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BEYOND LOGOS: THE RISE OF UNCONVENTIONAL TRADEMARKS IN INDIA

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ABSTRACT

Trademarks have traditionally been classified based on words, names, labels, and graphic signs. The rise of competition, in addition to technological advancements, has led to the expansion of modern-day branding to include sound, color, the configuration of a product, movements, patterns, positioning and even the scent of the product. Such unconventional or non-traditional signs present challenges to the established notions of trademark registration with respect to distinctiveness and representation in a graphical form.

The Trade Marks Act, 1999 made a significant departure from the Trade and Merchandise Marks Act, 1958, as it defined a “mark” to include the shape of goods, packaging, and combinations of colors. Sound marks and three-dimensional marks were explicitly recognized through the rules under the Trade Marks Rules, 2017. Unconventional marks such as product shapes, color combination, stitching patterns, and trade dress have been protected by way of trademark infringement or passing off suits in Indian courts. Nevertheless, unconventional trademarks continue to be subjected to increased judicial scrutiny owing to consumer perception and lack of graphical representation of the mark.

This paper studies the treatment accorded to sound, shape, color, positioning, patterns, smell, taste, etc. in India. This paper discusses the principles of acquired distinctiveness, functionality, graphical representation, and competitive necessity in the context of the Indian jurisprudence and comparative jurisprudence. This research aims at identifying the balance between the traditional method of registering trademarks and the ever-expanding range of unconventional trademarks.

INTRODUCTION

The Transformation of the Trademark

The trademark is no longer seen merely as the word that appears on the label or the mark that is used on the packaging. It may be recognized by the sound heard, by the form of the perfume bottle, by the placement of a certain color on a specific area of the product, by the design of the stitching on a pair of jeans or even by the animated logo that appears before the service online. In that way, branding has evolved beyond its mere visual recognition into a multi-sensorial commercial language.

This evolution, puts great strain on a trademark system that was developed for signs that were printed on paper and could therefore be compared to each other in print form. Words and designs are easily reproducible; but sounds, movements, or fragrances cannot be so easily rendered. And there is another problem with shapes and colors; even if they can be depicted visually, they may be technically necessary or aesthetically desirable for competitors.

Unconventional trademark is not defined in the Trade Marks Act, 1999. The term is used in academic literature and administrative processes to refer to trademarks that do not fall into conventional categories. Unconventional trademark usually encompasses sound, position, motion and multimedia, hologram, olfactory

or smell, taste, texture marks and others.¹

One of the problems in registering unconventional trademarks is that these are both open-ended and lack legal unity. While registration of a shape mark involves issues regarding functionality, these may not be relevant for a taste mark registration. Registration of a color mark involves issues of depletion of limited commercial resource, while registration of a smell mark involves issues of permanency of representation. However, all these marks have one thing in common – they seek trademark protection despite not following conventional criteria of the word-and-logo marks.

The Central Trademark Function

India's trademark legislation has evolved from being a purely visual regime to a more flexible and functionally oriented regime. The Trade Marks Act, 1999 specifically provides for the registration of shapes, packaging, and combination of colors. The Trade Marks Rules, 2017 provide guidelines for filing sound trademarks and three-dimensional trademarks. Unusual product designs, color schemes, trade dress, and patterns that can be seen to convey origin have been registered by courts.

Such expansion has not resulted in the creation of a general monopoly of sensory and aesthetic elements. Indian courts require an unconventional mark to meet criteria of distinctiveness and representation, whereas Section 9(3) of the Trade Marks Act prohibits trademark law from becoming a mechanism for obtaining permanent control over the shape of functional products.

Ultimately, the validity of the unconventional trademark depends on the same fundamental criterion as in the case of an ordinary trademark – the mark must serve to distinguish the goods or services of one business enterprise from those of another. Being unusual, aesthetically pleasing, or serving an advertising purpose is not sufficient to qualify as a trademark.

There are three basic questions relating to the protection of unconventional trademarks. The first question is about representation and legal certainty. The second question is about inherent and acquired distinctiveness. The third question is related to functionality, customary usage and the competitive need of the trademark protection.

¹World Intellectual Property Organization, "New Types of Marks", Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Doc. SCT/16/2, Sept. 1, 2006; Irene Calboli and Martin Senftleben (eds.), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (Oxford University Press, Oxford, 2018).

Thus, the future of unconventional trademarks in India lies in achieving a balance between the two aspects. It is necessary to understand the new technological and branding aspects of the sign while retaining the common colors, useful shape and other important things which are needed for competition.

OBJECTIVES

To examine the legal recognition and registrability of unconventional trademarks under Indian trademark law, with particular emphasis on graphical representation.

To assess whether the existing Indian framework is capable of accommodating emerging forms of unconventional trademarks and identify reforms that can provide effective protection.

LITERATURE REVIEW

Dev Gangjee, in his study *Non-Conventional Trade Marks in India*², examines the scope of non-conventional marks within the Indian trademark framework, with particular attention to shape marks and the approach reflected in the Trade Marks Registry's practice manual. He compares the Indian position with developments in the European Union and the United States and cautions against an overly liberal extension of trademark protection where product features may also have competitive significance. His analysis is relevant because it highlights that expanding the subject matter of trademark protection must be accompanied by safeguards against functional or anti-competitive monopolies.

Lisa P. Lukose, in *Non-Traditional Trademarks: A Critique*³, provides an Indian perspective on the conceptual and legal difficulties associated with extending trademark protection beyond conventional words and devices. Her work draws attention to questions of distinctiveness, sensory perception and graphical representation, demonstrating why the ordinary requirements of trademark registration become difficult to apply to signs such as sounds, smells, colors etc. The work is useful as the same difficulties continue to influence the treatment of unconventional marks under Indian Trademark law.

