

Test of Graphical Representation of Scent Mark: Fit or Unfit

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Abstract

The level of protection for non-traditional marks can vary widely from country to country, and businesses seeking to protect these types of marks internationally must navigate a complex web of national and international trademark laws and conventions. While U.S. trademark regulations have broadened their scope to encompass non-traditional marks like colors, scents, and sounds, international agreements and the trademark systems of many other countries tend to be less receptive to these unconventional types of marks. For example, the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) sets out minimum standards for trademark protection, but it does not require member countries to provide protection for non-traditional marks such as colours, scents, or sounds. Instead, it allows member countries to decide for themselves whether to grant protection for these types of marks. Even in countries that do provide protection for non-traditional marks, the criteria for registration and protection may be stricter than in the United States. For example, in some countries, registration of a colour mark may be conditional on the mark having acquired distinctiveness through use in the marketplace, meaning that the mark must have become known to consumers as identifying a particular brand or source of goods or services. Overall, the level of protection for non-traditional marks can vary widely from country to country, and businesses seeking to protect these types of marks internationally must navigate a complex web of national and international trademark laws and conventions.

Keywords: International trademark laws, trade-related aspects of intellectual property (TRIPS), U.S. trademark regulations, world trade organization's agreement

INTRODUCTION

Since ancient times, humans have been introduced to all the senses which are in their bodies and that they need to survive on a daily basis. One of them is smell; it is the oldest sense which helps us detect and distinguish between helpful and harmful substances in our surroundings to avoid letting them cause harm.

Olfaction, which is a critical physiological process of the nasal airway which not only brings a sense of smell to humans but can also bring someone pleasure. The sense of smell holds so many

powers; it can easily boost someone's mood from happy to sad, to depressed or overwhelmed; it can stir up the memory and give a nostalgic feeling right from their childhood. Smell does not just give us pleasure or remind us of someone or something; it also helps us detect hazards like smoke or gas and can save ours as well as many other lives. It also has a medical use which is aromatherapy. In this therapy, different kinds of scents are used to breath in, or to apply to the skin to help reduce stress, ease pain, promote sleep, focus, and relax. Researchers have proven that

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people who lose their sense of smell are more likely to go into depression, lose interest in food, and are always worried about their body hygiene.

HISTORY OF SCENT

The history of scents goes all the way from France to Paris to India which began in the sixteenth century. The foundation for fragrance can be traced back to the sixteenth century, when French producers were established in the south of France. The Mediterranean Coast of France had offered excellent conditions for cultivating plants whose flowers, plants, and roots were used to produce great fragrance. The fragrance producers use to produce great fragrance using those cultivated flowers, roots, and stems. The producers used to live near the growers in order to obtain and process all the cultivated materials as soon as they were harvested. In the coming years, everything was getting developed, and it became easy to transport goods from one country to another.

Soon in the nineteenth century, many of the essential products produced in France were shipped to Paris and were successfully purchased by hundreds and thousands of small perfume houses. Some of them used to sell the perfumes in their original form but many of the other buyers used to mix them and get the compounded form of them and sell them as branded retail products like soap, fine fragrance, soap, and many other forms. Soon it became a family enterprise, where it became easy to keep the formulas of fragrance composition safe. In today's global landscape, a handful of renowned Paris-based corporations dominate the development and production of the majority of perfumes, with their operations extending across the world through various branches.

Then, in the twentieth century, the fragrance industry went through immense changes. Almost half of the small perfume businesses were shut down; we can say they disappeared. Because of the increase in real estate values and rise in labour costs which led to the cultivation of jasmine only in a huge number. Later, the crops which were used in fragrance manufacturing were only grown in countries like India where land and labour were both very expensive. By the close of the 20th century, fragrance companies, none of which were based in France, had collectively captured more than half of the global fragrance market share.

Today, professionals in the technology industries have a new way of doing business to keep it growing. For that, they keep on changing their location, their ways, their methods, and their employees which causes tension and uneasiness among the small fragrance houses because people within the business should not exploit or take out their most valuable formulas and trade secrets which can be easily accessible or shared by the employees in the world of big companies.

Since the late twentieth century, the development has really made it difficult to keep the formula by which a fragrance is made safe because, to keep developing competing products, it is considered lawful to use technology to obtain the formula of the fragrance obtained by the competitors. Protecting the originality of the scent or fragrance has never been easy. None of the international conventions concerning intellectual property laws, such as EUT and TRIPS, explicitly permit or forbid the protection of scent marks under trademark law.

