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# A Comparison of Laws on Olfactory Marks vis-a-vis the National and the International Sphere

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## ABSTRACT

*With every moving day, the scope of trademark protection law is widening worldwide. The innovation and progress in the field of trademarks that have been seen recently fit under the category of "non-conventional trademarks," which encompasses smell, sound, taste, and other senses. When it comes to the registrability of smell markings, different countries have varied perspectives. Even though many nations have expressly prohibited the registration of trademarks that lack words or cannot be graphically represented, it has been established that some common law countries allow the registration of smell marks. Nonetheless, the question of whether smell marks are qualified for trademark registration is still debatable. These replicas were limited to smell marks exclusively for the sake of this article. This paper is divided into three sections. It begins by examining the worldwide status of smell marks. It then goes on to discuss the reasons for and against the registrability of smell marks before concluding with a critical analysis based on the findings, and It further deals with the International Development of Smell Mark specific to countries like the United States of America, the United Kingdom and India. When we talk about a critical study of smell mark registration, we're referring to the fact that, while scent marks appear to be a creative way of distinguishing goods and services at first glance, they're not feasible due to the subjective nature of the human sense of smell.*

**Keywords:** *Smell Mark, Non-Traditional Trademark, Trademark Act, Registration of the smell mark, Graphical Representation, TRIPS Agreement, Intellectual Property Law*

## I. INTRODUCTION

The world today is constantly growing. The expeditious enhancement in globalization, technological development and commercialization have led to the expansion of rivalry between

businesses, trade organizations, companies etc. for marketing their products relying on the various senses of the consumers such as sound, taste, smell and the like. Among these senses, the sense of smell has, for the longest time, been a

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crucial faculty on which individuals have depended upon in for regular activities. Plenty of studies have shown that a particular smell may trigger a specific influence on one's state of mind, and it has helped many organizations to acquire millions.<sup>3</sup>

The definition of "Trademark" under the Trademark Act, 1999, is vast. The various provisions indicate that such in exhaustive provisions were made by the lawmakers to expand the ambit of trademark and increase adaptability.<sup>4</sup> The term "trademark" represents word(s) or symbols that help in distinguishing between goods and services of various manufacturers. These words or symbols are usually graphically represented and easily recognize a particular product or brand. A similar definition has been mentioned in the TRIPs Agreement - "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."<sup>5</sup>

These signs, which comprise words, letters, figurative elements, personal names, numerals, and combinations of other such signs or colors, are qualified for registration as trademarks. The visual perceptibility of such signs is another vital factor for the registration of trademarks. If the

signs do not aid in distinguishing the pertinent goods or services, the registrability may depend on the uniqueness or distinctiveness that is acquired through use.<sup>6</sup> The fundamental function is to enable identification of the product and its source, its quality and authenticity. It also helps to advertise and promote the product.<sup>7</sup>

Usually, traditional trademarks refer to ocular trademarks and the use of graphics, colours and other visually representable symbols. Still, recently, there has been a development in other forms of trademarks involving other senses, such as sounds, taste, texture, smell and so on.<sup>8</sup> Some of them are involved in motion; they are not static but moving images and digital marks, like holograms and gestures, which have revolutionized both the fields of trademark law and marketing.<sup>9</sup> These non-ocular trademarks have been used repeatedly in the global market, but it lacks universal validity due to the need for territory wise registration.

Nevertheless, in modern times, most of the crucial changes have been introduced by such non-traditional marks. Another problem faced by lawmakers relating to such modern marks is the constant struggle that they have to put up to maintain the balance between developing intellectual property laws and coming up with

<sup>3</sup> Abhijeet Kumar, "Protecting Smell Marks: Breaking Conventuality" *JIPR* 21, 129-139, (2016).

<sup>4</sup> Sudipta Bhattacharjee and Ganesh Rao, "The Broadening Horizons of Trademark Law-Registrability of Smell, Sports Merchandise and Building Designs as Trademarks" *JIPR* 10 (2), 119-126 (2005).

<sup>5</sup> Agreement on Trade Related Intellectual Property Rights, 01.01.1995 [hereinafter TRIPS Agreement], Section 2, Article 15(1), Available at: [www.wto.org](http://www.wto.org)

[/english/res\\_e/publications\\_e/ai17\\_e/trips\\_art15\\_jur.pdf](#)

<sup>6</sup> Ibid.

