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Reassessing the Graphical Representation Requirement under Indian Trademark Law: A TRIPS-Compliant Approach to Non-Conventional Marks

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ABSTRACT

To summarize, this investigation has outlined the advantages and disadvantages that the deletion of the graphic depiction requirement has generated and emphasized the requirement to adapt to evolving trademark practices, while still offering adequate protection resulting from newly developed types of trademarks. The paper majorly highlights the limitations of Indian trademark law, assesses the standard of "capable of graphical representation" for trademark registration under the Indian Trade Marks Act, 1999., and. It is also crucial to investigate the need to amend the Indian Trade Marks Act, 1996 to provide for the protection of Non-Conventional Trade Marks and bring out recommendations for legislative and judicial reforms relating to it.

I. INTRODUCTION

Trademarks have been a very significant portion of Intellectual property law, that serves both economic and legal functions in protecting reputation of a brand, consumer's interests related to unwanted confusion and fairness in market. It is mostly seen as a symbol of goodwill of any business enterprise. A brand becomes well-known by being unique and widely recognized, but once it's famous, others may emulate or reference it even in unrelated markets, which can insipid its uniqueness.[2] Schechter emphasized that a brand's true value lies in its *uniqueness* which is a quality he also referred to as its *individuality*, *identity*, and *singularity*.[3]

A trademark's traditional purpose is to set one business's products or services apart from another. [4]

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[2] Sarah Lux, Evaluating Trade Mark Dilution from the Perspective of the Consumer, 34 U.N.S.W. L.J. 1053 (2011).
[3] Frank I. Schechter, The Rational Basis of Trade-Mark Protection, 40 Harv. L. Rev. 813, 825 (1927).
[4] Hristo Raychev & Sadettin Akin, *Distinctiveness of Three-Dimensional Trademarks in the Food Industry: Comparison Between EU and Turkish Practices* (Feb. 28, 2015), https://ssrn.com/abstract=3417012 (last visited Nov. 15, 2025).

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Traditionally, the uniqueness has to be set through marks, symbols, logos, names or drawings. Legally, trademark is a mark that consists of any word, design, name, numeral, letter, shape of products, packaging, as long as such sign is capable of telling the source of goods or/and services.[5] But branding has evolved beyond the visual in the twenty-first century.

In the present competitive world, the brands are committed to standing apart to entice and engage consumers' attention for better prospects. In European countries, brands use non-conventional (or non-traditional) trademarks as an innovative way to stand out in the market. However, in the legal world since time immemorial, non- conventional trademarks have not seen existence as they fall outside of traditional trademarks like words, designs or symbols. Certain business houses are inclined to use unique identifiers, such as smells, tastes, colours, shapes, textures, sounds, motions, multimedia and holograms due to distinguish their product in the market and this trend is largely driven by a consumer base that is extremely responsive to visual and sensorial representation.

In an age where brand identity and consumer's imperfection recollection matter more than ever, organizations are realizing that unique, memorable, and sensory-based marks can create a significant brand impression by granting a competitive advantage, hence the non-traditional trademarks are becoming a key talking point and demanding for a legal space in branding and marketing today. The Controller General of Patents, Designs and Trade Marks (CGPDTM) has recently approved *Sumitomo Rubber Industries Ltd.'s application for a rose-like floral fragrance for tyres (Class 12)*[6], on a proposed-to-be-used basis.[7] This development brings into focus the question of whether a smell mark can be recognised as a legally protectable indicator of commercial origin under Indian trademark law. To contextualise this issue, it becomes essential to understand the broader framework of non-traditional trademarks.

II. UNDERSTANDING TRADEMARKS

Trademarks may be defined very broadly, but to understand them, it important to categorize them as visual and non-visual trademarks. Visual trademarks include motion marks, holograms,

[5] Section 2(1)(zb)- "*Trademark*" means 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 of goods, their packaging or combination of colours or any packaging and combination of colours…."

[6] Sumitomo Rubber Industries Ltd. filed an application on 23 March 2023 for registration of the trademark "FLORAL FRAGRANCE / SMELL REMINISCENT OF ROSES AS APPLIED TO TYRES" in Class 12 (tyres for vehicles) under the Nice Classification, an international classification system for goods and services established by the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, June 15, 1957, as revised and amended.

[7] Jagriti Rai, India Registers First Smell Trademark for Japanese Company's 'Rose-Scented Tyre,' Indian Express (Nov. 26, 2025), https://indianexpress.com/article/legal-news/india-registers-first-smell-trademark-for-japanese-companys-rose-scented-tyre-10385468/ (last visited Nov. 27, 2025).