SIECKMANN'S CASE

The requirement for a graphical representation of a smell to be registered as a trademark has been a source of complication for many applicants. In the case of *Ralf Sieckmann v. Deutsches, Patent und Markenamt* [1], the registration for the smell of 'methyl cinnamate' was denied due to a failure to comply with the norm requiring graphical representation. Similarly, in the Indian context, Section 2(zb) of the Trade Marks Act requires a trademark to be capable of being represented "graphically". A mere description of the chemical composition of a smell cannot be considered an adequate graphical representation. This is due to the fact that such a description pertains to the inherent nature of the substance and not the aroma itself. Therefore, applicants seeking to register a smell as a trademark must find a way to visually represent the smell in a unique and distinctive way. This can be

challenging, but it is necessary to ensure that the trademark is properly protected and can be enforced against potential infringers.

Trade Marks Act of 1999: The manual also provides examples of smells that have been registered as trademarks in other countries, such as the scent of roses for perfumes and the smell of freshly cut grass for tennis balls. In order to register a smell as a trademark, it must meet the same requirements as any other type of trademark. This means that the smell must be distinctive and not generic or descriptive of the goods or services it represents. The smell must also be capable of being graphically represented, which can be challenging for smells as opposed to visual or auditory marks. In some jurisdictions, such as the European Union, the registration of smell marks has been allowed for certain goods, such as perfumes and cleaning products. Nevertheless, it remains a relatively infrequent occurrence.

Overall, the registration of smell marks can be a complex and challenging process and it is important to consult with a trademark attorney or agent for guidance and assistance in the registration process. Indeed, the registration of smell marks can be limited by various legal factors beyond graphical representation. For example, the distinctiveness and non-descriptiveness of the smell in relation to the goods or services it represents are important considerations. If the smell is too common or generic, it may not be able to function as a trademark and distinguish the goods or services from those of competitors.

Another constraint arises from the necessity that the mark not possess functionality. In other words, the scent should not serve a practical purpose for the product, such as masking undesirable odors or providing a therapeutic effect. If the aroma is purely functional, it may not qualify for trademark protection. Furthermore, the mark must not run counter to public policy or morality. This implies that offensive or scandalous fragrances may not be registered as trademarks. In summary, though unconventional trademarks like scent marks, shape marks, and sound marks have been granted protection in specific cases, registering such marks demands a meticulous evaluation of various legal considerations and may be subject to constraints.

FUNCTIONALITY DOCTRINE ON SCENT MARK

The functionality doctrine presents a significant legal challenge to the registration of scent marks. The doctrine aims to prevent a trademark owner from obtaining a monopoly over functional features of a product that are necessary for competitors to compete effectively. In the context of scent marks, this means that if the smell of a product is necessary for the product to function or serve its intended purpose, it may not be eligible for trademark protection.

The application of the functionality doctrine to scent marks can be particularly challenging because the scent of a product may not always be essential to its function or use. For example, the scent of a perfume may be purely decorative or ornamental, and not necessary for the perfume to perform its intended function of providing a pleasant fragrance. In such cases, the functionality doctrine may not apply, and the scent may be eligible for trademark protection.

However, if the scent is essential to the function or use of the product, such as the scent of a cleaning product that masks unpleasant odours, the functionality doctrine may preclude trademark protection. This is because granting trademark protection for such scents could impede competition and hinder the development of alternative products with different scents. The application of the functionality doctrine to scent marks requires careful consideration of the functional nature of the scent in relation to the product, and its potential impact on competition in the relevant market. The functionality doctrine poses a significant obstacle to the registration of scent marks, and can lead to the denial of trademark protection for scents that have become iconic and widely recognized. As in

the case of Chanel No. 5, denying trademark protection for such scents can leave the owner vulnerable to copycats and imitation products, without any legal recourse.

Furthermore, the functionality doctrine can also pose challenges for the registration of scents in industries where the functional aspect of the scent is an important consideration, such as in pharmaceuticals. As in the case of *Pohl Boskamp*, the peppermint flavour in their nitroglycerin spray was deemed functional in treating certain categories of chest complications, rendering it ineligible for trademark protection.

While the functionality doctrine is a vital aspect of trademark law, and serves to prevent monopolies over essential features of a product, it is important to ensure that its application does not unduly restrict the protection of potential intellectual property, particularly in the case of olfactory trademarks. As such, a nuanced approach is necessary to strike a balance between protecting the functional aspect of a product and allowing for the protection of valuable and distinctive scent marks.

Regarding Scent Trademarks in the United States

Hasbro was granted trademark rights for the distinctive scent of its Play-Doh product by the US Patent and Trademark Office. In the United States, it is possible to trademark a scent if it has a distinctive character for customers. However, in the European Union, the requirements for registering a scent trademark are much higher under current legislation. Hasbro's registration of the scent trademark will prevent competitors from introducing similar products with a comparable scent to the market.

