

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 3 | Issue 3

2020

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Smell Mark: A New Era

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ABSTRACT

Section 2 (1)(m) of the Trademarks Act, 1999 talks about 'mark'. It means that which marks are considered as Trademarks. Further moving on Section 2 (1) (zb) of the Trademark Act, 1999 elaborates about, what is Trademark On the basis of its graphical representation. Talking about Non Traditional Trade Marks and its registrability, Article 15 of the TRIPS Agreement, 1995 says that marks such as sound, scent, shape etc. are capable of being registered. If we look at some International Treaties then those treaties has talked about the nontraditional trademarks in a widest sense and because of that the importance of this type of marks has increased. Smell Marks are associated with food, chemical or any perfume also. And it has been laid for the first time in USA in the case of RE Celia in 1990 that smell marks are considered to be a Trademark and when we talk about registrability again WPO has given its guidelines about the same and has said that it can be registered. Coming down to protection given to Non Traditional Marks in USA and India both the countries have different perspective about the same. In USA the Lanham Act, 1946 gives protection to such marks. And in India it is considered under Trademark Act, 1999.

I. WHAT IS TRADEMARK?

A Trademark is specific or unique symbol which is used by any company or an organization or business entity in to protect their business affairs. In this changing world scenario there is a need of registration of Trademark. As we know that Trademark is considered as an Asset of any organization or business entity. Section 2 (1)(m) of the Trademark Act, 1999 talks about 'mark' to include device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.² Further the act elaborates about Trademark in Section 2 (1) (zb), "trade mark" 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 shape of goods, their packaging and combination of colours.³ The concept of Trademark is divided into two parts i.e. Traditional

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² Section 2 (1) (m) (Chapter) 'Definitions' of Trademark Act, 1999.

³ Section 2 (1) (zb) (Chapter) 'Definitions' of Trademark Act, 1999.

and Non Traditional Trade Marks. And the concept of Non Traditional Trade mark is an emerging aspect of Intellectual Property Law in our country now days.

II. CONCEPT OF NON TRADITIONAL TRADEMARK

Non Traditional Trademarks are those marks which do not fall under the category of Traditional Trademarks E.g. label, ticket, name etc. Non Traditional Trademarks are can be in form of sound, smell, shape, test or texture. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks.⁴ If the conditions are satisfied according to the said act the nontraditional Trademark is eligible for registration also.

Now a day's certain types of nontraditional types Trademarks are also accepted in India as well as at international level because some International Treaties.⁵ In older times there were only traditional Trademarks which were recognized by the law of any particular country but now a days due to changing platforms of various business there is plethora for 'Non Traditional Trademarks' also. And in all developed and developing countries the way of looking at this subject has also changed in a great way.

III. SMELL MARK: A NON TRADITIONAL TRADEMARK

A Smell Mark is associated with any food product or any perfume also. It can only be recognized through your natural senses. We cannot touch it or even cannot feel it. The registration of such marks becomes very difficult in this scenario. Just giving scent of any perfume or any chemical product cannot be conclusive proof. So the entity or any individual who is claiming for it has to prove the geographical conditions also to prove the smell. A scent trade mark was first recognized in 1990 in the United States in the case of RE CELIA CLARKE, DBA CLARKE'S OSEWEZ,⁶ where a scent, described as a high impact, fresh, floral fragrance reminiscent of plumeria blossoms, applied to sewing thread.

It is possible to register olfactory (odor, scent or smell) marks in some countries. According to the questionnaire, 20 out of 72 Offices replied that they accepted for registration this type

⁴Under, 'Protectable Subject Matter' Article 15 (1) of TRIPS Agreement (1995).

⁵ Madrid Treaty, Paris Treaty, Australian Treaty of WIPO.

⁶ TTAB - Trademark Trial and Appeal Board - *1 IN RE CELIA CLARKE, DBA CLARKE'S OSEWEZ Serial No 758,429 September 19, 1990, <https://ipmall.law.unh.edu/content/ttab-trademark-trial-and-appeal-board-1-re-celia-clarke-dba-clarkes-osewez-serial-no-758429>.

of mark.⁷ Like any other type of mark, olfactory marks need to pass the test of registrability and it has been found that there is no reason to bar the registration of a scent if it functions as a trademark for the applicant's goods.⁸ So according to WIPO such Trademarks can be registered if the conditions are fulfilled.