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trade dress, shapes marks, three-dimensional marks, position marks including colour marks. *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.* (2d Cir. 2012)[8] is a prime example of the single colour mark. In this case, the Second Circuit determined that Louboutin's iconic red sole had gained secondary meaning and was protected as a trademark, but only when used in contrast to the upper portion of the shoe. Although the court relied on the trademark-use doctrine rather than a comprehensive likelihood-of-confusion examination and the decision upheld the protectability of colour marks in the fashion industry, leaving issues unresolved with aesthetic functionality and consumer protection. The trademark law must strike a balance between branding innovation and issues of aesthetic functionality and customer perception, even in the visual realm. These challenges become even more complicated when applied to non-visual marks. Non- visual marks are becoming new-age identifiers and are mostly theoretical due to lack of representation standards. One example would be the Sound Marks that are used to identify a business or brand through audio files like jingles or signature tunes. The taste marks are also prevalent that are used to identify products through unique taste and difficult for registration. Also, there is prevalence of Texture Marks where the distinctive surface feel is associated with a brand and are also difficult subject matter for registration owing to subjective sensory variation.

Whereas the Smell Marks are the unique fragrances applied on products, that must be both unique and non-functional in order to be eligible for trademark registration under regulations such as those of the USPTO.[9] Internationally, just a few olfactory marks have been registered. The UK famously accepted its first smell mark in 1996, the identical 'Sumitomo rose-scent mark (UK Reg. No. 02001416) for tyres'[10] and another for 'strong smell of bitter beer' for darts' flights.[11] The EU has not absolutely outlawed scent marks, but in *Sieckmann v. DPMA (ECJ 2002)* the Court set a severe representability test that a fragrance must be graphically portrayed in a manner which is clear, precise, self-contained, easily accessible, understandable, durable and objective. [12] Where a scent can be registered, it must be described visually, objectively

[8] Rohini Roy, Louboutin v. Yves Saint Laurent: The Second Circuit's Functionality Faux Pas, 33 St. Louis U. Pub. L. Rev. 343 (2014), https://scholarship.law.slu.edu/plr/vol33/iss2/18 (last visited Dec. 1, 2025).
[9] USPTO, *TMEP* (2024) §§ 1202–1202.13
[10] *Floral fragrance/smell reminiscent of roses as applied to tyres*, UK Trade Mark Reg. No. 00002001416 (filed Nov. 1994; registered 1996), UK Intellectual Property Office, https://trademarks.ipo.gov.uk/ipo-tmcase/page/Results/1/UK00002001416 (last visited Dec. 5, 2025).
[11] Trade Mark Application Decision (No. 0/024/01) (U.K. Intell. Prop. Office June 16, 2000), https://www.ipo.gov.uk/o02401.pdf (discussing acceptance of the "strong smell of bitter beer applied to flights for darts" as a trademark) (last visited Dec. 5, 2025).
[12] *Case C-273/00, Ralf Sieckmann v. Deutsches Patent- und Markenamt*, 2002 E.C.R. I-11737, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62000CJ0273 (last visited Nov. 15, 2025).

described, and must not be built into the nature of the product.[13] In Europe, following reforms to the EU trademark regulation, several notable odour marks have emerged, including sewing thread fragranced with a plumeria scent.

While the Lanham Act does not specifically identify scent marks, the USPTO has approved the registration of scent marks based on guidance in the Trademark Manual of Examining Procedure (TMEP), which sets the procedures and criteria for non-conventional marks like scent marks.[14]

III. FUNCTIONALITY DOCTRINE AND THE EVOLUTION OF TRADEMARK PROTECTION IN A TECHNOLOGY-DRIVEN MARKET

Instead of encouraging innovation, the main goal of trademark law is to safeguard marks like names, logos, emblems, and other identifiers that provide source information and guarantee consistent quality to customers. Because it prohibits trademark protection from being extended to elements that are necessary for a product's use, purpose, or performance, the doctrine of functionality plays an important restricting role in this situation. When functional elements, such as color combinations, shapes, sizes, textures, graphics, and a product's overall trade dress, offer a practical benefit and are solely aesthetically pleasing, they are not covered by trademark protection.