To secure a scent trademark registration in the United States, individuals or businesses must establish that consumers readily link the fragrance to a specific product or entity. This substantiation can be a challenging endeavor, typically demanding substantial exertion. Companies frequently conduct surveys and research studies to persuade the US Patent and Trademark Office (USPTO) of the uniqueness of their scent that merits protection.

US law provides protection for non-traditional marks such as colours, scents, and sounds; other national trademark regimes and international conventions are typically less accommodating in this regard. In essence, it is important to note that other nations and international agreements may not offer an equivalent degree of safeguarding for non-traditional trademarks compared to what is available in the United States.

Some successfully registered scent trademarks in the US include the flowery musk fragrance used in Verizon shops, various fruity fragrances for Manhattan Oil's lubricant mixed as a car perfume in gasoline, and a certain chewing gum scent used by Brazilian manufacturer Grendene to give its shoes and flip flops an extra note.

While it is theoretically feasible to register a scent trademark within the European Union, practical implementation has proven challenging. The existing legal framework stems from the 2002 European Court of Justice ruling in *Sieckmann v. DPMA*, which dictates that trademarks, including fragrances, which are visually imperceptible, can only gain registration if they can be represented in a graphical form.

The graphic representation of the scent trademark must meet several requirements, such as being clear, distinctive, self-contained, easily accessible, understandable, and permanently objective. Simply providing a chemical formula is not sufficient. These requirements are difficult for applicants to meet, making it challenging to register scent trademarks in the EU.

In 2005, the European Court of First Instance dismissed the application for a scent trademark that contained a display titled "The scent of a ripe strawberry". The CJEU ruled that the description did

not meet the requirements of clearness and objectivity since there exists more than a single strawberry scent.

In 2006, the highest court in France ruled on the protectability of a perfume in the case of “*Bsiri-Barbir v. Haarmann Reime*”. The court ruled that the scent of perfume is not protectable because it is “an application of purely technical knowledge without any signs of creativity” and because the scent is perceived differently by every person.

The “scent of freshly mown grass” was registered as the only scent Union mark to date in 2000. However, the trademark, which described a grass scent attached to tennis balls, expired in 2007 due to non-renewal.

The use of fragrances and scents in marketing is indeed becoming more important for companies. It will be interesting to see if EU legislation will facilitate the registration of scent trademarks for companies in the near future. The American legislation could serve as a model for this. Furthermore, the new EU Trademark Regulation 2017 no longer requires the previously required graphic representation of the protected area, which may make it easier for companies to register scent trademarks.

LANHAM ACT

The issue of scent trademarks raises several complex legal questions and challenges as scents are intangible and subjective, and their perception and association can vary greatly from person to person. This can lead to issues of infringement, depletion, dilution, labelling, and unfair competition as described in the scenarios mentioned.

For example, if a retailer places one manufacturer’s scented yarn next to another manufacturer’s packaged potpourri or cigars, it could be argued that this creates a false association or misrepresentation of the source of the scents, which could potentially violate the misrepresentation provisions of the Lanham Act. Similarly, if employees handling and selling the scented yarn are wearing strongly scented perfumes or deodorants, this could interfere with the perception and association of the scent with the yarn, and could potentially lead to claims of unfair competition.

However, it is important to note that scents are inherently different from other traditional forms of trademarks, such as words, logos, or designs, and pose unique challenges for protection. The subjective and intangible nature of scents makes it difficult to establish a clear and objective standard for determining their distinctiveness, and their perception can vary greatly depending on individual factors such as culture, context, and personal experience.

Given these challenges, it is understandable why there may be reluctance to extend trademark protection to scents, and why the current legal framework may not be fully equipped to address the complexities and nuances of scent trademarks as some scent marks have been successfully registered and enforced in the US, as previously discussed. That being said, the unique nature of scents also poses practical challenges in protecting them as trademarks. For instance, the difficulty in describing and conveying a scent in a clear and objective manner for the purpose of registration and enforcement, as required by the law, can be a significant hurdle. Additionally, as scents are intangible and can be easily replicated, proving infringement and identifying the source of the scent can be challenging, especially when multiple scents are present in the market.

As scents are subjective and can be perceived differently by different individuals, relying on them as a trademark can also create uncertainty and confusion for consumers. For example, one person’s interpretation of a “freshly cut grass” scent may differ from another’s, potentially leading to confusion as to the source of the product. Overall, while scents may possess some characteristics that make them potentially eligible for trademark protection, their unique nature also presents significant challenges that may make it difficult to establish and enforce their trademark rights. However, the same cannot be said for scents. While visual trade dress can be protected without a showing of secondary meaning,

scents are not easily discernible and identifiable like visual images. It is difficult for scents to point consumers in the direction of an independent source or to guarantee that they represent a reliable mechanism to convey such an important message without causing confusion. Therefore, it remains unclear from the case of *Two Pesos, Inc. v. Taco Cabana* [2], whether scents can attain secondary meaning in the trademark sense and be protected under the Lanham Act. The nature of scents makes them inherently confusing and imparts functional attributes to a product. Additionally, the administrative burden and regulation required to manage scent marks outweigh any possible benefit to businesses.