<sup>7</sup> Narayanan P, Law of Trademarks, (5th edition Eastern Law House, 2000).

<sup>8</sup> Neeti Suri, "Single Colour Mark: It's Registrability in the United States and the United Kingdom", Available at: [www.legalserviceindia.com/articles/collour\\_marks.htm](http://www.legalserviceindia.com/articles/collour_marks.htm)

<sup>9</sup> Ibid.

technological improvements. They also have to ensure that both go hand in hand.<sup>10</sup>

### Definition of Trademark

The term "mark" is defined by law in the Trade Marks Act of 1999: mark "includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof."<sup>11</sup> The Act defines "trademark" as "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 and combination of colours...."<sup>12</sup>

A trademark also comprises any registered trademark or mark, or any other mark, used or proposed to be used in the course of trade to indicate a link between goods or services, and the right of a person as a proprietor or a permitted user, as the situation may be, to use the mark. These definitions indicate that the feature of the mark being graphically represented is critical to the mark's validity and registration. *"Graphical representation means the representation of a trademark for goods or services represented or capable of being represented in paper form, and include representation in digitized form,"*<sup>13</sup>

According to the Trade Mark Rules, 2002, issued by the Ministry of Commerce and Industry, Government of India, via a notification dated February 26, 2002. Graphical representation is a crucial part of a trade mark's legal standing, especially regarding the Indian position.

## II. TRADITIONAL AND NON-TRADITIONAL TRADEMARKS

The trademarks that use shapes, colours, words and symbols fall under the garb of traditional trademarks. Some of these include collective marks, shape marks, a combination of colours, well-known marks and trade dress, etc. On the other hand, the term "non-traditional trademarks" often refers to modern trademark forms, such as product taste, smell, texture, motion, shapes, designs, or colours.<sup>14</sup> Relatively, these marks are new in the regime of Intellectual Property. In most cases, they differ from the traditional categories, as they do not use logos, pictures, numerals, letters, words and the like. Non-conventional trademarks, therefore, consist of marks originating from sounds, textures, tastes, smells, motion and so on.<sup>15</sup> The difficulty faced in applying non-traditional trademarks is that most of them cannot be perceived visually or

<sup>10</sup> Garry Trillet, "Registrability of smell colour and sounds: how to overcome the challenges dressed by the requirements of graphical representation and distinctiveness within European Union Law?" (July, 2013), Available at <http://dx.doi.org/10.2139/ssrn.2340431>

<sup>11</sup> The Trademark Act, 1991, Section 2(m) available at: [ip-documents.info/2020/IP/THA/20\\_3240\\_00\\_e.pdf](http://ip-documents.info/2020/IP/THA/20_3240_00_e.pdf)

<sup>12</sup> The Trademark Act, 1999, Section 2(zb), available at: [ip-documents.info/2020/IP/THA/20\\_3240\\_00\\_e.pdf](http://ip-documents.info/2020/IP/THA/20_3240_00_e.pdf)

<sup>13</sup> The Trademark Rules, 2017, Rule 2 (1)(k), available at: [www.bananaip.com/wp-content/uploads/2021/07/THE-TRADEMARK-RULES-2017.pdf](http://www.bananaip.com/wp-content/uploads/2021/07/THE-TRADEMARK-RULES-2017.pdf)

<sup>14</sup> Assaf, Katya, "Non-Traditional Trademark Protection as (Non-Traditional) Means of Cultural Control" (2018), available t: DOI:10.1093/oso/9780198826576.003.0019

<sup>15</sup> Non-Conventional Trademarks, IPPRO, available at: [www.ipproinc.com/admin/files/upload/8ce71cd2d0e3086fd66415325f958236.pdf](http://www.ipproinc.com/admin/files/upload/8ce71cd2d0e3086fd66415325f958236.pdf)

represented graphically.<sup>16</sup>

Some of the essential non-traditional trademarks are as follows: -

### **Motion Mark**

As the name suggests, motion marks use movement for identification. In some countries, moving logos, video clips, film clips, documentary clips, motion pictures, moving cinematography, and the like have been registered as motion marks. Numbers of motion marks have been protected under the Federal Trademarks Act (Lanham Act).<sup>17</sup>