The Trade Marks Act, 1999, which lacks specific rules or methods to appropriately protect non-conventional trademarks in a technology-driven economy, is nevertheless the foundation of Indian trademark law. The European Union, on the other hand, has taken a more accommodating stance with Regulation (EU) 2017/1001 on the European Union trade mark. As long as a sign is clear, accurate, self-contained, easily accessible, comprehensible, durable, and objective, it can be expressed in any suitable format using widely accessible technology without the necessity for pictorial representation.[15]

[13] World Intellectual Property Organization, *New Types of Marks*, SCT/16/2 (Sept. 1, 2006), https://www.wipo.int/edocs/mdocs/sct/en/sct_16/sct_16_2.pdf (last visited Dec. 5, 2025).

[14] Adaja, Boluwatife, A Comparative Analysis Of The Protection Of Scent Marks In The Eu And Usa: A Call To Action For Nigeria (September 02, 2024). Available at SSRN: https://ssrn.com/abstract=4957256 or http://dx.doi.org/10.2139/ssrn.4957256

[15] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, 2017 O.J. (L 154) 1 (EU), https://eur-lex.europa.eu/eli/reg/2017/1001/oj (last visited Oct. 21, 2025)

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IV. GRAPHICAL REPRESENTATION AND EMERGING FORMS OF NON-TRADITIONAL MARKS

Several jurisdictions mandate a graphical representation, obstructing the registration of non-conventional trademarks that do not follow the visual formats.[16] In India, the most important criteria for a trademark registration as per the present law is that a trademark for a product or service should be capable of being represented graphically i.e., visually and graphically identifiable. Once the registration process is done, the owner of a registered trademark obtains exclusive rights to use it for promoting its business and can take infringement action under the Trademark Act, if anyone uses it in unauthorised manner.[17] For unregistered trademarks, the remedy is to file a common law action of passing off that protects the goodwill of businesses.[18] It cannot be denied that an identifiable mark that can be graphically depicted is of critical significance to the registration of any trademark in Indian context.

In legal terms, a mark is graphically represented when the representation of the same which is in paper form makes one understand the nature of the mark without needing supporting samples. It must be represented or expressed in a way that can be documented on file and stored in a registry of trademarks so that authorities can know what the Trademark is all about.

The trademark has been defined under the law as having three important components, in which first, is a mark; second, such mark should be capable of being depicted precisely in graphical form and third, it should be capable of distinguishing the goods or services of one person from those of others. So, these are the essentials that ensure that the mark can be easily identified and published in the journal of trademarks for facilitating its recognition and protection in the eyes of law."[19]

The graphical representation is the depiction of a trade mark which is applied on goods or services, in a paper form or in the digital form as further elaborated in Rule 2(1)(k) of Trademark Rules 2012.[20] Notably, this rule should be interpreted alongside the definition of a trademark as provided in Section 2(1)(zb) of the Trade Marks Act 1999, and consequently, a reading of both in combination would suggest that any representation of a trademark must be

[16] Ilham Azenal Sacabrata, *Graphical Representation in the Form of Label Merek/Mark Etiquette in Relation with Non-Conventional Trademarks Registration in Indonesia*, 9 *Indonesia Law Review* 1–? (2019), https://doi.org/10.15742/ilrev.v9n1.482 (last visited Dec. 4, 2025).
[17] Trade Marks Act, No. 47 of 1999, § 29 (India).
[18] Trade Marks Act, No. 47 of 1999, § 27 (India).
[19] Laxmikant V. Patel v. Chetanbhat Shah & Anr., AIR 2002 SC 275
[20] Trade Marks Rules, 2017, Rule 2(1)(k) (India) ("graphical representation" means the representation of a trademark for goods or services represented or capable of being represented in paper form and includes representation in digitized form).

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capable of being reduced to a representation on paper using the form prescribed for registration.

As far as colour trademark is concerned, legal recognition has been given in the 1995 *Qualitex v. Jacobson*[21] ruling, which allows colors to be trademarked under specific conditions. *Qualitex* legitimized color trademarks if they are non-functional and have acquired secondary meaning. Use of colour Magenta by T-Mobile[22], the use of the single colour Lilac by Milka-Chocolate,[23] the use of the single colour Blue by Tiffany and Co[24]., the use of the single colour Brown by United Parcel Service[25] are the leading examples of colour trademarks. Critics believe that this abuse of a colour trademark has stifled competition in the market and limited innovation within the marketplace.

With the rise of digital media, motion marks are also evolving as the contemporary equivalent of taglines. These trademarks feature distinctive and imaginative animations, either digitally generated or based on real-world motion. To qualify for protection, a motion trademark must be clearly represented in the application and demonstrate distinctiveness. The clear sequence of movements or series of images forms the essential part of such a mark that plays a decisive role in its legal recognition. Prominent examples include the Torch lady statue in Columbia Pictures intros, the Microsoft Windows startup animation, and the iconic Nokia opening screen.

