

**UNCONVENTIONAL TRADEMARKS**- Shaurya Kohli<sup>1</sup>**Abstract**

Technical advancements in the trademark field have been many recently, making it one of intellectual property's most fascinating subjects. Brand, service, or product identification is facilitated by trademarks, which are essentially intellectual property. Traditional marks like logos, symbols, images, captions, signs and names are generally not protected by trademark law.

Non-traditional trademarks are those that do not fall under the typical definition of a mark, such as a touch, smell, color, shape, texture, sound, taste, or any other sense of touch.

A trademark is traditionally described as any mark that is specific to a product and that can be linked to the company that made the goods. Word-marks, device marks, numerals, and so on are common types of trademarks. Unlike conventional and traditional trademarks, unconventional trademarks do not fit into either category. Sound markings, scent marks, shape marks, and colour marks are common examples of atypical trademarks. Unconventional trademarks must be able to communicate the difference between one person's goods and services and those of another. In order for the mark to be unique, it should be able to designate the source of the goods or services and so distinguish them from those of competitors.

**I. INTRODUCTION**

Technical advancements in the trademark field have been many recently, making it one of intellectual property's most fascinating subjects. Brand, service, or product identification is facilitated by trademarks, which are essentially intellectual property. It safeguards the product's producer or owner from unfair competition, defends the interests of customers and reduces the likelihood of consumer confusion. Traditional marks like logos, symbols, images,

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captions, signs and names are generally not protected by trademark law. But in today's fierce and ever increasing commercial market, it is critical for manufacturers of tangible commodities to distinguish themselves from one another.

Non-traditional trademarks are those that do not fall under the typical definition of a mark, such as a touch, smell, color, shape, texture, sound, taste, or any other sense of touch. The trademark protection is usually limited to graphically representable marks, however, non-conventional trademarks are registered and awarded protection since these marks can generate a specific level of recognition in the mind's eye of customers.

Consequently, brands have been more inventive and have embraced trademarks that aren't associated with them in the past. In general, trademarks are meant to prevent third parties from profiting from the goodwill that has been built up over time by a particular brand. Apple, for example, has built up its own goodwill over the years and has a devoted following of purchasers. Many brands have their own market worth and cash in on it. Many businesses establish trademarks to protect their brand value against exploitation by third parties. The Trademarks Act of 1999<sup>2</sup> and the Trademark Rules of 2017<sup>3</sup> oversee this important kind of intellectual property.

## II. UNCONVENTIONAL TRADEMARK: WHAT IS IT?

A trademark is traditionally described as any mark that is specific to a product and that can be linked to the company that made the goods. Word-marks, device marks, numerals, and so on are common types of trademarks. Unlike conventional and traditional trademarks, unconventional trademarks do not fit into either category. Sound markings, scent marks, shape marks, and colour marks are common examples of atypical trademarks.<sup>4</sup> Unconventional trademarks must be able to communicate the difference between one person's goods and services and those of another. In order for the mark to be unique, it should be able to designate the source of the goods or services and so distinguish them from those of competitors.

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<sup>2</sup> The Trademark Act, 1999, No. 47, Acts of Parliament, 1999 (India).

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<sup>4</sup> David Vaver, *Unconventional and Well-Known Trade Marks*, SJLS 1, 1-19 (2005).

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Because they want to keep their distinctive value, these trademarks are being protected as conventional marks. Allowing others to profit on the goodwill and reputation associated with non-traditional marks would be tantamount to complacency, which could lead to commercial invasion.

While a standard mark can be registered utilising its distinguishing qualities such as design or lettering, it is more difficult to do so with these non-conventional trademarks. As a result of the introduction of the Trademark Rules of 2017, which legitimised the marking of sound and colour if they may be graphically presented, these trademarks have gained statutory recognition and are experiencing a boom in India. According to the laws, the term "graphical representation" refers to the portrayal of the mark in paper or digitalized form, so that it can have its own distinct identity and help infringement claims if graphically represented.<sup>5</sup>

### III. INDIAN LEGISLATION

"A mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include the shape or packaging of goods and combination of colours" is defined as a trademark in Section 2(1)(zb)<sup>5</sup> and "A device or brand is defined as a mark as any combination of the following:" and "A mark is defined as any combination of the following:" There is a provision in the Trademark Act stating that a mark must have gained distinctiveness or secondary meaning through its long-standing bona fide usage in order to receive trademark protection. Due to the inability to graphically portray numerous atypical markings such as hologram marks and smell/taste/touch/texture/touch/texture, they are not registrable in India.