Examples of motion marks are the trademarks for 20th Century Fox Movies, Motion Pictures, Columbia Pictures, which are well-known motion marks registered in the U.S.A. In the field of media, an extreme need has been felt for recognizing motion marks. Motion marks in India are also gradually gaining momentum, with extensive media companies and movies looking for such marks.<sup>18</sup>

### **Touch Mark**

The sense of touch is a vital one, and the same has been used in the realm of businesses for the identification of product quality and texture, gradually moulding itself into a trademark. These

touch or texture marks must be distinctive to the consumers and not merely an ornamental or eye-catching element. The touchmark has to show characteristics of a standard trademark and be more than just packaging and decoration of the goods. However, compared to other non-traditional trademarks, touch marks are not being claimed as often. Hence, texture or touch marks are less celebrated in a lot of non-traditional trademarks.<sup>19</sup> An example of a well-known touchmark is the texture of a Louis Vuitton bag.<sup>20</sup>

### **Taste Mark**

Taste marks have made their way to acceptance in certain jurisdictions. The explanation of the product's taste has been taken as the requirement as a graphical representation of taste marks. Principles similar to that of smell marks apply to the registrability of such signs. Arguably, taste marks can be applied only to products and not to services.<sup>21</sup> There are a few obstacles faced while registering such marks. One such obstacle is the difficulty to describe the taste of a product and whether it is "functional."<sup>22</sup> However, some jurisdictions have accepted Taste marks as a valid form of trademark.

<sup>16</sup> See supra note 10.

<sup>17</sup> The Lanham (Trademark) Act, 1946, (United States).

<sup>18</sup> Sreenivasulu NS, "Millennium and Generation Next Trademarks: Trends in Branding and Merchandising, E-Science Central" *Intellectual Property Rights: Open Access*, (2014), Available at: <http://www.longdom.org/open-access/millennium-and-generation-next-trademarks-trends-in-branding-and-merchandising-ipr.1000117.pdf>, DOI: 10.4172/2375-4516.1000117

<sup>19</sup> See supra note 16.

<sup>20</sup> Dipak Rao and Singh, "The Contemporary Issue of Non-conventional Trade Marks," *Lexology*,

(May,2020)

Available at: [www.lexology.com/library/detail.aspx?g=1133f14d-32c0-41b5-a9e2-fed7ee80fe0e](http://www.lexology.com/library/detail.aspx?g=1133f14d-32c0-41b5-a9e2-fed7ee80fe0e)

<sup>21</sup> Tanisha Agarwal and Vanshaj Mehta, "Hear Me, Touch Me, Taste Me, Smell Me: Conventionalizing Non-Conventional Trade Marks in India" *JCIL* (2017), [jcil.lsyndicate.com/wp-content/uploads/2017/06/TanishaVanshaj.pdf](http://jcil.lsyndicate.com/wp-content/uploads/2017/06/TanishaVanshaj.pdf)

<sup>22</sup> Thomas A. Gallagher, Nontraditional Trademarks: Taste/Flavor, 105(3), *The Trademark Reporter*, 805, 806 (2015), Available at [www.inta.org/TMR/Documents/Volume%20105/vol105\\_No3\\_a4.pdf](http://www.inta.org/TMR/Documents/Volume%20105/vol105_No3_a4.pdf)

## Smell Mark

An 'Olfactory Mark' is a product mark used to identify it from similar products based on its smell. For a long, the same has been recognized with the help of the aroma of any object. However, until much later, the odor or smell did not receive trademark protection or even acknowledgement. The sense of smell has been discovered to be the most basic of the five senses and the most important. It also plays a more prominent role in everyday activities than is commonly recognized. Manufacturers have incorporated odours or fragrances to differentiate them from similar products, which have led to the development of olfactory marks. The olfactory sense is one of the most powerful senses in the human body, capable of imprinting itself in memory. Since the mid-90s, many products have been dependent on the odour of their product for their sale, some of which include Deodorants, Cosmetics, Soaps, Candles, Cleaning products, etc. The ability of an item's odour, not only to sell but also to recognize and differentiate, is a primary and indisputable role of scent in a considerable number of today's items. The primary goal of a trademark, which is to be protected, is to recognize different products. According to many jurists, the most fundamental role of a modern trademark is to distinguish one item from another in the world of commerce.