Arka Majumdar, Subhojit Sadhu and Sunandan Majumdar, in their article⁴ identify the graphical representation requirement as one of the significant

²Dev Gangjee, "Non-Conventional Trade Marks in India" 22 *National Law School of India Review* 67 (2010).

³Lisa P. Lukose, "Non-Traditional Trademarks: A Critique" 57 *Journal of the Indian Law Institute* 197 (2015).

⁴Arka Majumdar, Subhojit Sadhu and Sunandan Majum-

obstacles to the registration of unconventional trademarks. They observe that signs such as smell, sound and color do not always lend themselves naturally to conventional paper-based representation and therefore argue for an interpretation of the requirement capable of responding to the character of such marks. Their argument is important in the digital environment because the present Indian framework continues to define graphical representation in paper-oriented terms even though certain marks can now be represented more accurately through electronic and technological means.

CONCEPTUAL FOUNDATIONS OF UNCONVENTIONAL TRADEMARK PROTECTION

A Trademark is Not the Product Itself

Typical trademarks are separable from the goods. The word on the packet may be separated conceptually from the packet itself and the goods inside it. Names and logos have been ingrained into the consumer consciousness as symbols of origin. Consumers do not approach the shape, color etc. of bottles, shoes and household items with the same attitude. This complicates the process of proving consumer perception. A party claiming trademark rights in the product characteristic must prove that this particular characteristic has lost its significance as a feature of the product and acquired an independent source-identifying purpose.

This issue is often formulated using the phrase “secondary meaning”. Primary meaning of the characteristic relates to the product itself, either its appearance, function, quality or decoration. Secondary meaning appears when consumers associate this characteristic with the source of origin of the goods without referring to its name.

Inherent and Acquired Distinctiveness

However, there may be some unconventional signs that might possess distinctiveness inherent in them. An arbitrary sound used in connection with unrelated services or an extremely unconventional package would instantly create an impression of being inherently distinctive. However, in the vast majority of cases, claims relating to colors, shapes or product designs would need proof of acquired distinctiveness. In such cases, the relevant evidence might include the period and continuity of use; the geographical scope of use; market share and sales figures; money spent on advertising;

advertisements that direct the consumer’s attention to the feature etc. The success of the product might have been achieved through a successful word mark, price or quality.

Advertisements that read “look for the red sole”, “listen for the jingle” or “notice the bottle shape” are particularly convincing evidence since it shows that the proprietor is trying to educate his customers to use the feature as a trademark. On the contrary, advertisements that show a shape as more comfortable or fragrance as more pleasant might be used in an objection that the feature is functional.

THE STATUTORY FRAMEWORK IN INDIA

The Position under the 1958 Act

The Trade and Merchandise Marks Act, 1958 reflected a traditional understanding of trademarks. Section 2(1)(j) defined a “mark” to include a device, brand, heading, label, ticket, name, signature, word, letter or numeral, or a combination of those elements.⁵ The definition was inclusive, but it did not expressly refer to shapes, packaging or colors.

The 1958 Act did not necessarily make every unconventional sign legally impossible. Distinctive packaging and get-up could receive protection through passing off. Nevertheless, the statutory language was oriented towards signs capable of conventional visual reproduction.

The 1999 enactment changed this position in two respects. It expressly expanded the categories included within a “mark” and introduced the requirement that a trademark be capable of graphical representation.

The Expanded Meaning of “Mark”

Section 2(1)(m) of the Trade Marks Act, 1999 provides:

*“mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colors or any combination thereof.”*⁶

The inclusion of the shape of goods, packaging, and color combinations in the definition constitutes an explicit legislative shift from the 1958 Act. It is an affirmation that the trademark does not have to be a separate mark on the product. The very configuration of the product itself may serve as a sign.

dar, “The Requirement of Graphical Representability for Non-Conventional Trademarks” 11 *Journal of Intellectual Property Rights* 313 (2006).

⁵The Trade and Merchandise Marks Act, 1958 (Act 43 of 1958), s. 2(1)(j) (repealed).

⁶The Trade Marks Act, 1999 (Act 47 of 1999), s. 2(1)(m).

The usage of the term “includes” is also noteworthy since it suggests that the list is not exclusive. Sound, movement, position, and scent are not specifically included in the list, yet they do not automatically fall outside the scope of a potential trademark. Their ability to be registered as trademarks will depend on their ability to meet the criteria of the trademark.

An inclusive definition should nevertheless not be interpreted as eliminating the need for a definite sign. A general idea, style, marketing technique, or sensory impression cannot be registered as a trademark unless it meets the requirements for such identification.

Section 2(1)(zb): The Definition of “Trade Mark”

Section 2(1)(zb) defines a trademark as a mark:

- i. *capable of being represented graphically; and*
- ii. *capable of distinguishing the goods or services of one person from those of others.*⁷

The definition adds that a trademark may include the shape of goods, their packaging and combinations of colors.

Two distinct requirements thus emerge. First, the subject matter must be representable; secondly, the subject matter must be distinctive. A sign can be distinctive but not representable. The sign can also be very well represented but still generic, functional or non-distinctive.

The requirement for graphical representation has very useful procedural purposes. But the problem arises when one tries to see the graphical representation as the sole method of achieving the two. Sound and motion can perhaps be better represented by audio and video than by any notation or graphical representation. Scientific data can also represent a scent more precisely than ordinary words.

Rule 2(1)(k): Representation in Paper Form

Rule 2(1)(k) of the Trade Marks Rules, 2017 defines “graphical representation” as representation of a trademark for goods or services in paper form.⁸

It seems anachronistic in light of how trademarks are applied for, recorded and documented. Even the requirement set out by Rule 26(5) demands that a sound trademark should be submitted as an MP3 file. It thus follows that the digital registry works within a statutory language that emphasizes paper.