In the wake of the new trademark regulations, which took effect on March 6th, unconventional trademarks can now be registered. Sound markings can now be registered under Rule 26 of the new trademark regulations. In order to register a sound mark, you must submit a sound clip together with the musical notations you wish to use. You can apply for a colour mark by sending in a photocopy of a colour combination you want to use. In order to establish distinctiveness or secondary meaning, the Applicant must show that the colour or sound has been continuously used in a legitimate manner.

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<sup>5</sup> Dr. V.K. Ahuja, "Law Relating to Intellectual Property Rights" 3<sup>rd</sup> Edition, pg. 264.

<sup>5</sup> Supra note 1, § 2(1)(zb)

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#### IV. TYPES OF UNCONVENTIONAL TRADEMARKS

##### 1. Smell

Smell is one of our most powerful senses, capable of instantly bringing back memories. Many nations now permit the registration and protection of odours as trademarks, but the registration process is still challenging due to the odor's incapacity to be depicted graphically and the enormous job required to demonstrate its distinctness from the product.<sup>6</sup> The chemical formula of a material can often be used to illustrate the smell. Some corporations, on the other hand, have passed all of the needed examinations and have successfully trademarked the sense of smell. Some well-known instances of smell trademarks include the perfume of roses from a UK tyre company and the smell of beer from a London-based company's dart flights.

India does not directly restrict the use of olfactory markings, but it does follow the same position as the EU, which allows the registration of a fragrance as long as it is a graphical depiction that distinguishes the good from others. Like India, the EU requires a graphical representation of marks. In the UK, the smell mark "the smell of fresh-cut grass" for tennis balls was given by the Venoot Schap onder Firma Senta Aromatic marketing's Application, where the Second Board of appeal observed that the description of an olfactory mark for tennis balls is appropriate and sufficient to comply with the conditions of graphical representation.<sup>7</sup>

##### 2. Sound marks

Unconventional trademarks widely registered in India include sound marks. There were no explicit criteria or conditions for filing a sound mark application under the Act of 1999, even though it enabled the registration of sound marks. However, precise requirements for the registration of sound markings were introduced with the introduction of the Trade Marks Rules in 2017 (the "Rules"). The owner of a sound mark must now include a sound clip (no

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<sup>6</sup> Smell, Sound and Taste-Getting a Sense of Non-Traditional Marks, WIPO (17 October 2020, 6:10 PM), [http://www.wipo.int/wipo\\_magazine/en/2009/01/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html).

<sup>7</sup> [1999] E.T.M.R. 429

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longer than 30 seconds) together with the musical notations in the trademark application in order to get it registered.<sup>8</sup> Sounds are acceptable as trademarks if the sound is widely distinctive enough that a typical customer would identify it with only one owner's goods or services.

Comparatively speaking, sound mark is the most registered and protected non-conventional trademark. It's becoming increasingly popular, notably in the United States. When used correctly, a sound mark aids consumers in quickly and easily recognising a certain product on the commercial market. Instead of relying on words to convey a non-conventional trademark, a sound mark can graphically depict itself using a series of musical notes. Registered trademarks in this area include the sounds of Harley Davidson, Nokia song, and Tarzan Yell, to name a few of the most well-known.<sup>9</sup>

Yahoo Inc.'s three-note Yodel was granted India's first sound mark in 2008.<sup>10</sup> This registration paved the door for the registration of a slew of other sound marks in the years that followed. Sound marks have become increasingly popular among marketing teams at various corporations and agencies due to their ease of use in reaching and attracting large audiences such as sound marks of Nokia mobile phone, Britannia's bell sound, NSE's theme sound, etc.<sup>11</sup>

Sound can be trademarked in India if an MP3 recording of the sound is submitted to the Trademarks Registry of India in accordance with Section 26(5) of the Trademarks Rules of 2017 and is no longer than 30 seconds long. Another requirement is the submission of an image depicting the notations. In addition, the submitted application should explicitly identify that the trademark is sought for a sound, as per the Draft Manual of Trade Marks Practice and

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<sup>8</sup> Lindstorm Martin, *Brand Sense, Build Powerful Brands Through Touch, Taste, Smell, Sight and Sound*, Kogan Page Publisher (2005).

