachi" in relation to cargo and logistics services infringed or diluted the goodwill associated with the plaintiff's well-known "Aachi" mark used for food products.

**Judgment:**

The Madras High Court examined whether the mark had acquired distinctiveness and reputation extending beyond its original product category. The Court emphasised the doctrine of trans-border reputation and protection against dilution, holding that a well-established mark cannot be appropriated even in unrelated fields if such use is likely to cause confusion or unfairly capitalise on goodwill. The injunction was granted in favour of the plaintiff, reinforcing the principle that trademark protection extends beyond identical goods when reputation and distinctiveness are demonstrable.

**2. Amritdhara Pharmacy v. Satyadeo Gupta, AIR 1963 SC 449 (Supreme Court of India).**<sup>26</sup>

**Issue:**

Whether the marks "Amritdhara" and "Lakshmandhara," both used for medicinal preparations, were deceptively similar so as to cause consumer confusion.

**Judgment:**

The Supreme Court laid down the classic test for deceptive similarity, holding that comparison must be made from the perspective of a person of average intelligence and imperfect recollection. The Court found that the phonetic similarity between the marks was likely to mislead consumers, particularly in the context of medicinal products. It ruled in favour of the appellant, affirming that phonetic resemblance alone may suffice to establish infringement where confusion is probable.

**3. Britannia Industries Ltd. v. Cremica Agro Foods Ltd., 2008 (38) PTC 89 (Del) (Delhi High Court)**<sup>27</sup>.

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<sup>25</sup> *A.D. Padmasingh Isaac v. Aachi Cargo Channels Pvt. Ltd.*, AIR 2014 Mad 2 (Mad.).

<sup>26</sup> *Amritdhara Pharmacy v. Satyadeo Gupta*, AIR 1963 SC 449 (India).

<sup>27</sup> *Britannia Industries Ltd. v. Cremica Agro Foods Ltd.*, 2008 (38) PTC 89 (Del.).

**Issue:**

Whether the defendant's packaging and trade dress for biscuits infringed the plaintiff's distinctive packaging and amounted to passing off.

**Judgment:**

The Delhi High Court analysed the overall get-up, colour scheme, layout, and visual impression of the packaging. It held that trade dress protection extends to the totality of presentation where it has acquired distinctiveness and source-identifying character. The Court granted interim relief, emphasising that deceptive similarity must be assessed holistically rather than by dissecting individual elements.

**4. Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545 (Supreme Court of India).<sup>28</sup>**

**Issue:**

Whether a negative covenant restraining a bottling company from dealing with competing beverages during the subsistence of an agreement was enforceable, and how such restraint intersected with trademark and goodwill protection.

**Judgment:**

The Supreme Court upheld the enforceability of the negative covenant during the subsistence of the agreement, holding that such restrictions were not in restraint of trade under Section 27 of the Indian Contract Act, 1872, when reasonable and necessary to protect commercial interests, including trademarks and goodwill. The Court underscored the proprietary value embedded in trademarks and the importance of safeguarding brand integrity against unfair competition.

**RISK OF MARKET FORECLOSURE AND SENSORY DEPLETION**

The gradual acceptance of non-traditional trademarks-such as colours, sounds, shapes and other sensory indicators-reflects the evolving nature of branding in modern markets. However, within the Indian legal system, this development necessitates careful doctrinal scrutiny. The central concern is not whether such marks can perform a source-identifying function, but whether granting exclusivity over limited sensory features risks undermining competition and shrinking the public domain.

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<sup>28</sup> *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*, (1995) 5 SCC 545 (India).

### **i. The Finite Nature of Sensory Indicators**

Unlike word marks, which benefit from limitless linguistic creativity, sensory elements are inherently restricted in number. The range of basic colours, commonly recognisable sounds, or culturally familiar fragrances is limited both materially and psychologically. Excessive appropriation of such features through trademark protection may reduce the availability of effective branding tools for future market participants.

In the Indian commercial landscape-where visual identity and experiential branding are increasingly influential-early monopolisation of widely appealing sensory cues can create structural imbalances. Competitors may be compelled to adopt less intuitive or less commercially attractive alternatives, thereby affecting their ability to compete effectively. This concern is not merely economic but also normative, touching upon broader principles of fair competition embedded within Indian constitutional and statutory frameworks.

Accordingly, the doctrine of distinctiveness assumes heightened importance. Only those sensory features that have demonstrably evolved from mere product attributes into clear indicators of commercial origin should qualify for protection.