DIFFERENCE BETWEEN US, EU, UK, AND INDIA ON SCENT TRADEMARK

Non-traditional trademarks, such as sound marks, smell marks, and motion marks are becoming increasingly popular. These marks can provide a unique way for companies to differentiate their products from competitors and create a strong brand image in the minds of consumers.

Sound marks, such as the Yahoo yodel or the NBC chimes, are distinctive audio cues that are used to identify a particular brand or product. These marks can be registered as trademarks if they meet certain criteria, including being capable of graphic representation and having distinctive character.

Smell marks, on the other hand, are more difficult to register as trademarks. While it is theoretically possible to trademark a smell, it can be difficult to demonstrate that the smell is distinctive enough to be associated with a particular product or brand. In some cases, companies have attempted to trademark certain scents, such as Play-Doh's distinctive smell, but these efforts have met with mixed success.

Motion marks, such as Lamborghini's signature vertical opening doors, are distinctive visual cues that can be used to identify a particular brand or product. These marks can be registered as trademarks if they meet certain criteria, including being capable of graphic representation and having distinctive character.

Overall, non-traditional trademarks can provide a valuable way for companies to differentiate their products and create a strong brand identity. However, these marks can be more difficult to register and enforce than traditional trademarks, and companies should carefully consider the unique challenges and opportunities associated with non-traditional marks before seeking to register them.

US

The Lanham Act does not explicitly exclude scents from trademark registration, and the USPTO has developed a flexible and subjective approach to evaluating non-traditional marks such as scent marks. This approach allows for a wide range of marks to be registered, but it also requires a careful consideration of the distinctive qualities of the mark and its association with the goods or services in question.

Overall, the registration of scent marks and other non-traditional marks is a relatively new and evolving area of trademark law, and companies seeking to register these types of marks should work closely with experienced trademark attorneys to navigate the complex legal requirements and ensure the strongest possible protection for their brands.

EU

The *Sieckmann case* is a landmark case in the field of smell marks, and it has set a precedent for the registration of non-traditional trademarks. The case raised the issue of whether a smell can be registered as a trademark, and it established that it could, provided it met certain requirements. The *Sieckmann case* also highlighted the need for a graphical representation of the mark, which proved to be a significant obstacle for the registration of smell marks. The European Union's 2017 regulation on trademarks addressed this issue by abolishing the requirement for graphical representation, which has made it easier for non-traditional marks, such as sound, smell, and taste marks, to be registered.

The new regulation now requires that the mark be represented in a way that is clear, precise, self-contained, easily accessible, intelligible, durable, and objective. This has opened the doors for more possible applications, including smell marks. However, it is still a challenge to represent smells in a clear and precise manner, and the use of chemical formulas may not always be suitable. The *Sieckmann case* and the subsequent changes in the regulation have made it easier for businesses to protect their non-traditional trademarks, including smells. However, the registration of smell marks still poses significant challenges, and applicants need to ensure that they meet the requirements for registration under the new regulation.

UK

Yes, it is possible that changes will be made in the future to allow for the registration of smell marks in the UK. The recent amendments to the Trade Marks Act of 1994 indicate a willingness to adapt to changing technologies and forms of trademarks. The removal of the requirement for graphical representation paves the way for the registration of non-traditional marks such as sound marks. The White Paper also suggests that there is openness to the registration of non-traditional marks, like smells, colours, and sounds. Therefore, it is possible that in the future, the registration of smell marks may be allowed in the UK. However, any changes would likely require careful consideration and analysis to ensure that the registration of such marks is feasible and practical.

India

There is ambiguity in the Indian Trademarks Act of 1999 when it comes to the registration of smell marks. The requirement of graphical representation presents a challenge for non-traditional marks like smells, as it is difficult to represent them in a graphical form. It is worth noting that the Indian Trademarks Act of 1999 does not outrightly deny the registration of smell marks. The Act provides for the registration of non-traditional marks, including sounds and smells, under Section 2(1)(a) and Section 2(1)(m), respectively.