## III. SMELL MARK: STANCE IN THE NATIONAL AND INTERNATIONAL SPHERE

### Position in India

India has imported the European Union's approach as it can be understood from the Draft Manual for Trademark Practice & Procedure, a guide to the Trade Marks Act. In India, there have not been many unconventional marks that have received registration. Some of the acts that refer to non-traditional trademarks are Trade and Merchandise Marks Act (1958), Trade Marks Act (1999), Trade Marks Rules (2002) and the Draft Manual for Trademark Practice & Procedure. The manual deals with the relevant provisions of the Act in the context of non-conventional marks, followed by an analysis of the elaboration given on the relevant provision in the Draft Manual.<sup>23</sup>

Sections 2(1) (zb) and 2(1)(m) of the Trade Marks Act shows that the definition of trademark has been expanded to include in its ambit shapes, packaging and combination of colours.<sup>24</sup> Furthermore, Section 3 of the Draft Manual defines the trademark as including any mark as long as the mark is represented graphically and capable of distinguishing the goods or services of one person from that of the others. However, during registration, smells, sounds, colors, and shape require special consideration. Moreover, Rule 25 (12)(b) of the Trademark Rules, 2002 mandates graphical representation and Rule 28 and 30 require the representation to be durable on paper. Thus, this becomes a significant drawback

<sup>23</sup> Dev Gangjee, "Non-Conventional Trade Marks in India", *Nat'l L. School India Rev*, 22(1), pp. 67-95, (2010), Available at: [www.jstor.org/stable/44283714](http://www.jstor.org/stable/44283714)

<sup>24</sup> Trade Marks Act 1999 Sections 2(1) (zb), 2(1)(m),

in recognizing smell marks as legitimate trademarks in India.

The Draft Manual issued by the Trademark Office accommodates certain non-traditional trademarks even though the definition of the trademark doesn't necessarily involve any non-conventional trademark. The problem with scent marks is the inability to represent them graphically, and India recognizes marks that are graphically represented. The concept of smell marks is very new to India and will require time for advancement. The Delhi High Court, in *Cadbury India Limited & Ors. v. Neeraj Food Products*<sup>25</sup> pronounced that it was easy to understand why the majority of registration cases of non-traditional marks, especially smell marks, around the world, led to the rejection of registration. In respect of an olfactory sign, the requirements of the graphic representation are not satisfied by a chemical formula by a description in written words, by the deposit of an odours sample or by a combination of those elements.<sup>26</sup>

India's Trademark Regime still emphasizes the need for a trademark to be capable of graphical representation. However, conventions and treaties in the past have been held where a graphical representation of a trademark has not been considered a necessity in granting registration to it.<sup>27</sup> Therefore, it can be said that the Indian trademark laws do not currently have

the space to accommodate smell marks. The rigidity of graphically representing a trademark can be reconsidered, especially since alternative descriptions, such as the one adopted by the EU, are available. Such alternative descriptions lead to various unconventional trademarks, including but not limited to the smell mark.<sup>28</sup>

### Position in the United Kingdom

The Trade Marks Act of 1994 governs and regulates trademarks in the United Kingdom. Trademarks are defined in Section 1(1) of this Act as follows:

In this Act, a "trademark" means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.<sup>29</sup> A trademark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging. As a result, there is no regulatory distinction between the legal scope of trademarks and their registration. However, there have been cases of olfactory trademark registration in the United Kingdom. Following a community trademark registration in 1993, the UK created a new trademark to meet the regulations' obligations.

Chanel attempted unsuccessfully to register "Chanel No 5" as a trademark when the UK TMA went into effect. Chanel sought to depict the symbol graphically by describing its perfume as

<sup>25</sup> Cadbury India Limited & Ors. v. Neeraj Food Products, 142 (2007) DLT 724

<sup>26</sup> Javvadshaikh, "Olfactory Marks (Smell Marks)", *Legal Services India*, Available at: <https://www.legalserviceindia.com/legal/article-2928-olfactory-marks-smell-marks-.html>

<sup>27</sup> See supra note 19.

<sup>28</sup> Smell Trademarks in India, *Intellectual Property and Technology Laws Society of NUJS, Smell Trademarks in India*, <https://nujsiplaw.wordpress.com/2019/07/03/smell-trademarks-in-india/>

<sup>29</sup> The Trademark Act 1994, Section 1.