Then a hologram trademark uses a 3D holographic picture to uniquely identify the source of goods or services that appear realistic and ever-changing with different viewpoints. Glaxo Group's holograms on dental products, American Express' hologram on its credit cards, MasterCard's globe hologram, Visa's dove hologram on cards, and Intel's holographic logo sticker on its computer processors are some trademarks which are used in day-to-day routines, each serving as a different indicator of brands.

Another category of trademark is trade dress that refers to the complete look and feel of a product or its packaging that helps consumers identify its source. It comprises of elements like

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[21] Martin Lindstrom, *Brand Sense: How to Build Powerful Brands Through Touch, Taste, Smell, Sight and Sound* (London & Sterling, VA: Kogan Page 2005) (reviewed in *Journal of Product & Brand Management*, June 2005, 14(4): 278–79).

[22] Bailey King, *Pigment Politics: The Hues and Don'ts of Defining Single-Color Trademarks in Corporate Palette Power Struggles* (Dec. 9, 2023), https://ssrn.com/abstract=4647020 (last visited Dec. 4, 2025).

[23] Raju Narayana Swamy, *Nonconventional Trademarks in India: Reconciling the American Approach of "Anything Goes" and the Sieckmann Approach of Europe* (July 22, 2022), https://ssrn.com/abstract=4169400 (last visited Dec. 5, 2025)

[24]Sarah Lux, Evaluating Trade Mark Dilution from the Perspective of the Consumer (Nov. 1, 2011), University of New South Wales Law Journal, Vol. 34, No. 3, pp. 1053–1079, available at SSRN: https://ssrn.com/abstract=1965852
(last visited Dec. 5, 2025).

[25] Image Trademark of United Parcel Service of America, Inc., Serial No. 76408109, Reg. No. 2901090 (filed June 20, 2002; registered Nov. 9, 2004), https://trademarks.justia.com/764/08/n-76408109.html (last visited Dec. 5, 2025).

shape, color, design, and layout, like the layout of cube shape Apple stores, the green-and-yellow colour arrangement of Subway and the packaging, and the packaging of Toblerone chocolate etc. Brands and businesses can protect the ornamental or aesthetic form of their products by obtaining a shape trademark registration. However, a shape of a product cannot be registered as a trademark where the shape is given by the nature of the product, where the shape conveys significant value to the product, where the shape is necessary to achieve a desired technical result, e.g. Shape of an aeroplane would be compliant with aerodynamics to achieve desired result, hence there cannot be registration for that compatible shape. [26]

A 3D trademark protects the shape of the goods as well as the packaging. A 3D trademark will frequently be protectible as a trademark, but not if the style of the product is defined by the shape. The level of trademark protection of a 3D mark is highly variable and dependent on the goods and services for which the mark is applied. It is notable to mention that the Court in *August Storck KG v. Office for Harmonization in the Internal Market* (*Trade Marks and Designs)* [27]*,* concluded that the shape of a sweet in a gold-coloured wrapper with twisted ends did not meet the distinctiveness requirement.

A position trademark is officially defined as a mark that is affixed to or situated on a product, and may be represented by a drawing which must show the position of the mark or logo on the product, plus its size and proportions relative to the product as a whole. Like other trademarks, a position trademark must be distinctive, i.e., it must allow the users to recognize it as being from a particular brand. WIPO's Standing Committee explains that in some countries, position trademarks are considered a type of other marks, like figurative or 3D trademarks, rather than a separate category.[28] This seems to be the current Indian position as well.

Non-visual trademarks like Sound trademark or Aural Trademarks, are also accepted as performing the function of a trademark for certain goods and services. Sound marks like Audi 'heartbeat' sound logo[29], musical jingle of Deutsche Bahn[30], Netflix sound logo[31] have been

[26] Trade Marks Act, No. 47 of 1999, § 9(3) (India).
[27] August Storck KG v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case C-25/05 P, 2006 O.J. (C 212) 7 (ECJ).
[28] World Intellectual Property Organization (WIPO), *Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications: Representation of Non-Traditional Marks, Areas of Convergence, Area of Convergence No. 5: Position Marks*, available at https://www.wipo.int/edocs/mdocs/sct/en/sct_20/wipo_strad_inf_3.pdf (last visited Dec. 1, 2025).
[29] Audi sound mark, EUIPO Registration No. 018071642 (filed 2019), https://euipo.europa.eu/eSearch/#basic/1+1+1+1/018071642 (last visited Oct. 3, 2025).
[30] EUIPO Trademark Registration No. 018800487, https://euipo.europa.eu/eSearch/#details/trademarks/018800487 (last visited Oct. 4, 2025).
[31] EUIPO Trademark Registration No. 017916805 https://euipo.europa.eu/eSearch/#details/trademarks/017916805 (last visited Oct. 12, 2025).

given recognition. So, if sound marks are represented well by musical notations, then there is a good chance of getting them registered.