The requirement of graphical representation has been a matter of debate and interpretation in the Indian courts. In the case of *R. G. Anand v. Delux Films* [3], the Indian Supreme Court held that the requirement of graphical representation is not mandatory, and a mark can be represented by other means such as a description, a specimen, or even by sound or smell. It is important to note that this decision was made under the old Trademarks Act of 1958, which did not have a specific provision for graphical representation. The current Trademarks Act of 1999 specifically mentions graphical representation, which has caused some confusion and uncertainty.

Therefore, while the registration of smell marks is not impossible in India, the ambiguity and lack of clarity in the law make it difficult for innovators to obtain trademark protection for smell marks. It will require further clarification from the courts or a potential amendment to the law to provide a clear path for the registration of smell marks in India.

In the case of trademarking smells, it is indeed a challenging area, as it is difficult to clearly define and represent smells in a way that can be registered and protected. However, as you pointed out, with the advancement of technology and legal amendments, it may become possible to trademark smells in the future.

It is worth noting that there have been some successful cases of smell trademarks, such as the scent of Play-Doh, but these cases have been relatively rare and have involved specific and recognizable scents. Additionally, it is important to consider the potential challenges and issues that may arise from trademarking smells, such as the difficulty in enforcing and detecting infringement. So the topic of non-conventional trademarks, including smell marks, is an interesting and evolving area of intellectual property law, and it will be interesting to see how it develops in the future.

IMPACT OF GAS CHROMATOGRAPHY AND MASS SPECTROMETER

With the advent of contemporary GC-MS technologies, it is possible to accurately determine the formula of any fragrance. GC-MS is a highly sensitive analytical technique that allows for the separation and identification of individual chemical components present in a vapour sample.

In the past, perfumers would rely on their sense of smell and subjective evaluation to create fragrances, which made the process of creating a unique scent a closely guarded secret. With the use of GC-MS, perfumers can now analyse and reproduce existing fragrances with a high degree of accuracy.

The ability to analyse fragrances using GC-MS has also opened up new avenues for fragrance research and development. For example, researchers can use GC-MS to identify natural compounds present in plants and other sources that can be used to create new fragrances.

While the use of GC-MS has undoubtedly demystified the process of fragrance creation to some extent, the art of creating a truly unique and desirable scent still requires a deep understanding of fragrance chemistry, creativity, and an intuitive sense of smell.

The emergence of GC-MS technology has indeed created challenges for fragrance houses as it allows for the easy replication of existing fragrances. This has led to the rise of a “smell-alike” industry, which produces lower-cost versions of well-known fragrances without investing in the costly research and development that goes into creating an original fragrance. This has disrupted the traditional business model of the fragrance industry, which relied on the secrecy of fragrance formulas and the ability to charge premium prices for exclusive and unique scents. The emergence of the “smell-alike” industry has made it easier for consumers to access similar fragrances at lower prices, reducing the market share of traditional fragrance houses. The domination of the world fragrance market by a small number of multinational corporations has also led to an informal agreement among the major players not to directly compete with each other by replicating each other’s formulas. This has allowed each company to maintain its market share and protect its investments in research and development.

The rise of the “smell-alike” industry has challenged this agreement as it allows smaller companies to replicate the formulas of established fragrance houses and sell similar products at lower prices. This has forced traditional fragrance houses to innovate and develop new and unique fragrances to maintain their market share and justify their premium prices.

The increasing accessibility and accuracy of GC-MS technologies has indeed challenged the informal agreement among fragrance manufacturers not to directly compete with each other by replicating each other’s formulas. This has made it easier for smaller companies to enter the market and replicate the formulas of established fragrance houses, leading to increased competition and lower prices for consumers.

This agreement, however, was never extended to the clients of fragrance manufacturers, who attach their brands to fine fragrances developed and manufactured by external suppliers. GC-MS technologies have provided these clients with a new means of negotiating lower prices for the development of new fragrances as well as for ongoing supplies of existing products.

If a fragrance house refuses to accept the price negotiated by a client for ongoing supplies of a product that it developed for the client, the client could potentially reverse engineer the fragrance and then purchase supplies of it from a competitor at a lower price. This has created a new dynamic in the fragrance industry, where clients have more bargaining power and the ability to seek out lower-cost alternatives if their initial supplier is not willing to meet their demands. Overall, the increasing accessibility and accuracy of GC-MS technologies have disrupted the traditional business model of

the fragrance industry and forced established fragrance houses to innovate and adapt to changing market conditions.