<sup>9</sup> Harshada Wadkar, *Non-Conventional Marks*, Lexology (17 October 2021, 6:30 PM), <https://www.lexology.com/library/detail.aspx?g=4339efff-eba0-4339-a5f9-47f2d72ae7d1>.

<sup>10</sup> ICICI Secures Rights for Corporate Jingle, *The Indian Express*, Mar. 12, 2011.

<sup>11</sup> Labna Kably, *Jingles and Chimes can make Trademark Noise*, *The Times of India*, Mar. 27, 2017

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Procedure.<sup>1213</sup> If this does not happen, the trademark application will be treated as if it were for a term and scrutinised accordingly.

### 3. Shape

As a result of its ability to be visually portrayed and more importantly to demonstrate that the mark is distinctive, shape of goods markings are one of India's most well-known unusual trademarks types. To protect products whose shapes have become so distinctive and popular that the general public can recognise them by their shapes, the shape of goods mark can be used. Shape of goods marks are not registrable if the shape derives from the nature of the products themselves, or if they achieve a technological purpose, or if they give the product some significant value.<sup>13</sup> Keep this in mind. By simply replicating a two-dimensional graphic image of the object from different angles, the trade dress may be perceived and protection can be sought for a shape goods mark.

Sections 2(1)(m)<sup>14</sup> and 2(1)(zb)<sup>15</sup> of the Trade Marks Act, 1999 recognise the shape of goods as a trademark if it is distinctive in nature and can be graphically represented, just as a combination of colours. When it comes to shapes being trademarked, they're mentioned in Section 9(3)<sup>14</sup> of the Act, which states that they must be unique from the good or service they're associated with, and not inherent in them.

When proving distinctiveness, it must be shown that the shape no longer serves a functional purpose for the object, as the Applicant claims. To the extent that it is stated in the Trademarks Act, 1999 definition of a mark and the Trademark Rules, 2017, there are also provisions for the registration of such marks in India, the Indian trademark regime has approved this form of the mark.

The criterion for granting such registration is the ease with which purchasers can distinguish the product just by its shape, excluding other identical goods. According to the Delhi High Court, shape marks are important in the case of Apollo Tyres Ltd. vs. Pioneer Trading

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<sup>12</sup> Serial Number 12.2.5 of the Draft Manual of Trade Marks Practice and Procedure.

<sup>13</sup> Dr. Mohan Dewan, Registering Shapes in India: Guidelines and Processes, Lexology (17 October, 2021, 4:00 PM), <https://www.lexology.com/library/detail.aspx?g=94e581ac-5333-4a72-8dfc-111d746af82d>.<sup>14</sup>

Supra note 1, § 2(1)(m)<sup>15</sup> Supra note 5.

<sup>14</sup> Supra note 1, § 9(3)

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Corporation and Ors.<sup>15</sup> "Products' shapes are statutorily recognised as trademark constituent elements. In some cases, the shape of a product could have trademark significance, meaning that the specific shape of the product could be used to identify the product's source. Copying a product's distinctive shape could cause misunderstanding among customers as to where the items came from."

#### 4. Colour

Marks with a colour scheme still face difficulties in India, since they must meet strict uniqueness requirements before they may be used, or show that the mark has gained secondary meaning through long-term bona fide use.<sup>16</sup> In contrast to sound markings, which can be distinguished by their visual appearance or sound notations, colour marks cannot be protected unless they can be used to uniquely identify the economic origin of the products and/or services they are linked with.

Registration of a single colour mark remains a grey area since it lacks the intrinsic potential to be distinctive and may cause consumer confusion due to the numerous shades of a single colour.<sup>17</sup> The colour trademark is approved for colour combinations. Cadbury's royal purple, Barbie's pink in a protected tint, and 3M's canary yellow are just a few of the world's most well-known colour trademarks.<sup>18</sup>

A combination of colours is mentioned in the Trade Marks Act, 1999, under Sections 2(1)(m),<sup>21</sup> 2(1)(zb),<sup>22</sup> and 10(1).<sup>19</sup> Additionally, Section 26(2) of the Trade Marks Rules, 2017 states that a reproduction of the mark must be submitted along with trademark applications for colour combinations. However, the Act makes no mention of single-color trademarks. According to Section 9(1)(a) of the Act, no trademark registration should be made for any trademark that is not distinguishable from the rest. Because single colours are readily available and frequently utilised, trademarking them in India is constrained because

<sup>15</sup> 2017(72) PTC 253 (Del)

<sup>16</sup> Dev Gangjee, *Non-Conventional Trade Marks in India*, 22 *National Law School of India Review* 67, 67-96 (2010).