V. RISE OF NON-VISUAL TRADEMARKS: IS THE FUTURE OF BRANDING MOVING TOWARDS NON-VISUAL TRADEMARKS?

It is pertinent to note that the requirement of a trademark being graphically represented can't be applied to all such emerging forms of trademarks. The distinctiveness of non-traditional trademarks is also often questioned, giving rise to a low registration rate in countries, e.g. only 0.29% of EU trademark applications in 2023 were for non-traditional marks (Humphreys et al., 2024).[32] The lack of a unified international legal framework complicates the registration process, as seen in the varying approaches across different countries(Sultimova, 2022).[33]

Brands are getting more experimental and as a means to sustain them for longer in the market they must embrace certain platforms that engage the five senses. Plus, the availability of the Internet and e-commerce has also opened up the type of signing that organizations may wish to use as registered trademarks.[34] Though such non-conventional trademarks have existed across the globe for many years, the grant of protection for the same has gained prominence in recent times only.

Texture or tactile trademarks involve features related to the sense of touch, where the feel of a product or its packaging serves as a brand identifier. However, if the texture is functional, affecting use, quality, or cost, it cannot be registered, e.g. texture created for non-slippery tiles used in bathroom, is functional and cannot be registered. In 2006, tactile marks gained official acceptance when the International Trademark Association (INTA) resolved to support the acceptance of tactile marks. That year also saw the World Intellectual Property Organization (WIPO) mention 'texture or feel marks' as non-visible trademarks in a report focusing on new categories of marks.[35] WIPO clarifies in their report that the surface texture of a product, despite not being visible, can be distinctive and recognized, which is essentially the relevant law when

[32] Gordon Humphreys, Nedim Malovic & Stefan Martin, *Round-up of Non-traditional EU Trade Mark Decisions 2023*, 19 *Journal of Intellectual Property Law & Practice* 393 (Mar. 6, 2024), https://doi.org/10.1093/jiplp/jpae023 (last visited Dec. 7, 2025).

[33] E. B. Sultimova, *Non-Conventional Trademarks: Classification and Features of International Legal Protection*, 17 *Actual Problems of Russian Law* 112 (2022), http://dx.doi.org/10.17803/1994-1471.2022.142.9.112-124 (last visited Dec. 14, 2025).

[34] Garry Trillet, *Registrability of Smells, Colors and Sounds: How to Overcome the Challenges Dressed by the Requirements of Graphical Representation and Distinctiveness within European Union Law?* (July 2013), https://ssrn.com/abstract=2340431 or http://dx.doi.org/10.2139/ssrn.2340431 (last visited Dec. 5, 2025).

[35] Lisa P. Lukose, *Non-Traditional Trademarks: A Critique*, 57 *Journal of the Indian Law Institute* 197, 207–08 (2015) (noting that in 2006 the International Trademark Association adopted a resolution supporting the recognition and registration of tactile or touch marks)

it comes to trade marks. In *Louis Vuitton Malletier v. Santosh,*[36] Delhi High Court also granted injunction against the use of EPI Textured finished LV bags and awarded compensation of approx. 9.59 lakhs costs on the manufacturers for selling counterfeit goods.

Within the wide spectrum of non-visual trademarks, gustatory marks appear as both distinctive and contentious which seek to protect taste as a source identifier. The idea originate from the fact that just as a logo or a jingle can remind customers of a particular brand, a unique flavour might similarly function as a brand marker, particularly in pharmaceutical industries, confectionery, or beverages. Taste Trademarks or Gustatory Trademarks are the one in which sufficiently distinctive taste or the flavour of an item acts as its trademark.[37] However, unlike sound or motion marks, gustatory marks have to go through intense scrutiny and cannot be easily registered because taste being a utilitarian phenomenon, is essentially functional. This raises a serious question in a discussion; 'Does the acknowledgement of taste marks risk granting a monopoly over basic sensory experiences?'