The dilemma, however, can be managed when it comes to musical sound trademark but not so much

when it concerns motion, multimedia, hologram, and olfactory trademarks.

E. International Context: Article 15 of TRIPS

Article 15(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) adopts a broad functional definition. The clause states that any sign or combination of signs which is capable of distinguishing the goods or services of one undertaking from those of other undertakings shall be capable of serving as a trademark. These include words, personal names, letters, numerals, figurative characters and the combination of colors. Members may require signs to be distinctive through use, in cases where signs are not inherently distinctive.

TRIPS leaves member countries free to specify that visual perception be a requirement for registration, but does not insist upon it. India’s laws are sufficiently flexible to enable substitution of graphical representation by technology-neutral criteria.

F. Section 9(1): Distinctiveness and Absolute Grounds

Section 9(1)(a) prevents registration of trademarks that lack distinctiveness. Sections 9(1)(b) and 9(1)(c) deal with descriptive and customary marks respectively. Section 9(1)(a), in the proviso, allows registration if the mark has obtained distinctiveness through its usage prior to the filing date or is a well-known trademark.

All of these sections are applicable even to unconventional marks. Normal product shapes, usual colors, common sounds, or customary packaging will definitely not be registered without proving the distinctiveness acquired by it.

The requirement will be especially tough when the consumer generally regards such a matter as a part of the goods. This must be proven that the feature itself and not just the word mark accompanying it identifies source.

G. Section 9(3): Shape-Based Exclusions

Section 9(3) provides that a mark shall not be registered if it consists exclusively of:

- i. *the shape of goods resulting from the nature of the goods themselves;*
- ii. *the shape necessary to obtain a technical result;* or
- iii. *the shape giving substantial value to the goods.*⁹

⁷Id., s. 2(1)(zb).

⁸The Trade Marks Rules, 2017, r. 2(1)(k).

⁹The Trade Marks Act, 1999 (Act 47 of 1999), s. 9(3).

The first exclusion concerns natural or inherent form. A trader should not obtain exclusive rights over the basic shape of the goods themselves.

The second follows the doctrine of functionality. The law of trademarks cannot be used to claim monopoly on technical solutions. A shape that is functional for better grip, stacking, connecting or producing a mechanical effect should generally be available to competitors.

The third concerns 'shapes' whose commercial or aesthetic value adds significantly to the attractiveness of the products. This ensures that the valuable product appearance is not indefinitely claimed through the process of renewing trademark rights.

Unlike Section 9(1), there is no distinctiveness acquired proviso in Section 9(3). A shape that is technically necessary cannot be made registrable merely because consumers associate it with a particular manufacturer.

Section 10 and Color Claims

Section 10 permits registration to be limited wholly or partly to a combination of colors. Where such limitation exists, it must be considered in determining the distinctive character of the mark. A trademark registered without limitation as to color is deemed registered for all colors.¹⁰

Section 10 does not mean that every use of a color can be monopolized. Color claims must still satisfy Sections 2 and 9. The applicant must clearly define the shade, arrangement, placement and relevant goods or services.

The Trade Marks Rules, 2017

The second requirement of rule 23(2) is to mention if the application is related to 3D mark or combination of colors. Thereafter, rule 26 specifies special methods of representing.

In case of 3D mark, according to rule 26(3), two dimensional graphical or photographic representation must be provided including three separate views. Registrar may request additional views, verbal description or specimen.

In case of application for shape of goods or their packaging, rule 26(4) provides that there should be at least five different views and verbal description.¹¹

Rule 26(5) provides:

"Where an application for registration of a trademark consists of a sound as a trademark, its reproduction shall

*be submitted in MP3 format, not exceeding thirty seconds, recorded on a medium allowing easy and clearly audible replay, accompanied by graphical representation of its notation."*¹²

The Rule takes into account sound marks but leans more towards music sounds. Notations in music could easily capture a melody but it could not be used to capture non-music sounds like the sound produced by animals, engines, and even electronics.

J. Registration, Infringement and Passing Off

Registration grants exclusive rights under section 28 but these rights are limited by certain statutory provisions. The infringement issues are mainly dealt with under section 29. Registration is taken as prima facie evidence of validity under section 31, but validity can still be contested in relevant proceedings.¹³

Section 27(2) makes provision for the remedy of passing off which is particularly useful in relation to non-conventional trademarks. A shape, color combination, or manner of packaging might acquire good will even though it is unregistered or cannot be registered as a trademark. The burden on the claimant in a passing-off action is to prove good will, misrepresentation, and probability of harm.

SOUND MARKS

Just like a visual mark a sound may indicate commercial origin. The sound must be sufficiently clear and distinct. Common alarms, telephone rings, notification tones and ordinary machine noises are unlikely to possess inherent distinctiveness. A sound naturally produced by the operation of goods may also be functional. Length is relevant but not decisive. A very lengthy musical composition may be perceived as entertainment rather than as a trademark. Short and consistently repeated audio signatures are more readily accepted as badges of origin.

The well-known "yodel" sound of Yahoo Inc. is typically known to be the first sound mark that has been registered in India (through administrative procedure and not judicial decision).¹⁴ The application was filed before the Trade Marks Rules, 2017 expressly established the MP3 procedure. The sound had been represented through musical notes with evidence of its being used as a source indicator. Its importance lies in

¹²Id., r. 26(5).

¹³The Trade Marks Act, 1999 (Act 47 of 1999), ss. 27–31.

¹⁴Trade Mark Application No. 1270405, Yahoo Inc., Class 42; Jerome Gilson and Anne Gilson LaLonde, "Cinnamon Buns, Marching Ducks and Cherry-Scented Racecar Exhaust: Protecting Non-traditional Trademarks" 95 *The Trademark Reporter* 773 (2005).