***“The scent of aldehydic-floral fragrance product with an aldehydic top note from aldehydes, bergamot, lemon and meroli; an elegant floral middle note, from jasmine, rose, lily of the valley, orris and ylang-ylang; and a sensual feminine note from sandal, cedar, vanilla, amber, civet and musk. The scent also being known by the written Brand Name No.5.”***

<sup>30</sup> The application was denied because a scent is a product in and of itself rather than an indication of its origin. On the same day, Sumitomo Rubber Co applied to register "a floral fragrance/smell reminiscent of roses as applied to tyres", (Sumitomo Rubber Co.'s Application No. 2001416 dated 31.10.1994; cited from Vatsala Sahay, "Conventionalizing Non-Conventional Trademarks of Sounds and Scents: A Cross-Jurisdictional Study") and Unicorn Products applied to register "the strong smell of bitter beer applied to flights for darts", and both were approved.

In the context of the UK, as in the case of the ECJ, the issue was with the graphical representation of the marks. Graphical representation is required not only to document and publish the mark but also to determine the scope of existing trademark rights by the concerned parties. In a case involving the registration of the smell or fragrance of cinnamon in relation to furniture, the Principal Hearing Officer highlighted the difficulty in registering smell marks by stating that a man's perspective

of the scent is likely to be influenced by the conditions under which they have been valued. Apart from graphical representation, it is critical that the mark has a distinctive character, as the OHIM Third Board of Appeal stated in yet another case. Since an olfactory mark cannot be recognized visually, the question of whether an olfactory mark can be a trademark subject matter in any capacity emerged.

Since an olfactory mark cannot be recognized visually, the question of whether an olfactory mark can be a trademark subject matter in any capacity emerged. In the case of *Sieckmann v Deutsches Patent und Markenamt*<sup>31</sup>

#### **Sieckmann's Case**

The European Court of Justice's (ECJ) decision in *Ralf Sieckmann v. Deutsches Patent und Markenamt* constituted a significant milestone in olfactory mark jurisprudence. The applicant wanted to register a smell mark as a distinguishing mark that contained "the pure chemical compound methyl cinnamate (= cinnamic acid methyl ester) having the structural formula - C<sub>6</sub>H<sub>5</sub>-CH = CHCOOCH<sub>3</sub>." As asserted by the applicant, samples of this olfactory mark might have been obtained from local laboratories mentioned in the 'Gelbe Seiten' (Dutch Yellow Pages).

He also submitted a jar carrying a sample of the odours of such a smell mark, noting that "*the*

<sup>30</sup> Chanel's Application, 31.10.1994; cited from Nathan K G Lau, "Registration of Olfactory Marks as Trademarks: Insurmountable Problems?"(2004), 16 *SINGAPORE ACADEMY L. J.* 264, 265.

<sup>31</sup> *Ralf Sieckmann v. Deutsches Patent und*

*Markenamt*, Case C-273/00, (Dec12, 2002), European Court of Justice (hereinafter, unless the context otherwise requires, referred to as "Sieckmann's Case."

*scent was usually described as balsamically fruity with a slight hint of cinnamon.*<sup>32</sup>

As a result, the applicant used three techniques to convey the mark's scent: a verbal description, a chemical formula, and the submission of a smell sample. The ECJ first concluded that a sign that is not per se able to be detected by the sense of sight could qualify as a trademark if it has a distinctive character and can be graphically expressed, such as with pictures, lines, or characters. In other words, the judgment made it plain that the indicators that can be depicted visually are not limited to those signals that can be seen with the naked eye. However, a graphical representation of an olfactory system is not available. The most important criterion is that the mark stands out among other non-traditional trademarks.

The graphic representation must also be "clear, exact, self-contained, easily accessible, comprehensible, durable, and objective,"<sup>33</sup> according to the Court. The "**Sieckmann seven-fold test**" has come to be known for these factors, which apply not only to olfactory marks but also to other non-traditional trademarks. However, in this decision, the Court did not provide much information on what they stand for in detail or how they are met in practice. The goal of the graphic representation requirement, according to the Court, is to allow a sign to be physically displayed to define the scope of protection of the mark correctly. However, the ECJ refused to register this trademark after dismissing the applicant's chemical formula,

verbal description, and a sample of the olfactory mark. Even based on the combined value of the mark's descriptive qualities, the Court explicitly denied registration.