Gustatory trademarks are also subject to the functionality doctrine, so functional, naturally occurring flavours, or flavours that are integral to a product's purpose cannot be registered. However, the difficulty in obtaining taste mark registration as a trademark lies in the potential functionality. It remains ambiguous how a taste could be a source indicator, as it can fulfil a utilitarian function and consumers cannot typically experience the flavour or taste of something before purchase. Accordingly, even though it is theoretically possible to obtain a taste trademark registration, in practice it has proven elusive.

However, in India due to graphical representation aspect under the definition, there is a lot of difficulty in describing scents with precision as the mark must prove that the consumers associate the scent with a single source. Also, if the Scent marks are naturally linked to product use or quality are excluded from registration. It can be seen that even in progressive jurisdictions, scent mark registrations are quite rare owing to evidentiary and procedural challenges.

In conclusion, it is very simple to identify that in order to achieve trademark rights for non-conventional trademarks, the most critical element is to be able to show that consumers clearly identify and attribute the mark to a brand.

[36]Louis Vuitton Malletier v. Santosh & Ors., 2023 SCC OnLine Del 2183 (Del. H.C.)

[37] Simon Geiregat, *Trade Mark Protection for Smells, Tastes and Feels – Critical Analysis of Three Non-Visual Signs in the EU*, 53 *IIC — International Review of Intellectual Property and Competition Law* 219 (2022), https://doi.org/10.1007/s40319-022-01160-3 (last visited Dec. 5, 2025)

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VI. NEED FOR RECOGNITION OF NON-TRADITIONAL TRADEMARKS

The Trade Marks Act of 1999's stringent requirements for visual or graphical representation under Sections 2(1)(zb), 17, 18, and 29 act as a major structural obstacle to the registration of a number of unconventional and cutting-edge brand identifiers. Several sensory and dynamic marks, including motion, hologram, sound, scent, texture, and multimedia marks, are effectually excluded by this standard. On the other side these marks are becoming more and more important to contemporary branding strategies in the digital economy. Even while these marks might be indeed competent to distinguish products and services, their legal recognition under the current legal framework is limited by their incapacity to be sufficiently depicted in static visual form.

On the other hand, the European Union's 2017 trademark system overhaul represented a step away from the conventional graphical representation requirement. The EU has taken a technologically neutral and innovation-friendly stance that is consistent with modern forms of brand communication by permitting trademark representation in any form that is clear, precise, self-contained, easily accessible, comprehensible, durable, and objective. By allowing non-traditional trademarks to be registered using digital files including audio, video, and multimedia forms, this reform has increased the range of protectable subject matter without sacrificing legal certainty.

Businesses operating in India are still limited in their capacity to fully utilize innovative and expressive brand assets in the absence of a similar relaxation in the Indian trademark system. In addition to impeding the development of India's trademark regime, the ongoing adherence to antiquated representational standards may put Indian companies at a competitive disadvantage in the global intellectual property ecosystem. Therefore, in order to promote branding innovation, bolster trademark protection, and improve India's reputation as a forward-thinking and internationally aligned intellectual property jurisdiction, legislation reform targeted at modernizing trademark representation criteria is crucial.

The recognition of the requirement for developing proper legislation for the protection of non-conventional trademarks goes back many decades. But the expansion of their commercial interactions, with an emphasis on multisensory marketing, has mandated the legal acknowledgement of distinctive non-traditional signs as strong source identifiers. The rigid expectation of visual representation in compliance with Section 2(zb), Section 17, Section 18, and Section 29 of the Trade Marks Act, 1999 remains a considerable barrier to registration; leaving out whole types of brand identifiers. Reform in the European Union Trademark specifications in 2017, which excluded the condition of graphical presentation and instead

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permitted the representation of any form of "clear, precise, self-contained, easily accessible, intelligible, durable and objective," has shown a reasonably realistic method and a better fit for technology. Without a similar relaxation in India, businesses will not be able to fully exploit new and exciting brand properties, raft superior enhancements to the trademark regime, or hamper India's global position relating to intellectual property.

TRIPS Sets a Floor, not a Ceiling:

It is pertinent to note that TRIPS, under Article 15(1), nowhere explicitly requires a trademark to be represented graphically.[38] The phrase *"any sign, or any combination of signs"* is deliberately kept broad to ensure that the evolving types of marks sound, smell, holograms could be protected. It focuses on the capability of a sign to differentiate goods or services of one enterprise from another.[39]

Graphical representation is not required by the TRIPS Agreement as a need for trademark protection. Article 15(1) of TRIPS allows, but does not mandate, WTO Members to apply a criterion of visual perceptibility and defines a trademark generally as any sign capable of differentiating the goods or services of one undertaking from those of others. As a result, TRIPS takes a flexible and technologically neutral stance, giving Member States the freedom to accept both visual and non-visual marks as long as the fundamental condition of distinctiveness is met. This framework does not require Members to limit trademark protection to visually representable signs, and it encourages the registration of newly developed non-conventional trademarks.