The passage discusses how advancements in GC-MS technologies have made it possible for clients to produce their own supplies of perfumes developed by fragrance houses. This was realised by luxury conglomerate LVMH in 2011 when they built a fragrance compounding facility outside Paris and started producing supplies of concentrates for their popular scents like “Miss Dior Chérie,” “Dior Homme,” and “Kenzo Flowers”. Previously, these supplies were obtained from Givaudan, Firmenich, and IFF, after they developed the respective formulas. LVMH claimed that the blends they produced for these brands embodied subtle modifications of those produced by Givaudan et al. This was presumably a tactic to avert liability for breaching any contractual obligation to purchase concentrates from the companies that developed the original fragrances. LVMH’s actions were distressing to fragrance houses because they involved the production of successful and well-established perfumes. The profits derived from the sale of these liquid blends cover not only the costs of their development but also the formulation of a constant stream of new proprietary blends that manufacturers use to compete for new business.

The passage discusses how advancements in GC-MS technologies have made it easier for people to acquire the fragrance industry’s proprietary formulas legally. This has challenged the industry’s business model, as the industry’s most valuable assets are now accessible to anyone with access to a well-equipped laboratory. The loss of trade secret protection resulting from the use of these technologies is compounded by calls for greater government regulation of the industry’s products. Such regulations may require the public disclosure of the ingredients or formulas of proprietary fragrance compounds.

COMMON MAN’S STRUGGLE BEHIND DISTINGUISHING SCENT

Unlike visual or auditory cues, scents are difficult to identify and communicate, which can result in consumer confusion. The passage refers to the *In re E.I. DuPont de Nemours & Co. case*, which established a set of factors used to determine the likelihood of confusion between marks. The first factor on the list is actual similarity between competing marks, which can be difficult to ascertain in the case of scents because of their subjective nature. Consumers may perceive similarities between scents even when little or no analytical similarity exists. This can lead to a degradation of identity, making it difficult for consumers to recall a specific scent and select the corresponding product from a shelf filled with scented products.

In addition to the challenge of determining actual similarity between competing marks, the patent and trademark office must also consider the nature and extent of actual and potential confusion. In the case of scents, the inherent confusion and difficulty in communication mean that both actual and potential confusion already exist. The passage provides an example of a consumer seeking a specific scented fibre glass product and how communication with other customers or store clerks would be hindered by the subjective nature of scent perception. This further highlights the challenges in applying the likelihood of confusion test to scents. These difficulties should preclude the inclusion of scents under the Lanham Act, which governs trademark law in the United States. The author also suggests that there may be additional legal concerns related to trademark protection for scents.

SIGNIFICANCE OF TRADE DRESS

In recent years, retailers have also started to use technology to enhance the visual and auditory experience of shopping. For example, many stores now use digital signage and interactive displays to showcase their products and provide information to customers. Augmented reality (AR) and virtual reality (VR) technologies are also being used to allow customers to see how products would look in their homes or on their bodies before making a purchase. In addition, retailers are increasingly using data and analytics to personalise the shopping experience for individual customers. By collecting information about customers’ browsing and purchase histories, as well as their preferences and

behaviours, retailers can tailor their marketing and promotions to better meet the needs and desires of each customer.

The visual and auditory presentation of merchandise as well as other extrinsic factors, like customer service and return policies, play a significant role in driving retail sales. As technology continues to evolve, retailers will likely find new and innovative ways to use these factors to enhance the customer experience and boost sales. Scent marketing, also known as olfactory marketing, is a growing trend in the retail industry. The use of fragrance in retail spaces is thought to enhance the shopping experience by creating a pleasant and memorable atmosphere, while also promoting brand recognition and customer loyalty.

Retailers are using a variety of scent delivery systems, including diffusers, sprays, and scented fabrics, to distribute fragrance throughout their stores. They are also using different scents to evoke different emotions and moods. For example, a store selling spa products might use lavender or eucalyptus scents to create a relaxing atmosphere, while a sports store might use citrus scents to create an energetic and invigorating atmosphere. In addition to traditional retail spaces, scent marketing is also being used in other industries, such as hospitality, where hotels and resorts are using fragrance to create a welcoming and luxurious environment. It is also being used in healthcare settings, where certain scents are used to reduce anxiety and promote relaxation.

While scent marketing can be effective in creating a positive customer experience, it is important for retailers to be mindful of customers who may be sensitive or allergic to certain fragrances. Retailers should also be careful not to overuse scent, as it can quickly become overwhelming and detract from the shopping experience. Scent marketing is an innovative and effective way for retailers to differentiate themselves and create a memorable shopping experience for their customers.

PROTECTION GIVEN TO TRADE DRESS IN US

Trade dress is an important aspect of branding and intellectual property law. It refers to the overall visual appearance of a product, including its packaging, labelling, and other visual elements. Trade dress can be protected under trademark law if it is distinctive and serves to identify the source of the product.