The Sieckmann decision has significantly impacted the registration of non-traditional or intangible trademarks, notably olfactory marks, particularly in the European Union. The applicant met a rigorous condition of the Sieckmann seven-fold test, as described above, and so the decision has set a strong precedential value against the registrability of olfactory trademarks. The fragrance that is being considered for registration as a trademark must be different because it must function as a trade origin signal rather than being a result of the product's nature. The utmost level of distinctness, originality, correctness, and originality has become the highest in the cases of olfactory marks. Therefore the case aligned itself with the statutory position applicable in the U.K. and the European Union.

Therefore, while olfactory mark registrations are allowed and open in theory in the United Kingdom, the reality of practice is quite the opposite, particularly in the case of the Sieckmann, as written descriptions, chemical formulas, samples, and electronic sensory analysis have all been struck down by the courts.

### **Position in the United States Of America**

While the EU has been cautious in the reception of non-traditional marks, America has a more liberal approach towards registering such marks. The Trademark Act 1946, The United States of

<sup>32</sup> Ibid (*para 11 of the judgement*).

<sup>33</sup> Ibid (*para 55 of the judgement*).

America, provides for the protection and registration of trademarks at the federal level. Section 45 of that Act defines trademarks and reads as follows: "The term "trademark" includes any word, name, symbol, or device, or any combination thereof— (1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."<sup>34</sup>

The definition is not exhaustive and includes non-visual marks as well. Hence, the Act recognizes the existence of a mark even if it is unregistered; the right is not established by the holder but by the commercial use of the product or service.<sup>35</sup>

Such an approach is adopted because of the competitive, capitalist economic structure of the country. The registration is administered by the U.S. Patent and Trademark Office (U.S.P.T.O.). Section 1052 of the Lanham Act enables the determination of which marks can be trademarked. The definition of trademark includes devices and symbols to accommodate non-traditional trademarks (scent, sound, shapes and the like)—the U.S. supreme court case

Qualitex Co v. Jacobson Products Co., 514 US 159 (1995)<sup>36</sup> made the registration of non-conventional trademarks easier as it was held that a trademark can be "almost anything at all that is capable of carrying meaning."<sup>37</sup>

Scent Trademarks the first scent to receive trademark protection was the scent described as a "high impact, fresh, floral fragrance reminiscent of Plumeria blossoms."<sup>38</sup>

*In re Clarke, 17 USPQ2d 1238 (TTAB 1990)*, it was held that "***Scent marks can be affixed directly to or infused into the product, like the Plumeria Blossom-scented yarn or hypothetical raspberry-scented upholstered furniture, or could even be affixed as a scratch-and-sniff or scented card.***"<sup>39</sup> Average restrictions were laid down for determining what can be trademarked and what cannot. "The scent had to be distinctive of the product, and it could not be practical or functional. Therefore, the fragrance of a perfume could not be registered. Moreover, in terms of graphical representation, the Court stated that while drawings were not required, description of the scent was required."<sup>40</sup>

in the case of *Two Pesos Inc. v. Taco Cabana Inc*<sup>41</sup>, it held that the Trade dress of a particular product might entail size, shape, colour or colour combinations, texture, graphics, or even particular sales techniques within itself. A trade dress may also include attributes like sounds and

<sup>34</sup> The Lanham Act, 15 U.S.C. § 1127.26 (1994)

<sup>35</sup> *In re int'l Flavours and Fragrances*, 183 F.3d, 1361, 1366 (Fed. Circa 1999)

<sup>36</sup> *Qualitex Co v. Jacobson Products Co.*, 514 US 159 (1995).

<sup>37</sup> Brinks Hofer Gilson & Lione, "The Sound of Unconventional Marks in the United States", *World Trademark Rev.* 94 (Aug, 2007).

<sup>38</sup> *In re Clarke*, 17 USPQ2d 1238 (TTAB 1990).

<sup>39</sup> See supra note 30

<sup>40</sup> US Trademark Law, available at: [www.uspto.gov/sites/default/files/trademarks/law/Trademark\\_Statutes.pdf](http://www.uspto.gov/sites/default/files/trademarks/law/Trademark_Statutes.pdf)

<sup>41</sup> *Two Pesos, Inc. v. Taco Cabana, Inc.*, 120 L Ed 2d 615: 505 U.S. 763 (1992)

smell. The view adopted by the U.S.A. regarding non-conventional trademarks is perhaps the most inclusive and most liberal in the world.