### **ii. Strategic Foreclosure and the Boundaries of Trademark Law**

Trademark law is fundamentally intended to prevent consumer confusion, not to facilitate strategic exclusion. When sensory characteristics closely associated with product performance or consumer expectations are monopolised, trademark protection risks extending beyond its legitimate purpose.

For example, if a scent commonly associated with “cleanliness” were granted exclusive protection in relation to household products, competitors could be prevented from using a sensory signal that consumers naturally perceive as indicative of effectiveness. In such circumstances, exclusivity may distort market communication rather than protect brand identity.

Indian law addresses this risk through the doctrine of functionality, codified in Section 9(3) of the Trade Marks Act, 1999. Features that arise from the nature of the goods, are necessary to achieve a technical result, or add substantial value to the product are expressly excluded from registration. This statutory limitation prevents trademark law from encroaching upon the domains of patent and design protection.

The principle of aesthetic functionality further reinforces this safeguard. If granting exclusive

rights over a sensory feature would place competitors at a substantial disadvantage unrelated to reputation, protection ought to be denied. In this way, the law maintains a necessary boundary between legitimate brand protection and anti-competitive control.

### **iii. Evidentiary Standards and Judicial Restraint in India**

Indian trademark practice reflects a cautious approach toward non-traditional marks. The requirement under Section 2(1)(zb) that a mark be capable of graphical representation continues to serve as a gatekeeping mechanism. Even where non-visual marks such as sound marks are accepted, clarity and precision in representation are strictly demanded to prevent overbroad claims.

More importantly, non-traditional marks are rarely treated as inherently distinctive. Applicants bear a significant evidentiary burden to establish acquired distinctiveness. This typically involves demonstrating prolonged and exclusive use, substantial advertising investment, market penetration, and consumer recognition. Such rigour ensures that sensory elements are protected only after they have genuinely come to signify commercial origin in the minds of the public.

This evidentiary discipline performs a systemic function: it prevents the premature privatisation of sensory features that may otherwise remain part of the shared competitive environment.

### **iv. Preserving the Balance Between Innovation and Access**

The expansion of trademark subject matter must be accompanied by principled restraint. An overly permissive regime risks converting finite sensory resources into perpetual private monopolies. Conversely, excessive rigidity may fail to accommodate legitimate developments in brand communication.

The appropriate path for Indian trademark jurisprudence lies in maintaining stringent thresholds of distinctiveness, applying the functionality doctrine robustly, and assessing competitive impact with sensitivity. Sensory marks should receive protection only where they operate exclusively as badges of origin and do not confer non-reputation-based competitive advantages.

Through such calibrated adjudication, Indian trademark law can adapt to contemporary branding realities while safeguarding both the public domain and the integrity of market competition.

## BALANCING COMMERCIAL INNOVATION WITH COMPETITION POLICY

Indian trademark law maintains a balance between promoting innovation and protecting competitive markets. Under the Trade Marks Act, 1999, there are exclusive rights for distinctive marks, but not without limitations, so as not to use these rights for closing the market.

Section 2(1)(zb) of the Trade Marks Act defines a trademark as a graphically representable sign that distinguishes goods and services of one undertaking from those of other undertakings. The requirement of distinctiveness covers origin indicators but excludes functional and descriptive characteristics. Section 9(1) of the Act excludes signs that are devoid of distinctive character, descriptive of quality, or customary in trade.<sup>29</sup> This is to ensure that competitors have access to necessary characteristics for describing and marketing their products.

Section 9(3) of the Act excludes signs that are shaped solely by the nature of the goods, are necessary for a technical result, or give substantial value to the product. This is based on the functionality doctrine, where there is a balance between promoting innovation and protecting competitive markets.

Furthermore, the Indian Supreme Court emphasized consumer confusion over expansion of proprietary rights in its judgment in *Amritdhara Pharmacy v. Satyadeo Gupta*. Trademark law is often interpreted by Indian courts to avoid overreaching and granting competitive advantages beyond those based on reputation. Acquired distinctiveness for non-traditional trademarks is evidence of caution and granting of exclusive rights for features that identify products.

This is evidence of embedding competition policy without using the Competition Act of 2002. Trademark exclusivity is legitimate not only for protecting brand investments but also for ensuring competitive neutrality without market distortions.