TRIPS establishes minimum standards, not maximum ones. So, if a requirement like graphical representation is stricter than TRIPS, a country is allowed to relax it, as long as it still meets TRIPS' minimum protection for trademark rights. Since TRIPS doesn't demand graphic representation, India could move towards other forms of representation (e.g., sound files, MP4s for motion marks) without breaching TRIPS.

According to this construction, TRIPs accommodate technological advancement in the mode of signification and is not limited to visual indicia but also includes sensory indicia such as sound, scent, movement, and holographic marks. The current restriction of a graphical representation

[38] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 15, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 299, 319–20, available at https://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Dec. 5, 2025).

[39] Natalia Pérez Acevedo, *The Applicability of the Graphical Representation Requirement on the Registration of Non-Traditional Trademarks: Comparative Analysis of a Possible Update in the Andean Community Regulation in the Light of the European and Chinese Experiences*, 38 *Revista La Propiedad Inmaterial* 73 (Jul.–Dec. 2024), https://doi.org/10.18601/16571959.n38.04 (last visited Dec. 5, 2025).

threshold in Indian law therefore presents yet another formalistic entanglements to the protection of non-conventional trademarks, particularly where the essential distinctiveness of the sign depends on non-visual sensory perception. The European Union, Regulation (EU) 2017/1001, [40]that eliminated the restriction of graphical representation by adding "clear and precise representation" in any suitable form faithfully reflects the text and teleology of TRIPS. On similar terms, the statutory framework of India could be reviewed to eliminate this unnecessary barrier to registration of trade marks, creating greater compliance with TRIPS' minimum standards regime for aligning domestic law, while also enabling the registrability of new non-conventional categories of trademarks subject to technological evolution of the marketplace.

It is also submitted that Article 6quinquies of the Paris Convention[41], which is primarily related to the cross-border protection of trademarks registered in the country of origin offers an ancillary basis for relaxing India's rigid graphical representation requirement in the context of non-traditional marks.[42] The clause requires convention members to accept such marks "as is" for protection in other member countries and to reject them only for very specific reasons, such as lack of distinctiveness, interference with public order or morality, or deceptive or misleading nature. Notably, this rule protects markings that do not adhere to conventional visual formats as long as they are able to demonstrate the source of the goods and services. Refusal cannot be based solely on the shape of the mark or sign or how it is displayed.[43] In contrast, the current Indian regime, which requires graphical representation under Section 2(1)(zb) of the Trade Marks Act, 1999, effectively prohibits the registration of marks that, although distinctive, cannot be adequately rendered in graphic form, thereby undermining the Paris Union's harmonization goals. A more flexible approach, such as the European Union's "clear and precise representation" model, would better serve the objectives of Article 6quinquies and maintain India's compliance with Article 15(1) of the TRIPS Agreement. The smell, taste, touch and movement marks have neither been included in nor excluded from Indian trademark laws such as the Trade Marks Act, 1999; Trade Marks Rules, 2017 and Draft Manual of Trade Marks

[40] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 Dec. 2015 to approximate the laws of the Member States relating to trade marks, 2015 O.J. (L 336) 1; Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 Dec. 2015 amending Regulation (EC) No. 207/2009 on the Community trade mark, 2015 O.J. (L 341) 1.

[41] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305, Art. 6quinquies(B).

[42] Zhan Q., *The International Registration of Non-traditional Trademarks: Compliance with the TRIPS Agreement and the Paris Convention*, 16 *World Trade Review* 111 (2017), https://doi.org/10.1017/S1474745616000392 (last visited Dec. 5, 2025).

[43] Ibid

Practice and Procedure.

To get on par with the ever-growing arena of non-conventional trademarks, in India the definition of a 'mark' was expanded in 2002 to include three-dimensional marks such as the shape of goods, motion marks, colours and colour combinations, odours and sounds among other forms. Graphical representation is however the *sine qua non* of trademark registration in India. However, Indian laws have attempted to make some accommodations for the same. A silver line has been extended in terms that the Trademark Rules of 2017 (Rule 2(k)) have widened the definition of graphical representation to include representation via a digitized form as well. Unconventional trademarks are hence slowly but steadily making their way into Indian jurisprudence. The regulation of non-conventional trademarks has not been properly explored in India, and there is hence a dearth of legal jurisprudence in this regard. It is highly advisable that India take a leaf out of the trademark laws of some of these developed countries and enact necessary provisions in the existing statutes.

