

Protection of Non-Traditional Trademarks (Sound, Smell, and Color): Challenges and Legal Perspectives

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Abstract

With the expansion of branding and marketing, trademark protection has extended beyond traditional words, names, logos and symbols to encompass non-traditional trademarks, including sounds, colours, fragrances, forms, motion marks, textures, holograms and multimedia. Such markings can be crucial source identifiers, allowing consumers to associate certain sensory or visual characteristics with particular enterprises. This paper deals with the protection of sound, smell and colour trademarks with special reference to the Indian legal status¹. It discusses the Trade Marks Act, 1999, Trade Marks Rules, 2017 and important international developments under the TRIPS Agreement. The paper identifies certain important problems such as distinctiveness, representation, customer perception, functionality, evidential requirements and disparities between different legal systems. In India, sound marks have found somewhat more acceptance whereas scent marks are still to be easily registered owing to challenges concerning objective depiction and consistent identification. Colour markings can be protected if they are distinctive and strongly associated with the consumer. The paper outlines the necessity of safeguarding non-traditional trademarks for fostering innovation in branding, reducing customer misunderstanding, protecting goodwill, increasing intellectual property value, and supporting fair competition. It states that Indian trademark law should keep evolving with technological and commercial changes but with the caveat that the protection should not result in unwarranted monopolies over common or useful qualities.²

Introduction

Traditionally, trademarks have been words, names, logos, symbols, labels or a combination of these that help consumers identify the goods or services of one business from those of another. However, the concept of branding has been greatly enlarged by the modern economic world. Today companies compete not just with visual symbols and brand names, but also with sensual experiences and unique presentation. Thus, non-conventional trademarks,³ such as sounds, colours, fragrances, forms, motion marks, holograms and multimedia aspects, have become more and more relevant when considering modern trademark law. Non-traditional trademarks are especially important because customers may link a distinctive sensory feature with the commercial origin of a product or service in the absence of a standard phrase or emblem. A unique sound at the opening of a commercial, a specific colour that is always used with a brand, or a certain fragrance in a shopping location can build a strong psychological link between the sensory aspect and a particular business. Such features can therefore perform the same fundamental function as conventional trademarks: they can identify and distinguish the source of goods or services.

¹ Trade Marks Act, 1999, § 2(1)(m) (defining “mark”) and § 2(1)(zb) (defining “trade mark”)

² *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, Case C-273/00, [2002] E.C.R. I-11737 (discussing the requirements for clear, precise, self-contained, easily accessible, intelligible, durable and objective representation of a mark)

³ Trade Marks Act, 1999, § 2(1)(m), § 2(1)(zb) (defining “mark” and “trade mark” and establishing the source-identifying function of trademarks).

But their increasing commercial use has posed serious legal and practical problems. The usual kind of trademark can be expressed graphically as words, pictures or symbols. This makes it relatively easy to identify, register and enforce. In contrast, whereas scent cannot be simply represented in a traditional trademark register, sound requires a correct means of reproduction and colours may be difficult to monopolise because of their restricted availability and their possible practical or aesthetic relevance. These challenges involve major questions of distinctiveness, graphical or perceptual representation, functionality, consumer perception, registration, scope of protection and enforcement. The legal protection of non-traditional trademarks therefore involves a balance between two conflicting interests. On the other hand, commercial firms should be able to safeguard true brand identities that have earned distinctiveness and commercial goodwill. In contrast, trademark law should not permit particular traders to maintain perpetual monopolies over common sensory traits which competitors legally require.⁴ Therefore, the protection of non-traditional marks must be consistent with the fundamental purposes of trademark law, namely, to prevent confusion on the part of the customer, to preserve the goodwill of businesses and to ensure fair competition. Among the different types of non-conventional trademarks, sound, smell and colour marks pose some of the most interesting legal questions.

Trademarks that are not conventional

A non-traditional trademark is a mark that is capable of distinguishing the products or services of one undertaking from another and goes beyond conventional trademarks, such as words, names, logos, or symbols⁵. These marks establish a unique brand identity by employing sensory or visual elements. Sound marks are unique jingles, musical notes, tones, or other noises that consumers associate with a specific brand. Colour marks are composed of a single colour or a combination of colours that have become distinctive and are used to identify a specific source. Olfactory marks, or smells, are distinctive fragrances that are linked to specific products or services. Shapes, motion marks, holograms, and multimedia marks are additional examples. Shape marks, motion marks, texture markings, and holograms are additional examples.