#### **IV. SMELL MARK: DEBATE FOR AND AGAINST**

##### **The Debate for Smell Mark**

The effective registration of smell marks will lead to the expansion of brand recognition, as smells create associations in the human brain and help in recognition.<sup>42</sup> Consumers may choose one brand over the other if the other product has a better, more pleasing fragrance.

- As fragrances can trigger emotional centers of the brain, consumers may start to prefer a particular product over another and thereby increase sales. It is most likely to enhance the mood of people and lead to a better purchasing experience. Happier customers are more likely to come back to repurchase products or try newer products.

- The quality of specific products such as tea, coffee, cocoa and the like can be determined by their smell. The value of a product will be heightened with better fragrances than without.

- The successful registration of smell marks will lead to the prevention of imitation of products with unique fragrances.

- Smell marks also cater to consumers who are visually impaired and illiterate.

##### **The Debate Against Smell Marks**

- The sense of smell is highly subjective

and unreliable. Therefore, it can be challenging for scents from acting as trademarks and makes judicial administration difficult.

- There is a universal preference for some fragrances; this naturally depletes the total number of available scents for the registrability of smell marks, thereby causing smell mark depletion

- The inability to describe certain smells may lead to confusion and difficulty in registration.

The constant struggle for the inclusion of olfactory marks for both commercial use and the identification of products by the differently-abled is a concept that is novel and has yet to gain significance in the national and global scenario. Smell marks may one day be helpful to the blind for product identification. Such a step would be a giant leap for humanity towards equity.<sup>43</sup>

#### **THE HURDLES FACED IN REGISTRATION OF SMELL MARKS**

Although smell markings have achieved recognition in several nations, they still lack the support of robust legal provisions, and more expansion in this area of law is required. With more nations creating provisions for the registration of smell marks, an apparent discrepancy between the requirements established by the countries may be recognized. On the one hand, countries like Australia and Europe rely on the Sieckman test, while the

<sup>42</sup> Hawes J E, *Fragrances as trademarks, trademarks reporter*, 79 (1989) 134

<sup>43</sup> See supra note 24.

Supreme Court's *Qualitex* decision governs trademark law in the United States.

The most fundamental problem that a smell mark faces is the consumer's ability to smell the goods before purchasing them. If not, the main objective of the smell as a trademark is defeated because the consumer must wait until the product is used at home to smell it. In this manner, he is unable to link the fragrance to its source, and hence his decisions will not be influenced at the time of the sale.

Another issue with smell marks is that, even if a consumer identifies or recognizes the smell, he may not consistently associate the smell with the identification of the product or maker. Whether or not an item's aroma serves as primary identification, the producer seeking to protect that mark from infringement must be able to demonstrate that similar odours could create confusion. Similar fragrance blends, like similar colors, might be difficult to distinguish without expert assistance. In terms of practical administration challenges, smell marks are more complex and burdensome than color marks.

## V. CONCLUSION

As demonstrated by the evaluation of several authorities and international and domestic legislation and rules discussed above, the concept of non-traditional trademarks is new and evolving. The protection of non-traditional marks in the field of intellectual property is still a bit vague. Unlike traditional trademarks, sound, smells, and tastes are frequently important features of goods, and it may be argued that such qualities should not be monopolized. Even

though non-traditional marks are ineligible for trademark registration due to their inability to be represented graphically or visually, there have been a few occasions where authorities and courts have violated this restriction and registered a non-traditional mark.

This was due to their marks' capacity to expressly and clearly distinguish the commodities they represented from other identical products in the market. It is frequently tricky for traders to register such marks in trademark registries because they lack the groundwork to act as the sole identifier of the source or origin, the theory of smell depletion, and the fact that smell or scent is subjective changing and varying from person to person. Thus different consumers may perceive it in a completely different way based on their opinion.

All of this, when combined, can have a negative impact on the functionality and efficacy of smell marks as trademarks. To summarize, it is true that the way products smell can be a huge determining factor in an individual's life. Still, the lack of graphical representation and the arbitrary and random nature of smell or scent can sometimes pose a risk in the case of registration of a smell mark, but a balance between the use of technology by various Trademark Offices of different countries and founding jurisprudence of trademark, the lacuna present in the process of trademark registration.

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