<sup>17</sup> Althaaf Marsoof, *The Registrability of Unconventional in India and Sri Lanka: A Comparative Analysis*, 12 *JIPR* 497, 497-506 (2007).

<sup>18</sup> M M S Kharki, *Non-Traditional Areas of Intellectual Property Protection: Colour, Sound, Taste, Smell, Shape, Slogan and Trade Dress*, 10 *JIPR* 499, 499-506 (2005). <sup>21</sup> *Supra* note 1, § 2(1)(m) <sup>22</sup> *Supra* note 5.

<sup>19</sup> *Supra* note 1, § 10(1).

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they aren't particularly distinctive. As a result, it's impossible to say where colour trademarks stand exactly in India. A court in Delhi ruled in 2003 that Colgate Palmolive Co.<sup>20</sup> could not use the plaintiff's red and white colour scheme in the packaging of its products because doing so constituted passing off. The court also said that replicating the colour of another product's packaging constituted passing off. The court ruled that there could be no monopoly over colours and held that copying the colour of another product did not amount to passing off years later, in *Cipla Ltd. v. MKI Pharmaceuticals*,<sup>21</sup> wherein a preliminary injunction was sought to prevent the defendant from using an orange colour similar to that of the defendant in producing their products.

#### 5. Hologram

To portray a hologram mark on paper would be impossible since it would be unable to catch all of the mark's motion. Hologram marks are non-traditional trademarks that combine images and colours viewable only from a specific direction.<sup>22</sup> It is common practice for businesses to use these types of trademarks to deter unintentional counterfeit imitations of goods and services. One of the most well-known holographic marks is found on the toothpaste manufactured by Glaxo.

#### 6. Touch and Texture

The texture mark, also known as a touchmark, is the least claimed non-conventional trademark because it is not used as frequently as other trademarks.<sup>23</sup> It is critical for the registration of a touchmark that it conveys some sort of value and isn't just an adornment for the packaging of goods or services. Khvanchkara wine bottles' velvet-touch trademark and leather-like texture on brandy or grappa packaging are examples of touch as a mark of origin.

### V. CONCLUSION

The condition that a mark must be visually representable under the Trademarks Act is a major impediment to the approval and registration of other unusual trademarks, even though

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<sup>20</sup> *Colgate Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd.*, (2003) DLT 51.

<sup>21</sup> *Cipla Ltd. v. MKI Pharmaceuticals*, (2007) (36) PTC 166 Del.

<sup>22</sup> Tanisha Agarwal & Vanshaj Mehta, *Hear Me, Touch Me, Taste Me, Smell Me: Conventionalizing NonConventional Trademark in India*, 3 JCIL 1, 1-22 (2017).

<sup>23</sup> 27 *Ibid.*

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unconventional marks such as sound, shape, colour, and motion continue to gain favour in India. It's still possible to try to register a scent or taste mark by duplicating its chemical composition, although the chances of doing so under the Act appear to be slim. A further issue is the minimal or non-existent likelihood of touch/texture and holographic markings being registered, as they may not be graphically represented and only human contact is capable of detecting them. Furthermore, in order to appreciate the distinctive character of hologram marks, they must be seen from specific angles, and hence cannot be simply portrayed in trademark applications.

Non-conventional trademarks can be registered using the Trademark Rules, which outline the process in great detail. Modern marketing strategies that use colours, forms, fragrances, and noises to make their product stand out still have room for improvement in the law.

Besides this, in India, a trademark registration application must include a graphical representation of the trademark as well as other requirements that must be completed. There is no unique character in trademarks if they aren't "capable of distinguishing" between the goods and services of one party and those of the other. This type of mark can only be registered if a proof is supplied to establish the acquisition of a unique character as a result of its use. It must be acquired/attain a secondary unique meaning if any of these trademarks are descriptive in nature to suggest that they pertain to a certain brand or owner of the products and services in question. Non-traditional trademarks are registrable in India if they have developed uniqueness and are well-known among the general public as a result of their widespread and long-term use, and if customers link those non-traditional trademarks to their brand or owner.