Legal Framework

The Trade Marks Act, 1999 is the primary legislation in India that governs trademark protection. Its objective is to safeguard marks that are capable of distinguishing the goods or services of one individual from those of another and to prevent consumer confusion that may result from deceptive or unauthorised use.⁶ The definition of "mark" under the Act is sufficiently broad to accommodate contemporary branding developments, whereas the definition of "trademark" concentrates on the ability of a sign to distinguish commodities or services. Historically, Indian trademark law prioritised conventional marks, including words, names, labels, and insignia. However, technological and commercial advancements have facilitated the recognition of non-traditional forms of marks.. The registration of certain unconventional marks, particularly sound marks, has been further facilitated by the Trade Marks Rules, 2017. The TRIPS Agreement establishes minimum standards for the protection of trademarks at the international level and mandates that member countries provide protection for signs that are capable of distinguishing products or services. Despite the fact that the conventional concept of trademarks was closely linked to visually perceptible **signs**, numerous jurisdictions have gradually broadened the scope of protection to encompass sounds, colours, shapes, motion, multimedia elements, and other unconventional signs. For instance, the European Union allows the registration of marks that can be represented on the register in a manner that allows the public and competent

⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 15(1), Apr. 15, 1994, 1869 U.N.T.S. 401 (recognising signs capable of distinguishing the goods or services of one undertaking from those of other undertakings as trademarks).

⁵ Trade Marks Act, 1999, § 2(1)(m), defining "mark" to include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging, or combination of colours and other elements.

⁶ Trade Marks Rules, 2017, r. 26, prescribing requirements concerning the representation of trademarks, including provisions specifically dealing with sound marks and colour combinations.

authorities to clearly identify the subject matter of protection. The United States has also acknowledged a variety of non-traditional trademarks in which the relevant feature serves as a source identifier and satisfies the relevant requirements of trademark law. The broader comprehension of trademark protection has been impacted by these international developments, which underscore the growing significance of sensory and unconventional branding methods.

Types of Non-Traditional Trademarks

1. Sound Trademarks: A sound trademark consists of a distinctive sound, musical sequence, jingle, or other auditory element that enables consumers to identify the commercial source of particular goods or services. Sound marks have become increasingly important because consumers can develop strong associations between particular sounds and specific brands, even when the brand name or logo is not expressly mentioned. Well-known examples include the Intel startup sound, the MGM lion's roar, and Nokia's classic ringtone, all of which have been used as distinctive elements of brand identity. For registration, the sound must generally possess distinctive character and must be capable of being represented or recorded in an appropriate manner. Depending on the jurisdiction, this may involve musical notation, an audio file, or another representation that accurately identifies the scope of the claimed mark. The principal legal difficulty is distinguishing between a sound that merely serves an advertising or entertainment function and one that consumers actually perceive as indicating commercial origin.⁷ Sounds that are common, functional, customary in a particular industry, or directly associated with the characteristics of goods or services may face difficulties in obtaining protection. Consequently, evidence of extensive use, advertising, consumer recognition, and market association may become important in establishing the distinctiveness of a sound mark.

2. Color Trademarks: A color trademark consists of a particular color, combination of colors, or color arrangement that functions as an identifier of the commercial source of goods or services. Although colors are fundamental components of product design, advertising, packaging, and communication, a color may acquire trademark significance when consumers strongly associate it with a particular business. Examples frequently discussed in trademark law include Tiffany & Co.'s robin-egg blue, Cadbury's distinctive purple in jurisdictions where protection has been recognized, and UPS's brown branding associated with its delivery services.⁸ The protection of color marks is subject to considerable limitations because granting exclusive rights over a color can potentially restrict competitors from using a feature that may be commercially necessary or commonly used. For this reason, courts and trademark authorities generally examine whether the relevant color has acquired distinctiveness through extensive and consistent use. Factors such as the duration and extent of use, advertising expenditure, market recognition, consumer surveys, and the extent to which consumers associate the color with a particular undertaking may be relevant. Protection is therefore generally stronger where the color has become a genuine source identifier rather than merely serving a decorative, descriptive, or functional purpose.