¹⁰Id., s. 10.

¹¹The Trade Marks Rules, 2017, rr. 23(2), 26(3) and 26(4).

showing that the inclusive definition under the 1999 Act was capable of accommodating an auditory mark even before specialized procedural rules were enacted. The 2017 Rules subsequently regularized the process.

In *Shield Mark BV v. Joost Kist*¹⁵, the Court of Justice of the European Union recognized that sounds could constitute trademarks. It held that ordinary musical notation on a staff could satisfy the representation requirement when it clearly depicts the sequence, pitch and duration of the notes. A vague description such as the cry of an animal, or simple onomatopoeia, would ordinarily lack the required clarity and precision.

This reasoning remains relevant to India because Rule 26(5) requires graphical notation. A digital recording may be accompanied by a waveform, spectrogram, sonogram, a description of frequency, duration and sequence or another objective acoustic representation.¹⁶ The recording should remain the authoritative representation because it allows the public to perceive the actual sound. Technical diagrams may supplement the recording but should not replace it where they are not intelligible to ordinary users of the register.

The proprietor of a sound mark must show that the relevant consumers associate the sound with a particular source. Evidence may include repeated use in advertisements, applications, devices, broadcasts or retail environments.

SHAPE AND THREE-DIMENSIONAL MARKS

A product shape is generally perceived as the product itself and hence, shape marks face a greater scrutiny vis-à-vis distinctiveness. The applicant must show that consumers treat the shape, independently of any name or label and other decorative elements, as indicating origin. A highly unusual and arbitrary package may theoretically be inherently distinctive but ultimately, it's the perception of consumer that is important. For a shape to become a trademark it requires acquired distinctiveness because consumers are less accustomed to treating product design as a trademark.

Section 9(3) prevents applicant from controlling useful product features like functionality, indefinitely. Thus, a shape which is functional to the goods itself cannot be registered as a trademark e.g., round shape of tyres. The existence of alternative designs does not automatically establish non-functionality. Further, a trader should not obtain exclusive rights in a technical

solution merely because competitors could adopt less efficient alternatives.

In *Philips Electronics NV v. Remington Consumer Products Ltd.*¹⁷, the Court of Justice held that a shape necessary to obtain a technical result could not escape the exclusion merely because other shapes were capable of achieving the same result. In *Lego Juris A/S v. OHIM*¹⁸, the Court held that a product's shape cannot be registered as a trademark if all its essential characteristics perform a technical function. These principles are persuasive in applying Section 9(3)(b).

In *Zippo Manufacturing Co. v. Anil Moolchandani*¹⁹, the Delhi High Court considered counterfeit lighters reproducing the ZIPPO word mark and the distinctive three-dimensional configuration of Zippo's lighter. The plaintiff relied upon registration of the shape as well as its word and device marks. The Court restrained the defendants from using the registered three-dimensional mark and shape in relation to counterfeit goods. The decision is important as an example of enforcement of a registered three-dimensional mark.

In *Gorbatschow Wodka KG v. John Distilleries Ltd.*²⁰, the Bombay High Court considered a passing off action against defendants imitating plaintiff's vodka bottle having a distinctive bulbous structure. The Court found prima facie evidence that the plaintiff's bottle had acquired reputation and distinctiveness. The shape was not dictated by the nature of vodka or by an ordinary functional requirement of a bottle. The Court treated the configuration as novel, arbitrary and capable of identifying the plaintiff's goods. The defendant's bottle was not identical in every detail and the Court focused upon the overall commercial impression and the imperfect recollection of consumers.

In *Knitpro International v. Examiner of Trade Marks*²¹, the Delhi High Court considered the standards applicable to shape-mark registration. The Court emphasized that a registrable shape must do more than represent the generic form of the product. It must, by itself and without reliance upon an appended name or logo, associate the goods with a particular source. Thus, a shape that is not technically novel may acquire trademark significance through long and exclusive use.

In *Apollo Tyres Ltd. v. Pioneer Trading Corporation*²², the defendant argued that tyre treads were func-

¹⁵Case C-283/01, [2003] ECR I-14313.

¹⁶World Intellectual Property Organization, "New Types of Marks", Doc. SCT/16/2, Sept. 1, 2006.

¹⁷Case C-299/99, EU:C:2002:377.

¹⁸C-48/09 P, EU:C:2010:516.

¹⁹2011 (48) PTC 390 (Del).

²⁰2011 (47) PTC 100 (Bom).

²¹C.A. (COMM.IPD-TM) No. 110 of 2022, decided on July 13, 2022 (Delhi High Court).

²²C.S. (OS) No. 2802 of 2015, decided on Aug. 17, 2017 (Delhi

tional because they affected grip and road performance. The Delhi High Court distinguished the general need for tread from the particular arrangement adopted by the plaintiff. It accepted that a specific pattern could contain creative and source-identifying choices even though tyre treads perform technical functions.

Overlap with Design Law

A design-infringement claim protects the statutory rights granted due to registration under the Designs Act, 2000. Passing off protects goodwill against misrepresentation. Although both actions may concern the same product appearance, their legal ingredients are distinct. A product shape may simultaneously fall within design law and trademark law. Design law protects novel visual features for a limited period. Trademark law protects source identification and may continue indefinitely. To obtain trademark protection after or alongside design protection, the proprietor must independently establish:

- trademark use;
- distinctiveness;
- non-functionality;
- goodwill, where passing off is claimed; and
- likelihood of confusion or misrepresentation.