Trade dress can include a wide range of elements, such as the shape and design of the product, the colours used in packaging and labelling, and even the typeface used in product names and other text. The key to trade dress protection is that the overall appearance of the product must be distinct and unique, and must be associated with a particular source or brand. Trade dress protection can be particularly important in industries where product design and visual appeal are key selling points, such as the fashion and beauty industries. However, trade dress protection is not limited to these industries and can be applied to a wide range of products and services.

In order to protect trade dress, a company must register its trade dress with the appropriate government agency, such as the United States Patent and Trademark Office. Once registered, the company can prevent others from using similar trade dress that could cause confusion among consumers. Trade dress is an important aspect of branding and can be a valuable tool for protecting a company's intellectual property rights.

Trademark law has evolved to accommodate them, recognizing that these elements can be just as important to a brand's identity and consumer recognition as traditional marks like logos and slogans. It is often developed over time and may incorporate non-traditional elements; it can be more difficult to establish and protect than traditional marks. In order to be registered as a trademark, a trade dress must be distinctive and have acquired a secondary meaning, meaning that consumers associate the trade dress with a particular source or brand. This can require significant time and investment on the part of the owner to develop and promote the trade dress.

Trade dress is an important aspect of branding and can be a valuable tool for protecting a company's intellectual property rights. While it may be more challenging to establish and protect than traditional brands, trade dress can be a powerful means of creating a unique and recognizable brand identity that sets a company apart from its competitors.

GRAPHICAL REPRESENTATION OF SCENT TRADEMARK

The example used is Sieckmann's mark, which consumers may have limited capacity to perceive through visual representations. This could lead to confusion about the boundaries of trademark protection.

Moreover, even if consumers could readily recognize the chemical formula for methyl cinnamate, which is used as a fragrance mark, the mark itself is inherently unstable due to factors such as concentration, quantity, temperature, or the substance bearing the odour. This makes it difficult to consistently perceive the mark and could further complicate trademark registration.

The importance of graphical representation in trademark registration and the potential challenges that emerge when attempting to protect marks are inherently difficult to perceive.

OLFACTORY TRADEMARK IN INDIA AND US

Olfactory trademarks, also known as smell trademarks, are a type of non-conventional trademark that is relatively new and can be difficult to register. This is because they do not fit into the traditional categories of trademarks, such as words, logos, and slogans. Instead, they are based on a particular scent or smell that is associated with a particular product or service.

The key elements required for trademark registration are distinctiveness, non-functionality, and the ability to identify the source of the product or service. Olfactory trademarks can be challenging to meet as they are intangible and not easily recognizable by consumers.

However, some companies have successfully registered olfactory trademarks, such as the smell of freshly cut grass for tennis balls, and the smell of a particular type of plastic for toys. As with any trademark, the registration process requires careful consideration and analysis of the distinctiveness and commercial value of the mark.

It is important to note that the TRIPS agreement does not explicitly mention olfactory trademarks, but it does provide a framework for member nations to establish and enforce intellectual property rights, including trademarks, in their respective countries.

TRIPS on Olfactory Trademarks

Section 2 and Article 15 of the TRIPS Agreement define the protectable subject matter of trademarks as any sign, or any combination of signs, that can distinguish the goods or services of one undertaking from those of other undertakings. The article specifies that words, including personal names, letters, numerals, figurative elements, and combinations of colors, as well as any combination of such signs, shall be eligible for registration as trademarks.

This means that trademarks can take various forms and can consist of any combination of signs that can distinguish one company's products or services from those of another. The TRIPS Agreement aims to promote fair competition and prevent unfair use of trademarks by establishing rules for the registration, use, and enforcement of trademarks, among other intellectual property rights.

Olfactory Trademarks in India

Section 2(1)(zb) of the Trademarks Act of 1999 in India defines a trademark as a mark that is capable of being represented graphically and can be used to distinguish the goods or services of one person from those of another.

The graphical representation requirement means that the trademark must be capable of being visually represented in a clear and precise manner, either on paper or in digital form. This requirement allows for the trademark to be examined, registered, and used by other parties.

Non-conventional marks, such as sounds, smells, and tastes, may not fit within the traditional graphical representation framework. However, the Trademark Rules 2017, Rule 28, allow for non-conventional marks to be represented in a graphical manner, such as through digital recordings or visual depictions.

Therefore, while non-conventional marks may not fit the traditional definition of a trademark, they can still be registered and protected under Indian trademark law if they can be represented graphically in a clear and precise manner.

“A mark can be registered as a trademark under the Act if it meets the following criteria:

1. It is a ‘mark’ under Section 2(1)(m) of the Act.
2. It can be graphically represented. It can be differentiated from the products of others.
3. It should conform to the provisions of the rules.
4. Trademark Rules 2002 Rule 28 and 30 require representation on paper in a durable form.