3. Smell Trademarks: Smell or olfactory trademarks are among the most challenging forms of non-traditional trademarks because they involve sensory characteristics that are inherently difficult to describe, represent, reproduce, and objectively identify. A scent may qualify as a trademark in principle where consumers perceive the smell not as an inherent characteristic of the product but as an indication of its commercial source. One well-known example from international trademark practice is a floral fragrance associated with sewing thread, where the scent was treated as distinctive because it was not inherent to the goods themselves. Similarly, a scent applied to a product or used in a commercial environment may potentially function as a trademark if consumers associate that scent with one particular business. However,

⁷ *Shield Mark BV v. Joost Kist*, Case C-283/01, [2003] E.C.R. I-14313 (recognising the possibility of sound marks while considering the requirements for their representation and distinctiveness).

⁸ Trade Marks Rules, 2017, r. 26(5), which provides for the submission of a sound mark in MP3 format along with a graphical representation of its musical notation.

registration requires a sufficiently clear and precise means of identifying the protected scent. Written descriptions can be subjective and may fail to communicate the exact sensory characteristics of a fragrance, while chemical formulas describe composition rather than necessarily communicating how a scent is perceived. Furthermore, scents can vary according to concentration, temperature, storage conditions, and individual perception. These difficulties have made smell marks comparatively rare and have contributed to uncertainty regarding their registration and enforcement.⁹

Challenges of Protection of Non-Traditional Trademarks

One of the main problems in defending non-traditional trademarks is distinctiveness. A trademark has to be able to differentiate the undertaking's goods or services from the goods or services of other undertakings¹⁰. Generally, sounds, colours and smells, unlike traditional word or logo marks, may be viewed first as a decorative, useful or promotional feature rather than as a designation of commercial origin. Thus, the applicant must show that the relevant sensory trait is either inherently distinctive or has become distinctive through use. In many instances it may require a great deal of evidence to prove that consumers have formed a strong association between the particular sound, colour or fragrance and a single commercial source. Another big problem is graphic or objective portrayal. Words, illustrations or symbols can typically simply replicate traditional trademarks in a trademark registry. However, sensory markings are more difficult to be represented in a way that is clear, exact, self-contained, accessible, comprehensible, durable and objective. A sound can be more easily conveyed by an audio recording, whereas a smell can not always be expressed enough by written description or chemical formula. The problem is particularly serious because registration should enable both the trademark authority and the public to know exactly what subject matter is protected. Uncertainty in representation may lead to difficulty in establishing the bounds of the exclusive right. Another key limitation is the functionality theory. Trademark law exists to safeguard identifying elements of commercial origin, not to confer everlasting monopolies over functional or technically advantageous qualities. A feature that is fundamental to the usage or performance of a product, or that gives a technological or practical advantage, should normally be available for competitors to utilise where other forms of intellectual property protection, such as patents, are more suitable.¹¹ This problem could develop in respect to colours, shapes, fragrances and sounds where the particular characteristic has a practical purpose and is not only used to identify the source of the goods or services. The principle of functionality guarantees that trademark law will not be used to perpetuate monopoly power over features that must remain in the public marketplace. Consumer perception is also the key to the protection of non-traditional trademarks. It is not enough to employ a sound, colour or smell for a long period of time to make it a trademark. The question is whether customers do in fact interpret that trait as denoting a particular business source. Such association may need extensive evidence including advertising and promotional records, sales numbers, market research, consumer surveys, evidence of duration and scope of usage, and proof that competitors or customers recognise the feature as belonging to the applicant. The evidence burden can make the registration of non-traditional trademarks more complex and costly than for conventional trademarks. Finally, variation across borders poses serious challenges for international commerce. The registrability, representation, distinctiveness and scope of protection of non-traditional trademarks have been approached differently in various jurisdictions. What is protected in one country may be challenged or have different standards in another country, such as a sound, colour, or scent. Those disparities increase the cost and complexity of

⁹ *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, Case C-273/00, [2002] E.C.R. I-11737 (holding that the representation of a trademark must be clear, precise, self-contained, easily accessible, intelligible, durable and objective, and addressing the difficulties of representing olfactory marks).

¹⁰ Trade Marks Act, 1999, § 9(1)(a)–(b) (providing for refusal of marks that lack distinctive character or consist exclusively of indications describing characteristics of goods or services).

¹¹ Trade Marks Act, 1999, § 30(2)(b), concerning limitations on trademark rights where use of a mark is necessary to indicate the intended purpose or characteristics of goods or services.

protecting international brands and may make it impossible for companies¹² to pursue a standard global trademark strategy. However, the worldwide progressive recognition of non-traditional trademarks suggests a more general trend of adjusting trademark law to contemporary commercial circumstances. The task for legislatures and courts is to devise bright line standards that safeguard true brand identities while avoiding the unwarranted monopolisation of common, functional, or commercially necessary sensory qualities.