VII. Conclusion and Recommendations

Indian courts have largely adopted a conservative approach, with most non-traditional trademark applications either facing objections at the registration stage or being subsequently abandoned. The lack of registered sensory trademarks (such as smell, taste and touch trademarks) in India amply demonstrates how restrictive the Trade Marks Act 1999 has been through its mandatory requirement for graphical representation. The statutory insistence on this type of graphical representation has been a significant limitation to the development and acceptance of non-conventional trademarks that are becoming increasingly commercially significant and are able to demonstrate that they can function as source identifiers. With branding strategies continually moving away from the use of visual branding elements towards engaging with consumers on multiple sensory levels, the current trademark system in India is not capable of meeting or accommodating these new brand realities.

Legally, the TRIPS Agreement does not see graphical representations as an absolute necessity to register trademarks; instead, it emphasises that distinctiveness is a basic positive requirement in accordance with Article 15. Further, as a member of the WTO, India has a large zone of policymaking within which it can correct its existing trademark laws, align them with the TRIPS agreement, and keep the integrity of its legal systems intact. If India continues to set a higher level of representational standards than the TRIPS agreement allows, it will isolate itself from world-class trademark practices and stifle the growth of innovative branding in a consumer-centric and technological market.

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Therefore, it is suggested to review and modify Section 2(1) (zb) of the Trade Marks Act, 1999 to eliminate the rigid requirement of graphical representation and adopt a more flexible and technologically-neutral standard that requires "clear and precise representation" while also allowing for broad undergraduate interpretation based on Article 15 of TRIPS.

It is also recommended that India adopt clearer guidelines and examination standards for non-conventional trademarks, to guarantee proper assessment of variables like distinctiveness, graphical representation, and functionality.[44]

In order to loosen the strict need of graphical representation, India could implement a hybrid framework for the registration of olfactory trademarks, based on Australian experience.[45] In line with the Australian approach, functional and naturally occurring smells should be specifically excluded from registrability in order to prevent monopolization.[46]

A combination of (i) a clear verbal description of the smell, (ii) disclosure of its chemical formula, and (iii) the required deposit of a scent sample to be kept with the Trade Marks Registry should be allowed by the amended Trade Marks Examination Manual. In accordance with the evidentiary criteria used by the US TTAB in *re Clarke*[47] and *re Pohl-Boskamp*[48], applicants should also be required to show acquired distinctiveness by long-standing and exclusive use, backed by consumer surveys, advertising expenditure, and sales statistics.[49] Such a change would allow non-conventional trademarks to be legally protected while ensuring transparency, access and objectiveness in both the filing process and the enforcement process.

In addition to the importance of legislative change, the Trade Marks Registry should develop detailed administrative guidelines to facilitate the submission of appropriate digital and scientific formats for non-conventional trademarks (e.g. MP3 files for sound marks, MP4 files for motion marks, scientifically verifiable representations/samples for scents and textures). Such a complementary regulatory approach will allow for the registration of non-conventional trademarks without compromising the integrity of the trademark registry. Collectively, these reforms will create a more inclusive and innovation-oriented trademark regime in India, align India's trademark systems with global best practices, and strengthen India's position in the

[44] Yue Mi, *Analysis of Location Trademarks Registration*, 9 *Dispute Resolution* 2596 (Nov. 2023), https://doi.org/10.12677/DS.2023.96355 (last visited Dec. 4, 2024).
[45] M. P. Ram Mohan & Pratishtha Agarwal, *The Proustian Predicament in Trademark Law: Charting the Legal Recognition of Olfactory Marks*, IIMA Working Paper No. 2025-08-01 (Aug. 2025), https://www.iima.ac.in/sites/default/files/2025-08/WP%20No.2025-08-01.pdf (last visited Dec. 5, 2025).
[46] Ibid
[47] In re Clarke, 17 U.S.P.Q.2d 1238 (T.T.A.B. 1990).
[48] In re G. Pohl-Boskamp GmbH & Co. KG, Serial No. 85007641 (T.T.A.B. Feb. 13, 2013).
[49] Supra at 46.

evolving international trademark harmonisation landscape.

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