Therefore, this requirement acts as a significant impediment.

The condition of graphical representation has ensured that olfactory marks are difficult to register under Trademark Law in India.

Olfactory Trademarks in the USA

In the United States, trademarks are governed by the Lanham Act, also known as the Trademark Act of 1946. The Act recognizes conventional marks, such as words, names, symbols, and devices as well as any combination of them that indicate the origin of a product or service eligible for protection.

The Act does not explicitly mention olfactory or other non-conventional marks, such as sounds and colors, as being eligible for trademark protection. However, Section 45 of the Act defines a trademark as any word, name, symbol, or device, or any combination of them, used by a person to identify and distinguish their goods or services from those of others and to indicate the source of the goods or services.

Although the Act does not explicitly mention olfactory or other non-conventional marks, such marks may still be eligible for trademark protection if they satisfy the criterion of “recognizability” by a majority of the consuming public. This means that if a particular smell or sound is associated with a specific product or service in the minds of consumers, it may be protected as a trademark, even if it is not explicitly mentioned in the statute.

However, registering non-conventional marks can be more challenging than registering conventional marks because of the requirement for graphical representation. Therefore, it may be necessary to provide a detailed description of the mark and any other relevant information to ensure that it meets the requirements for registration and protection under US trademark law.

The US trademark law and courts have been more liberal in recognizing non-conventional trademarks including olfactory trademarks than Indian trademark law. In India, the absence of an explicit mention of non-conventional trademarks including olfactory trademarks in the TRIPS agreement and Indian trademark law makes it difficult for such marks to be registered.

Graphical representation is a significant impediment to registering olfactory trademarks in India. The requirement for graphical representation makes it challenging to represent smells in a clear and precise manner, which is necessary for the trademark to be examined, registered, and used by other parties.

As of now, olfactory trademarks cannot be registered under Indian trademark law. However, as consumer behaviour and branding practices evolve, the demand for the protection of olfactory trademarks may increase, and Indian trademark law may evolve to incorporate such marks.

FIT OR UNFIT

Trademark law has evolved significantly over the past century to broaden the scope of protectable commercial indicators. In the United States, trademark protection initially applied only to names, logos, and other designs that served as source identifiers for goods and services. However, as businesses began to develop unique and distinctive ways of presenting their products and services to the public, trademark law expanded to protect these features as well.

One example of this expansion is the protection of sounds as trademarks [4]. In 1994, the U.S. Patent and Trademark Office (USPTO) granted the first sound mark registration to NBC for its three-tone chime. Since then, many other companies have sought and obtained sound mark registrations for their distinctive sounds, such as the roar of the MGM lion and the Intel chime.

Additionally, the concept of trade dress has been incorporated into trademark law, which allows businesses to protect the overall look and feel of their products or services [5]. This includes the design and packaging of a product, as well as the decor and atmosphere of a service establishment.

These developments in trademark law have provided businesses with greater opportunities to protect their distinctive commercial indicators and prevent others from using similar indicators that could cause confusion among consumers [6]. While U.S. trademark law has expanded to protect non-traditional marks such as colours, scents, and sounds, international conventions and other national trademark regimes are generally less accommodating to these types of marks.

Even in countries that do provide protection for non-traditional marks, the criteria for registration and protection may be stricter than in the United States [7–10]. For example, in some countries, registration of a color mark may be conditional on the mark having acquired distinctiveness through use in the marketplace, meaning that the mark must have become known to consumers as identifying a particular brand or source of goods or services.

CONCLUSION

In India, trademark law has undergone significant evolution, expanding its scope to protect a diverse range of commercial indicators. Initially confined to names, logos, and designs, trademark protection now extends to non-traditional marks, including sounds, colors, and scents. However, the recognition and protection of scent trademarks pose unique challenges in the Indian legal landscape. While India has embraced the protection of non-traditional marks, the criteria for registration may be stringent. Similar to other countries, the distinctiveness of a scent mark may need to be established through market use, complicating the registration process. Additionally, the inherently volatile nature of scent, influenced by factors, like concentration and temperature, may present obstacles to consistent perception, raising questions about the feasibility of scent trademark registration. In the realm of trade dress, encompassing the overall visual appearance of a product, India acknowledges the significance of distinctive elements such as packaging, design, and colors. The registration process with the appropriate government agency, such as the Indian Trademark Office, is essential for safeguarding trade dress rights and preventing confusion among consumers. While India has adapted its trademark law to accommodate non-traditional marks, including scents, challenges persist in establishing and protecting these unique identifiers. The dynamic nature of scent and stringent registration criteria necessitate careful consideration and strategic efforts by businesses seeking to secure intellectual property rights in the realm of olfactory branding.

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