A design registration and trademark distinctiveness exist independently of each other. Consequently, expiry or invalidity of a design does not automatically bars a passing-off claim. The courts need to be cautious against the possibility of using passing-off claim as a disguise of indirect prolongation of the design monopoly after its expiry.²³

SINGLE COLORS, COLOR COMBINATIONS, POSITION AND

PATTERN MARKS

Colors are finite commercial resources. A broad monopoly over a basic color may substantially burden competitors. The law should distinguish between:

- a color in the abstract;
- a precisely identified shade;
- a combination of colors;
- colors arranged in fixed proportions;
- color applied to a particular part of a product; and

High Court).

²³The Designs Act, 2000 (Act 16 of 2000), ss. 2(d), 19, 22; *Micolube India Ltd. v. Rakesh Kumar*, 2013 (55) PTC 61 (Del) (FB); *Carlsberg Breweries A/S v. Som Distilleries and Breweries Ltd.*, 2018 SCC On-Line Del 12912.

- color forming one element of composite trade dress.

Section 2(1)(m) expressly refers to a “combination of colors” rather than a single color. This has resulted into confusion about whether a single color can constitute a mark. A strictly literal interpretation may suggest exclusion. However, a broader interpretation suggests that Section 2(1)(m) is inclusive and that a single color, when defined by shade and position, may constitute a device or other mark capable of distinguishing goods. The preferable approach is not to impose an absolute prohibition. It is to require:

- i. exact identification of color through a recognized color code;
- ii. a clear representation of placement;
- iii. strong evidence of acquired distinctiveness;
- iv. proof that the color is not functional or customary; and
- v. a narrowly drafted specification.

In *Colgate-Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd.*²⁴ the plaintiff relied upon the color arrangement, layout and overall get-up rather than claiming red or white in the abstract of the toothpaste packaging. The Court recognized that a trader ordinarily cannot monopolize a color but deliberate reproduction of a distinctive color combination and packaging arrangement may amount to passing off where it creates a deceptive overall similarity. The decision is best understood as a trade-dress case where protection was based on overall impression of packaging. It did not grant a universal monopoly over red and white.

Christian Louboutin’s red-sole litigation concerned a specified red shade applied to the outsole of women’s footwear. The claim is more accurately understood as a position mark than as an abstract single-color mark. In *Christian Louboutin SAS v. Abubaker*²⁵, a Single Judge of the Delhi High Court dismissed the suit at an early stage and reasoned, inter alia, that a single color was not included within the statutory definition of a mark. The Division Bench set aside the dismissal and held that a registered mark enjoyed prima facie validity under Section 31 and that the suit should not have been dismissed without service upon the defendants, pleadings, evidence or a properly raised validity challenge.²⁶ The appellate decision is important for two reasons. First, it prevents a court from invalidating a registered unconventional mark summarily with-

²⁴2003 (27) PTC 478 (Del).

²⁵C.S. (COMM) No. 890 of 2018, decided on May 25, 2018 (Delhi High Court).

²⁶RFA (OS) (COMM) No. 13 of 2018, decided on Apr. 11, 2019 (Delhi High Court, Division Bench).

out procedural safeguards. Secondly, it recognizes that characterization matters i.e., the claimed sign was a defined 'red' shade placed on a specified part of footwear.

In *Libertel Groep BV v. Benelux-Merkenbureau*²⁷, the Court of Justice recognized that a single color could function as a trademark provided (without shape or form) can be registered as a trademark, provided it possesses distinctive character and is graphically represented in a clear, precise, and objective manner.

In *Heidelberger Bauchemie GmbH*²⁸, the Court considered a color-combination claim. It held that merely naming two colors and claiming them in every conceivable form did not define a single sign. The colors had to be arranged in a systematic and predetermined manner.

In an attempt to protect purple, identified as Pantone 2685, the Cadbury in the application described purple as applied to the whole visible surface of packaging or as the "predominant" color.²⁹ The Court of Appeal of England and Wales held that this wording did not define a single, stable sign. The word "predominant" allowed multiple appearances and arrangements. The case highlights the importance of precise description of color, placement, tone etc. It further establishes that even a wide reputation cannot overcome an inherently indeterminate representation.

Pattern

Marks

Pattern marks consist of regularly repeated visual elements. They may appear on textiles, footwear, bags, packaging or product surfaces. A pattern may be decorative and source-identifying at the same time. The relevant question is whether consumers recognize it as indicating origin rather than merely as ornamentation.

In *Levi Strauss & Co. v. Imperial Online Services Pvt. Ltd.*³⁰, the Delhi High Court considered the arcuate stitching pattern used on Levi's jeans. The Court accepted that a stitching pattern could function as a trademark where it had acquired source significance independent of the word mark.

²⁷ Case C-104/01, EU:C:2003:244.

²⁸ Case C-49/02, EU:C:2004:384.

²⁹ *Société des Produits Nestlé SA v. Cadbury UK Ltd.*, [2013] EWCA Civ 1174.

³⁰ C.S. (COMM) No. 657 of 2021, order dated Mar. 24, 2022 (Delhi High Court).

Position

Marks

A position mark consists of an element placed at a specific location on a product. Examples may include color on the sole of a shoe³¹, stripes on the side of footwear or a label placed at a recurring position. Indian law does not expressly name position marks, but its inclusive definition is capable of accommodating them. Yet again, clear representation is important because the sign consists not merely of the element but of the relationship between the element and its placement.

OLFACTORY AND TASTE MARKS

Smell

Marks

In some cases, even scent may act as commercial origin identifier. However, the problem lies in defining the particular scent objectively on a paper i.e., graphical representation. A verbal description such as "a fresh floral fragrance" may be subjective. A chemical formula identifies a substance but does not necessarily communicate the scent perceived by humans. Different chemical mixtures may produce similar odors, while the same chemical composition may be experienced differently depending upon concentration and environment. A physical sample presents its own difficulties as it may evaporate, oxidize or change over time. It may not remain accessible to the public throughout the life of the registration.