Indian Position

The nature of branding has changed and India has slowly moved toward recognising and protecting non-traditional trademarks. The Trade Marks Act, 1999 has a rather wide definition of a “mark” and the statutory structure is amenable to the inclusion of signs other than traditional words, names and logos, as long as these signs meet the basic criteria of trademark protection. The Trade Marks Rules, 2017 additionally provide for procedures related to various non-conventional marks including sound markings. Among the several classes of non-traditional trademarks, sound marks have gained relatively much recognition in India. The Indian Trade Marks Registry has accepted applications for sound marks if the applicants are able to demonstrate that the sound is capable of distinguishing their goods or services from the goods or services of their competitors.¹³ In practice, an applicant may be asked to produce an acceptable graphical representation of the sound in addition to an electronic recording or other prescribed representation. The recognition of sound markings represents the increasing realisation that customers are able to identify a certain sequence of sounds, musical notes or aural expression with a particular commercial source. However, the protection of sound markings is not automatic. The sound must have a particular character and be used as a sign of business origin, and not only describe or accompany the goods or services. Therefore, it could be hard to register a simple or common sound. The application may be required to show that the consumer has linked the specific sound to the applicant’s business by virtue of wide and regular use. This makes proof of promotion, market recognition, sales, length of use and consumer association extremely significant.

Smell or olfactory trademarks pose a far higher challenge in the Indian context. In principle a unique fragrance may be used to identify the source, however the practical requirements for registration and enforcement are troublesome. It is hard to explain a smell precisely, and a written description may not capture the exact features of the smell. Chemical formulas might tell you what a material is made of, but they don’t necessarily create an approachable or trustworthy model of the smell itself. Furthermore, the aroma can change with time and is affected by storage circumstances, temperature, concentration and individual perception.

Thus, olfactory marks are mostly unexplored in Indian trademark practice. There is a lot of confusion here since there is no well-developed method of the objective representation, examination and reproduction of odours.¹⁴ There is also a concern that exclusive rights over particular odours may interfere with legitimate commercial activity, particularly where the scent is used for a functional or technical reason rather than being used primarily as a flag of origin. Colour trademarks are somewhere in the middle. A single colour or a mix of colours might have trademark significance where consumers firmly associate that specific colour scheme

¹² Trade Marks Act, 1999, § 9(3), providing that a mark shall not be registered where it consists exclusively of a shape or other characteristic resulting from the nature of the goods, necessary to obtain a technical result, or giving substantial value to the goods.

¹³ Trade Marks Act, 1999, § 9(1)(a), read with § 9(1)(b), concerning the requirement of distinctiveness and the exclusion of marks that are incapable of distinguishing the goods or services of one undertaking from those of another.

¹⁴ Trade Marks Act, 1999, § 9(3), providing that a mark shall not be registered where it consists exclusively of a shape or other characteristic resulting from the nature of the goods, necessary to obtain a technical result, or giving substantial value to the goods.

with a particular business. But colour protection has to be handled with care, as colours are scarce resources that enterprises can lawfully need for decorative, descriptive, functional or communicative objectives. Granting an exclusive right to a hue in common use without proper explanation could put competitors at an unjustified disadvantage.

Thus, Indian trademark law gives much attention to distinctiveness and customer association. A hue which is otherwise non-distinctive may obtain protection thru extensive use, if it has been known to customers as designating a certain source.¹⁵ Such acquired distinctiveness can be proved by evidence such as use over a long period, expenditure on advertising, market share, consumer surveys, sales data and promotional material. Therefore, the Indian stance represents a progressive change from the standard concept of trademarks to a larger acceptance of sensory and non-conventional types of branding. The protection of non-traditional trademarks, however, still depends on the applicant's ability to show that the element in question actually serves a trademark function. The real problem for the Indian legal system is to arrive at clear and predictable criteria and yet not permit trademark protection to be a ground for an unwarranted monopoly on common sensory aspects.

Importance of Protecting Non-Traditional Trademarks

The protection of non-conventional trademarks is becoming increasingly vital in a marketplace where firms compete not just with traditional brand names and logos, but also with distinguishing sensory and experience elements. Sound, colour, shape, movement and other unusual characteristics can be effective weapons in the arsenal of building customer recognition, and setting one project apart from another.