## CONCLUSION

Indian law on trademarks has progressed from the traditional visual markers of the colonial past to the more recent and non-traditional markers of sound, colors, scents, tastes, and textures, which reflect the growing phenomenon of sensory branding and the memory triggers made famous by Proust. The growing acceptability of sound marks like Yahoo's yodel and Nokia's tune, and combinations of colors with the aid of MP3 notations and Pantone codes under the Trade Marks Act, 1999, reflect this trend. However, the Indian law also presents difficulties

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<sup>29</sup> *Trade Marks Act, No. 47 of 1999*, § 2(1)(zb), India Code (1999).

with the graphical representation under Section 2(1)(zb), the need to prove the existence of secondary meaning for establishing distinctiveness, and the functionality doctrine under Section 9, which limits the monopoly over the essence of the product.

The tension in the Indian law on trademarks, therefore, reflects the need for a balance that protects consumers from confusion and promotes competition and innovation in crowded markets. The recent acceptability of sound and shape marks represents the progressive side of the Indian law on trademarks, while the non-acceptability of olfactory and taste marks reflects the difficulties with graphical representation and the need for evidence. The way forward for the Indian law on trademarks lies with the development of uniform registry guidelines and the evolution of digital filing systems and judicial decisions that reconcile TRIPS flexibility with the imperatives of fair competition. The Indian law on trademarks must therefore be made to evolve with purpose and legitimacy, ensuring that the non-traditional markers do not erode the common pool of sensory experience and that trademarks serve as indicators of origin and not inherent qualities. The evolution of branding requires the Indian law on trademarks to keep pace with the changing reality, yet the law must not lose sight of the inherent limitations of the law. The real challenge with the Indian law on trademarks has not been the acceptability of non-traditional markers, but the reconciling of the acceptability with the inherent limitations of the law and the need to keep the competitive architecture of the market unaltered.

## **SUGGESTIONS**

The rise of non-traditional trademarks (NTTMs) in India calls for the establishment of a framework that balances the need for brand innovation with the need to uphold fairness in the market and the law. While the Trade Marks Act, 1999, provides a broad definition, challenges persist, especially with respect to the graphical representation, distinctiveness, and evidence requirements. The following steps are recommended-

### **i. Flexible Graphical Representation**

Section 2(1)(zb) provides that the mark must be capable of graphical representation, which is not the case with scents, tastes, textures, and motion.

Recommendation: The Indian government could allow alternative representations, such as the use of MP3 or WAV files to represent sound, olfactory notations to represent scents, and the use of sequential images or 3D models to represent motion or shape marks, which is the international standard, including WIPO and the European Union.

## **ii. Clear Evidentiary Guidelines**

Indian courts, such as in the case of *N. R. Dongre v. Whirlpool Corp.*, have focused on the acquired distinctiveness element.

Recommendation: The Indian government could clearly define the evidence that will be accepted with respect to the different classes of NTTMs, which may include market share, surveys, advertising, and media recognition.

## **iii. Standardized Examination Protocols**

The examination process with respect to NTTMs is not standardized.

Recommendation: The Indian government could establish different examination protocols with respect to different classes of NTTMs, such as sound, color, shape, and motion.

## **iv. Secondary Meaning and Acquired Distinctiveness**

The majority of NTTMs need to prove acquired distinctiveness.

Recommendation: Set clear parameters on time, exclusivity, and association with consumers to assist applicants and examiners.

## **v. Integration with the Functionality Doctrine (Section 9(3))**

It prevents the monopolization of functional or essential characteristics of a product.

Recommendation: Issue guidelines on the scope of registrability of functional or aesthetic characteristics to balance registrability with competition policy.

## **vi. Judicial Guidance and Precedent Building**

There is a lack of case law on NTTMs.

Recommendation: Encourage judicial determination of cases on sound, color, shape, and scent marks to develop authoritative precedents on registrability, distinctive characteristics, and infringement.

## **vii. Registry Modernization**

It is difficult to search NTTMs due to the lack of standard codes in the database.

Recommendation: Design and develop a digital repository with metadata on non-visual marks that can be searched using audio files, color codes, 3D shape representations, and motion.

**viii. Training and Awareness**

Lack of knowledge creates barriers in the process of registration as well as enforcement.

Recommendation: Workshops for lawyers, examiners, and business entities to cover topics like sensory marks, evidence, and international best practices.

**ix. Harmonization with International Standards**

India is relatively conservative in its approach compared to TRIPS, EU, and WIPO.

Recommendation: Aligning the process of registration with TRIPS Article 15(1) to provide support for non-traditional trademark/marks protection both locally and internationally.

**x. Encouraging Incremental Innovation**

Over-regulation may be a hindrance to innovation.

Recommendation: Pilot projects for allowing NTMs with legal support.

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