In *Ralf Sieckmann v. Deutsches Patent- und Markenamt*³², the applicant sought registration of an olfactory sign. He submitted a chemical formula, a verbal description and a sample. The Court of Justice held that the representation of a trademark must be clear and precise, easily accessible, intelligible, durable and objective. The chemical formula represented the substance rather than the smell. The verbal description was insufficiently precise, and the deposited sample lacked durability. Their combination did not cure the deficiencies. The criteria remain influential even in jurisdictions that have removed the word "graphical" from their legislation. They protect legal certainty by requiring the register to reveal the exact subject matter of the exclusive right.

A significant Indian development occurred in 2025 concerning an application by Sumitomo Rubber Indus-

³¹ Supra note 25.

³² Case C-273/00, EU:C:2002:748.

tries for a rose-like floral scent applied to tyres. WIPO subsequently reported the matter as India's first accepted smell-mark application. The application was advertised in the Trade Marks Journal after the Registry accepted a scientifically structured representation of the scent.³³ The said application identified a floral fragrance applied to tyres. A rose scent is not a natural characteristic of rubber tyres and does not appear necessary for their mechanical operation. According to WIPO's report, the applicant used a multidimensional olfactory representation supported by scientific and expert material. The evidentiary record included an olfactory vector and analytical material intended to demonstrate consistency, reproducibility and non-functionality.

The case weakens the assumption that olfactory marks are practically impossible to register under Indian law. It suggests that graphical representation may be satisfied through an objective scientific model. Having said that, it is essential to note that olfactory marks still need to pass the test of functionality, distinctiveness, novelty etc. just like other trademarks.

Scientific representation does not eliminate every problem. The Registry should not accept a highly technical representation that cannot reasonably inform the public of the scope of the right. Expert interpretation may be necessary, but the register must remain meaningfully accessible. A scent is unlikely to be registrable where it:

- is the natural smell of the goods;
- results from ingredients or manufacturing;
- produces a therapeutic or practical effect;
- constitutes a principal reason for purchase;
- is customary in the industry; or
- is necessary for effective competition.

An arbitrary fragrance applied to unrelated and ordinarily odorless goods presents a stronger trademark claim. In the United States, *In re Clarke*³⁴ permitted registration of a plumeria-blossom scent for sewing thread and embroidery yarn because the scent was not inherent or functional for those goods and had been promoted as a source identifier.

³³Unnat P. Pandit, "India's First Smell Mark: Sumitomo Rose-Scented Tyres", *WIPO Magazine*, Feb. 13, 2026, available at: <https://www.wipo.int/en/web/wipo-magazine/articles/indias-first-smell-mark-sumitomo-rose-scented-tyres-89623> (last visited on July 26, 2026); Trade Mark Application No. 5860303, Class 12, Trade Marks Journal No. 2236.

³⁴17 USPQ2d 1238 (TTAB 1990).

Taste Marks

Taste marks face even greater obstacles. Taste is ordinarily perceived only after purchase and consumption. It frequently constitutes an inherent, functional or desirable characteristic of food, drink, medicine and oral-care products. Taste also varies according to temperature, age, ingredients and individual perception. Descriptions such as "sweet", "strawberry" or "spicy" are unlikely to define a single objective sign. Indian legislation does not expressly exclude taste marks. Nevertheless, there is no reported Indian judicial/administrative authority establishing a registrable taste mark, and the Trade Marks Rules prescribe no method for representing one. At present, taste marks remain more theoretical than practical.

MOTION, MULTIMEDIA, HOLOGRAM,

TEXTURE AND FLUID MARKS

Motion Marks

A motion mark consists of a defined movement or change in the position of an element. It includes an animated logo, a particular opening sequence or a recurring movement displayed by a digital interface e.g., Nokia's "connecting hands" mark. A series of still images may show the sequence, but it may not accurately convey speed, timing or transition. A video file accompanied by numbered frames and a description would provide more precise notice. Indian law does not expressly exclude motion marks. The obstacle lies in the absence of category-specific filing rules.

Multimedia

Marks

Multimedia marks combine visual movement and sound in a single sign e.g., Netflix's "tudum" sound with red 'N' animation. Their identity arises from the integrated sequence rather than from the visual or audio element considered separately. A multimedia file should therefore constitute the primary representation. Requiring the applicant to divide it into static images and musical notation may alter the subject matter of the claim.

Holograms

A hologram changes appearance depending upon the viewing angle. A single photograph may not show the complete sign. Multiple views or a video representation may be necessary. The applicant must distinguish between trademark features and security functions. A

holographic feature used solely to authenticate goods or prevent counterfeiting may be functional rather than source-identifying.

Texture

Marks (also known as tactile marks)

A texture may function as a trademark where consumers identify goods by non-functional surface texture of a product e.g., cracked glass texture on the surface of whisky bottle³⁵. The difficulty is that consumers may not touch the product before purchase, particularly where goods are sold in sealed packaging or online. Representation may require photographs, detailed descriptions, measurements and a durable specimen. A texture dictated by grip, comfort or manufacturing requirements should remain unregistrable on functionality grounds.

The registration of texture trademarks is no longer merely a theoretical possibility. Jurisdictions such as Ecuador and the United States have recognized tactile features as trademarks, including the cracked-glass texture of the Old Parr whisky bottle and a leather-textured wrap around a wine bottle.³⁶ These examples demonstrate that, where a texture is distinctive and capable of identifying commercial origin, its registration is practically achievable despite the representational challenges associated with such marks.