1. Sparks creativity in branding and marketing

Legal protection motivates companies to invest in unique and inventive ways of advertising their reputation. Companies might generate unique sounds, colour combinations, visual effects, or other sensory elements to set themselves apart from competitors. Businesses have greater incentive to engage in long-term branding initiatives when these qualities may be adequately protected legally after they become distinctive.

2. Avoids consumer confusion

The main function of trademark law is to allow consumers to identify the commercial source of goods and services. Unconventional marks can function like conventional trademarks. Even when the business name is not prominently displayed, people may easily recognise a firm by a certain sound or characteristic colour scheme. A sensory identification protection can preclude competitors from employing confusingly identical sensory traits, thus decreasing the likelihood of consumer fraud.¹⁶

3. Maintains good will and reputation

Companies spend a lot of effort in building goodwill and establishing a recognisable market character. Commercial goodwill in an enterprise comprises any relationship which consumers make between a particular business and a particular sound, colour or other sensory element. This goodwill can be exploited by unauthorised copying and can even harm the reputation of the original brand. Trademark protection provides a legal way to protect this built up reputation.

¹⁵ Neha Mishra, "Registration of Non-Traditional Trademarks," *Journal of Intellectual Property Rights*, Vol. 13, pp. 43–50 (2008). Mishra discusses colour marks, their registrability, distinctiveness, secondary meaning and the broader difficulties surrounding non-traditional trademarks.

¹⁶ Malladi Gayathri, "A Comparative Jurisdictional Study of the Registrability of Single-Color Marks," *Trends in Intellectual Property Research*, Vol. 3, Issue 1 (2025). The article specifically examines single-colour marks, acquired distinctiveness and the Indian position in comparison with the US and EU

4. Boosts commercial value of intellectual property

Non-traditional trademarks can be important intangible assets. A successful brand may be strongly connected with a unique sound, colour combination or other sensory identifier and so have considerable commercial worth. Such trademarks can be licensed, assigned, franchised and incorporated into bigger intellectual property portfolios. Therefore, effective legal protection helps to the economic worth of a company's intangible assets.¹⁷

5. Encourages fair competition in the market

Protection of authentic non-traditional trademarks may assist in promoting fair competition by preventing competitors from unfairly stealing distinctive traits connected with another business. At the same time, trademark law must also ensure that the protection is not so wide as to preclude competitors from utilising ordinary colours, sounds, smells or other characteristics that are important for legitimate business purposes. This balance is preserved by requiring individuality and imposing constraints in terms of functioning and fair competition.

6. Adapts to changing consumer behaviour

Today's consumers engage with companies thru television, radio, streaming services, mobile apps, social media, digital advertising and immersive technology. In such surroundings, consumers may be exposed to a brand thru music, animation, colour or other sensory components rather than a traditional logo. Thus, the recognition of non-traditional trademarks makes trademark law relevant to the modern commercial operations.

7. Strengthens the overall intellectual property regime

The recognition of the non-traditional trademarks shows the flexibility of the intellectual property law to adapt to the technology and commercial advancements. It is this balancing act that permits the law to safeguard true innovation, while at the same time protecting the public domain and the interests of competitors.

Conclusion

The Indian approach to non-traditional trademarks is gradually evolving. Sound marks are gaining somewhat clearer recognition while smell and other types of colour marks remain a substantial legal and practical difficulty. The basic condition still is that the sign claimed must be a recognisable sign of business origin. As firms increasingly use sensory elements to generate a reputation, Indian trademark law will have to adopt clearer rules for representation, distinctiveness, evidence, functionality, registration and enforcement. A balanced strategy can guarantee that true brand innovation is preserved without creating an overabundance of monopolies over aspects that should be left open for general commercial use. Branding is more than simply logos and names, and non-traditional trademarks have gained significance in today's business. While sound and colour trademarks have fared better in the legal arena, smell trademarks still encounter considerable legal and practical challenges. Developing clearer criteria for the registration and enforcement of non-traditional trademarks would be important for nations such as India to maintain pace with technical developments and global business practices.

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¹⁷ Dev S. Gangjee, "Paying the Price for Admission: Non-Traditional Marks across Registration and Enforcement," in *The Protection of Non-Traditional Trademarks: Critical Perspectives*, pp. 59–88 (Oxford University Press, 2018). Gangjee discusses the difficulty of granting exclusive rights over colours and the need to balance trademark protection against the interests of competitors.