

SCENT MARKS AS NON-TRADITIONAL TRADEMARKS: LEGAL RECOGNITION AND CHALLENGES IN INDIA

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ABSTRACT

Trademarks in the modern world of business are considered an important tool of brand differentiations. But in a legal scenario, most of the framework is based upon traditional visual identification. Therefore, this article is focused upon the concept of olfactory marks, which utilize the faculty of smell in defining brands, generating a very high degree of brand loyalty. However, there are a number of barriers seen under the legal aspect, identified by the Trademarks Act of 1999, which provides a challenge in successfully incorporating these marks. At the outset, problems lie in defining graphical representations, which form an essential component of this legal framework. There is a great challenge in proving the distinctiveness of the mark, which is considered non-functional. As of now, there is a clear lack of procedural guidelines, technological infrastructure, and qualified manpower in the Indian Trademark Registry, which is needed in handling non-traditional trademark applications. Therefore, by examining successful legal frameworks worldwide, this article provides a pertinent contrast. The paper concludes by recommending targeted amendments to the legal framework of an emerging economy like India.

Key Words: - *Olfactory Marks, Graphical Representation, Distinctiveness, Trademarks Act 1999, Non-traditional Trademarks*

INTRODUCTION

In India, trademarks are essential for differentiating the products and services of various businesses. Although conventional trademarks like logos, words, and symbols are firmly established, non-conventional marks such as scent marks are still largely unacknowledged. Scent marks, which rely on smell to recognize a product, pose distinct legal difficulties under the Trademarks Act, 1999. The necessity for a visual depiction under Section 2(1) (zb)¹ along with the requirement for distinctiveness under Section 9(1)² complicates the registration of scent marks. In India, there is a lack of judicial guidance or procedural framework to review or assist such applications. The absence of organizational preparedness, technological criteria, and examiner education makes the acknowledgment of scent trademarks even more challenging.³ This article explores the legal status of scent trademarks in India, highlighting the doctrinal and procedural obstacles that hinder their registration. It emphasizes the necessity for legal and administrative changes to integrate scent marks into the Indian trademark system, facilitating innovation and expanding brand protection.

Olfactory trademarks, or scent marks, are unique smells that serve to identify and differentiate the products or services of one business from those of competitors. As opposed to traditional trademarks like logos or brand names, scent marks appeal to a consumer's sense of smell, forging potent connections in their minds. An illustration of this is the Brazilian company Grendene, which has employed a bubblegum fragrance for its footwear, thereby establishing an immediate sensory connection between the product and the brand. The capacity of scent marks to function as unconventional trademarks stems from their ability to enhance brand recognition and customer loyalty through sensory branding. Given that smell is a highly influential sense for memory and recall, scent marks offer businesses a distinctive method to set their products apart in crowded marketplaces. They expand the scope of trademarks beyond visual and auditory indicators, representing a developing area in the realm of intellectual property.⁴

¹The Trademarks Act, 1999 (Act 47 of 1999), s. 2(1) (zb)

²The Trademarks Act, 1999 (Act 47 of 1999), s. 9(1).

³Naresh Prajapati and Rajanikant Patel, "Sensory Branding and Legal Reform: A Doctrinal Study on Scent Marks in Indian Trademark Law", available at <https://doi.org/10.20944/preprints202505.2115.v1>

⁴Team AMLEGALS, "Recognition of Smell as a Trademark in India", available at <https://www.amlegals.com/recognition-of-smell-as-a-trademark-in-india>

There is no specific regulation that permits the registration of scent marks. The definition of a trademark in Section 2(1) (zb) requires a mark to be capable of graphical representation and to distinguish goods or services. The necessity for graphical representation presents a considerable challenge for scent marks, which are inherently non-physical and cannot be visually depicted in the same manner as logos, colors, or words. Likewise, Section 9(1)⁵ of the Act prohibits the registration of marks that lack distinctiveness or serve a utilitarian purpose. Although this provision is applicable in principle to scent marks, Indian courts have not yet ruled on these sections concerning olfactory trademarks. The 2015 Manual of Trademarks Practice and Procedure⁶ offers no direction on how to file or examine applications for scent marks, leaving businesses without a clear process for registration.

The challenges of registering scent marks in India are further compounded by the absence of procedural guidelines and technological infrastructure within the Trademark Registry. While sound marks can be registered under Rule 26(5) of the Trade Marks Rules, 2017⁷, with established methods for graphical representation, scent marks lack a similar system. The fundamental requirement for trademark registration, which involves a visual or graphical depiction, remains a significant hurdle for scents, rendering applications for such marks practically unfeasible within the current framework. Furthermore, proving the distinctiveness of a fragrance presents inherent difficulties, as it must be uniquely linked to the product and not simply a result of its natural components or formulation. Internationally, courts and trademark offices have demonstrated a more flexible approach toward olfactory trademarks. In the United States, certain scents have been registered as trademarks, provided they are non-functional and associated with a specific source. These examples highlight the potential for recognizing scent marks as valid trademarks, provided that Indian law and administrative practice evolve to accommodate non-traditional marks.

⁵The Trademarks Act, 1999 (Act 47 of 1999), s. 9(1), supra note 2.

⁶Office of the Controller General of Patents, Designs & Trade Marks, "A Draft Manual of Trade Marks Practice & Procedure" (March 10, 2015), available at https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_32_1_tmr-draft-manual.pdf

⁷The Trademarks Rules, 2017, r. 26(5).

Reforms are needed at both the legal and procedural levels to facilitate the identification of scent marks in India. During the legislative process, Section 2(1) (zb) of the Trademarks Act, 1999⁸ needs to be amended to allow for non-visual forms of representation. This might involve employing standardized chemical compounds, comprehensive scent descriptions, or globally acknowledged fragrance classification techniques. This amendment would align Indian law more closely with jurisdictions that have started accepting non-traditional marks without depending exclusively on visual representation. The Trade Marks Rules should be broadened to include particular filing requirements for scent marks, akin to the system established for sound marks in Rule 26(5)⁹. These guidelines should explain how applicants can present scent samples, offer scientific identifiers, and show uniqueness. In addition to these modifications, the Registry will require enhanced technological assistance, such as access to lab facilities and digital fragrance databases, along with specialized training initiatives for trademark examiners. Collectively, these actions would establish a more transparent and functional framework for assessing scent trademarks and would facilitate the gradual incorporation of sensory branding into Indian trademark law.¹⁰

CONCLUSION

In summary, although scent marks are mainly overlooked in India, they denote a significant area in branding and intellectual property. Resolving the existing legal and procedural deficiencies would enable businesses to utilize olfactory branding effectively and also align India with global trademark protection standards. Acknowledging and enabling scent trademarks would encourage innovation, improve brand distinction, and fortify the entire trademark system to include new non-traditional marks. India needs to develop a framework that allows it to engage with all five senses when assessing how someone perceives a product. Allowing this flexibility will allow India to align itself more closely with many countries throughout the world, including all European Union member states, as well as the United States, regarding how they protect trademarks. Currently, Indian law mandates a graphical representation for trademark registration. By adopting international standards that prioritize "clear and precise" identification over rigid graphical requirements, India could better safeguard non-traditional marks like "The Scent of

⁸The Trademarks Act, 1999 (Act 47 of 1999), s. 2(1) (zb), supra note 1.

⁹The Trademarks Rules, 2017, r. 26(5), supra note 7.

¹⁰Prajapati and Patel, supra note 3.

India." As the concept of a "brand" evolves to encompass more than mere images or sounds, Indian IP law must adapt accordingly, or risk sidelining domestic creators in global markets where logos alone no longer define brand identity.