Fluid Marks

A fluid mark changes its appearance while retaining an identifiable core. Digital businesses frequently adapt logos for festivals, public events or interactive displays e.g., Google logos on special occasion changes. Trademark registration ordinarily protects a defined sign, not the abstract idea of variation. Section 15 of the Trade Marks Act permits registration of a series of trademarks that resemble one another in material particulars and differ only in matters that do not substantially affect identity.³⁷

Series registration may assist where variations are limited and predictable. It is unsuitable for an open-ended system allowing unlimited changes. The law should protect the stable source-identifying element, not the general concept of repeatedly changing a logo.

³⁵Vikrant Rana, Titiksha Sinha and Asmita Kaur, "Tactile Marks: Can We Protect the Sense of Touch?", *LiveLaw*, Nov. 23, 2024, available at: <https://www.livelaw.in/law-firms/law-firm-articles/-intellectual-property-old-parr-scotch-whisky-graphic-representation-international-trade-mark-association-consumer-eu-louis-vuitton-276104> (last visited on Aug. 2, 2026).

³⁶Supra note 35.

³⁷The Trade Marks Act, 1999 (Act 47 of 1999), s. 15.

MAJOR CHALLENGES IN INDIAN LAW

Graphical Representation in a Digital Registry

The most immediate challenge is the continued requirement of graphical representation read with paper-form representation under Rule 2(1)(k). The objective behind representation remains legitimate as the public must know what is protected. The difficulty is requiring every sign to be converted into a static visual form. The law should therefore regulate the quality of representation rather than its physical medium.

Proving Consumer Perception

Unconventional-mark disputes frequently involve an evidentiary gap. Proprietors rely upon sales and advertising figures, but these may establish reputation in the product or word mark rather than in the claimed feature. Courts should require evidence directed specifically towards the unconventional feature. A consumer's awareness that a famous company uses a color does not necessarily establish that the color alone functions as a trademark.

Functional Monopolies

The functionality doctrine is essential because trademarks may be renewed indefinitely. Without careful scrutiny, a proprietor could extend patent-like or design-like exclusivity through trademark law. A claimant should not be permitted to describe a feature as technically superior in advertising and subsequently deny functionality in trademark proceedings. Hence, a balanced approach is needed to distinguish functionality from marks.

Aesthetic Functionality and Substantial Value

Section 9(3)(c) excludes a shape giving substantial value to the goods. The provision is difficult because aesthetic appeal and source identification may coexist. A designer product may be purchased partly because of its appearance and partly because consumers associate that appearance with a particular source. Courts should examine whether exclusivity would materially restrict competitors from offering attractive alternatives.

Interaction with Copyright, Designs and Patents

The same subject matter may attract multiple intellectual-property claims. A package may contain copyright artwork, a registered design, a word mark and unregistered trade dress. Overlap is permissible only when the requirements of each regime are independently satisfied. The claimant must prove trademark significance and confront applicable functionality objections.

Registry Capacity and Public Accessibility

Effective examination of unconventional marks may require knowledge of acoustics, chemistry, color science, product engineering and digital media. The Registry must also ensure that third parties can search and perceive registered signs. The database should allow users to:

- play audio recordings;
- watch motion and multimedia files;
- view all perspectives of three-dimensional marks;
- identify color codes;
- inspect pattern repetition; and
- access non-confidential scientific representations of sensory marks.

A file stored internally but inaccessible to the public does not adequately perform the notice function.

COMPARATIVE APPROACHES

The European Union

European trademark law previously required graphical representation. Regulation (EU) 2017/1001 removed that expression. Article 4 now requires the sign to be represented on the register in a manner enabling authorities and the public to determine the clear and precise subject matter of protection.³⁸ The reform did not abandon the *Sieckmann* principles³⁹. It replaced a medium-specific condition with a certainty-based standard. The European Union Trade Mark Implementing Regulation recognizes category-specific forms of representation for:

- shape marks;
- position marks;
- pattern marks;
- color marks;
- sound marks;
- motion marks;
- multimedia marks; and
- hologram marks.⁴⁰

Sound may be represented through an audio file or musical notation. Motion and multimedia marks may be filed through video. This system acknowledges that

³⁸Regulation (EU) 2017/1001 of the European Parliament and of the Council of June 14, 2017 on the European Union Trade Mark, art. 4.

³⁹Supra note 32.

⁴⁰Commission Implementing Regulation (EU) 2018/626, art. 3. the most accurate representation depends upon the nature of the sign.

The Singapore Treaty and WIPO

The Singapore Treaty on the Law of Trademarks and its Regulations establish procedural principles for non-traditional marks. The Treaty does not compel every contracting state to register all forms of marks, but its Rules recognize that applications may concern three-dimensional, hologram, motion, color, position and non-visible signs.⁴¹

WIPO's Standing Committee on the Law of Trademarks has repeatedly examined non-traditional marks, including sound, smell, taste, texture, motion and holograms. Its work emphasizes that representation, distinctiveness and the public interest remain interconnected.⁴²

The United States

United States jurisprudence provides useful guidance on distinctiveness and functionality. In *Qualitex Co. v. Jacobson Products Co.*⁴³, the Supreme Court held that color could function as a trademark after acquiring secondary meaning, provided that it was not functional. The Court rejected an absolute prohibition but recognized that competitive need could limit protection.

In *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*⁴⁴, the Supreme Court held that product design could not be inherently distinctive for federal trademark purposes and required proof of secondary meaning. Consumers ordinarily perceive product design as making the product more useful or attractive rather than as identifying origin.

In *Traffix Devices, Inc. v. Marketing Displays, Inc.*⁴⁵, the Court held that a utility patent constituted strong evidence that claimed product features were functional. The availability of alternative designs did not eliminate functionality where the feature was essential to the use or purpose of the product or affected its cost or quality. By contrast, *Two Pesos, Inc. v. Taco Cabana, Inc.*⁴⁶ recognized that inherently distinctive packaging or overall presentation could receive protection without secondary meaning.