IV. SIGNIFICANCE OF SMELL

Olfactory memory is the most unused mean to link a brand to consumers. The smell as the most potent type of human memory can potentially identify a product if it qualifies the criteria of a trademark. Smells have also the ability to recollect pictures and emotions and this may affect consumer's attitude and decision marking to purchase particular products. It can be held that once distinctive, a smell is one of the most powerful manners to differentiate the goods of one merchant from those of the other.⁹ So human being get know about any scented product from its unique smell immediately. Sense of smell is very important when we talk about any product related to it. An individual's sense of smell results from stimulation of the olfactory glands, at the top of the sinus cavity, which directly trigger the olfactory bulbs in the limbic system of the brain. While odors may evoke a conscious evaluation ninth cerebrum, this is not required. The olfactory gland scan and do directly trigger both memory and emotional responses.¹⁰

V. REGISTRABILITY OF NON TRADITIONAL TRADEMARK

When we talk about registrability of Smell Mark the international conventions as well as our Indian legal system does not give stress on this issue. Various international treaties like Madrid Protocol does not provide for registration of Trademark. Further the Paris Convention only talked about Industrial Marks and designs and not about nontraditional marks. So when we look at the Trademark Law Treaty, 1994 it expressly excluded the registration of sound and smell marks. Coming down to TRIPS Agreement it completely remained neutral in this context of smell marks as well as sound marks and its registration. It said that it is completely upon the contracting parties that whether they want to get it registered or not. So there is no specific law or treaty which speaks about the registration of a smell marks. And therefore further the author wants to discuss about the various situations about this issue at

⁷ STANDING COMMITTEE ON THE LAW OF TRADEMARKS, INDUSTRIAL DESIGNS AND GEOGRAPHICAL INDICATIONS Sixteenth Session Geneva, November 13 to 17, 2006 https://www.wipo.int/edocs/mdocs/sct/en/sct_16/sct_16_2.pdf, Page No 10, Para 46.

⁸ Ibid.

⁹ <https://www.bananaip.com/ip-news-center/non-conventional-trademark-smell-marks/>.

¹⁰ <http://jcil.lsyndicate.com/wp-content/uploads/2018/04/Registrability-of-Smell-Mark-as-Trademark-final-Tanushree-Roy-9.pdf>, Authored by: Tanushree Roy 2nd Semester LL.M. (Intellectual Property Laws) Student, Symbiosis Law School Pune.

International level. How the due procedure of law is complied in different countries.

VI. PROTECTION FOR SMELL MARKS IN DIFFERENT NATIONS

(A) United States of America

US is the biggest capitalist country in the world. In US there are so many business comes in existence every day. Some companies out there do work related to fragrances and smell related products. So there are wide acceptances of Smell Marks in US. Section 2(f) of The United States Trademark Act of 1946 (the Lanham Act) encompasses non-traditional marks as eligible subject matter for trademark protection by not excluding them in the definition of a trademark: “any word, name, symbol, or device, or any combination thereof...used by a person...to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicated the source of the goods, even if that source is unknown.”¹¹

(B) Australia

Registering a scent as a trade mark is difficult. A scent to qualify as a trade mark in Australia must be unusual and distinctive and associated with a particular good or provision of service. In your application, you must explain in a concise written description how the scent will be applied. An example of a scent trade mark is the eucalyptus scent for golf tees (reg no 1241420).¹² IP Australia has rejected the following scent trademarks as they have failed to meet this test:

The scent of musk for perfume (reg no 727820);

A eucalyptus scent for laundry detergent (reg no 762286); and

The scent of coffee for a suntan lotion (reg no 821444)¹³

(C) Indian Jurisdiction

Like in United Sates the situation is far more different in India. There are few cases which are registered in India about this affair. India being a traditional convention following country does not have in depth cases regarding this issue. Matters come in a traditional way in front of Indian courts. The Indian system has definitely garnered a lot from the experiences of the European Union and the United States, and while its decision to not grant trademark-ability status to olfactory and gustatory marks is based on practical impediments of today, the same

¹¹Section 2 (f) The United States Trademark Act (The Lanham Act), 1946, <https://www.bitlaw.com/source/15usc/1052.html>.

¹² <https://legalvision.com.au/4-types-of-trade-marks-explained/>.

¹³ Ibid.

may be subject to change, considering the growing commercial and advertizing trends coupled with the leaps that technology is taking.¹⁴

VII. CONCLUSION

There are few obstacles are present in Indian Scenario when it comes to Non Traditional Trademarks. Especially Smell Marks are not registered in India on large scale because there is not that wide scope in Indian regime. With the changing needs of the society our concepts of business are changing slowly and it will definitely help in growth of Non Traditional Trademarks. And the concept of law will also improve regarding this issue in India.

¹⁴Unconventional trademarks: the emergent need for a change,
https://www.indialawjournal.org/archives/volume4/issue_1/article_by_harsimran.html, by harsimran kalra.