⁴¹Singapore Treaty on the Law of Trademarks, 2006, and Regulations under the Singapore Treaty, r. 3.

⁴²World Intellectual Property Organization, "Representation and Description of Non-Traditional Marks: Possible Areas of Convergence", Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Doc. SCT/19/2, Apr. 28, 2008.

⁴³514 US 159 (1995).

⁴⁴529 US 205 (2000).

⁴⁵532 US 23 (2001).

⁴⁶505 US 763 (1992).

The distinction between product design and packaging is useful for Indian law. Packaging may immediately communicate origin, while product configuration generally requires more substantial acquired distinctiveness evidence.

RECOMMENDATIONS FOR REFORM

Amend Section 2(1)(zb) of Trademark Act, 1999

The phrase “capable of being represented graphically” should be replaced with:

“capable of being represented on the register in a manner that enables the Registrar, competent authorities and the public to determine clearly and precisely the subject matter of protection.”

An explanation should state that the representation must be clear, precise, self-contained, accessible, intelligible, durable and objective.

This amendment would preserve legal certainty while removing an unnecessary medium-specific restriction.

Amend Rule 2(1)(k) of Trademark Rules, 2017

The definition tying graphical representation to paper form should be repealed or replaced. “Representation” should include approved electronic, visual, audio-visual, scientific and other technologically reliable formats. The Rules should authorize the Registrar to update acceptable file standards through public directions without requiring frequent legislative amendment.

Introduce Category-Specific Filing Rules

The Trade Marks Rules should separately address different types of marks. For e.g., for sound⁴⁷, motion, multimedia and hologram marks audio-visual file can be attached. For color marks color code, precise arrangement, position and proportion may be specified. For position and pattern marks drawings of the marks on product along with a representation showing the recurring unit, orientation, repetition and spacing may be specified.

Problem arises in case of Olfactory marks and taste marks. For these marks registration may be permitted conditionally i.e., where objective, durable and accessible representation is technologically possible. The information provided must be sufficient for third parties to understand the claim. It may include clear verbal description, objective scientific profile, non-functionality statement etc.

⁴⁷For sound musical notation may also be added. Waveforms or spectrograms may supplement the recording.

Establish Evidence Standards for Acquired Distinctiveness

The Registry should publish guidelines concerning acquired distinctiveness to establish certainty and objectivity in the process. The applicant should demonstrate recognition of the unconventional feature independently of accompanying words and logos.

Modernize the Public Register

The Registry should maintain a digital database allowing users to perceive unconventional marks directly. Audio, video and three-dimensional files should remain accessible throughout the registration term. The system should preserve original files and later technical migrations so that changes in format do not alter the protected sign.

Develop Institutional Expertise

Specialized examiner training must be provided to examiners of trademarks at registry vis-à-vis olfactory sciences, digital animation, color identification, product engineering etc.

CONCLUSION

The development of unconventional trademarks reflects a broader transformation in commercial communication. Consumers increasingly encounter brands through sound, movement, shape, color, pattern and sensory experience. Indian trademark law cannot remain confined to signs that resemble printed words and logos.

The Trade Marks Act, 1999 created the statutory foundation for this transition by expressly including shapes, packaging and combinations of colors. The Trade Marks Rules, 2017 recognized sound and three-dimensional marks through specialized filing requirements. Indian courts have protected the Zippo lighter configuration⁴⁸, the Gorbatschow bottle⁴⁹, distinctive color arrangements⁵⁰, stitching patterns⁵¹ and other forms of trade dress when evidence established source identification and likely consumer confusion.

⁴⁸Nirmal Chawat, “All about Shape Marks w.r.t. Zippo v. Anil Moolchandani (2006)”, *iPleaders*, June 30, 2023, available at: <https://blog.iplayers.in/all-about-shape-marks-w-r-t-zippo-v-anil-moolchandani-2006/> (last visited on July 25, 2026).

⁴⁹Mathews P. George, “Bombay HC on Passing Off & Shape of Vodka Bottle”, *SpicyIP*, May 25, 2011, available at: <https://spicyip.com/2011/05/bombay-hc-on-passing-off-shape-of-vodka.html> (last visited July 28, 2026).

⁵⁰Supra note 24.

⁵¹Ananyaa Banerjee & Ragini Ghosh, “Delhi High Court Protects Arcuate Stitching Design Mark of Levis”, *S.S. Rana & Co.*, Apr. 18, 2022, available at: <https://ssrana.in/articles/delhi-hc-protects-arcuate-stitching-design-mark-levis-2/> (last visited July 30, 2026).

The jurisprudence also reveals necessary limits. A familiar or generic product form cannot be monopolized merely because it has been commercially successful. Functional shapes must remain available. Colors must be defined narrowly. Decorative patterns require proof of trademark significance. Sensory marks must be objectively represented and non-functional.

The Sumitomo rose-scented tyre application⁵² indicates that scientific representation may permit Indian law to move beyond the assumption that smell marks are inherently incapable of registration. It does not eliminate the need for caution. Administrative acceptance is not a substitute for judicial scrutiny, and scientific complexity must not undermine public notice.

The principal statutory difficulty is no longer the conceptual recognition of unconventional marks. It

is the insistence upon graphical representation in paper form. India should replace that requirement with a technology-neutral standard directed towards clarity, precision, objectivity, accessibility and durability.

Such reform should not transform every sensory or aesthetic feature into private property. The proper role of trademark law is narrower: to protect signs that genuinely identify commercial origin while keeping functional, customary and competitively necessary features within the public domain. As branding becomes increasingly digital, animated and multisensory, the legitimacy of unconventional trademark protection will depend upon how successfully Indian law maintains this balance.

⁵²Supra note 33.