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SENSING THE BRAND: PROTECTING NON-VISUAL TRADEMARKS IN INDIA'S IP FRAMEWORK

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I. Abstract

The rise of modern branding for enhanced consumer recognition has led to the inclusion of sensory elements, effecting the incorporation of non-visual trademarks and necessitating their recognition and protection under the existing trademark regime. The stringent requirements of distinctiveness and graphical representation under the Trade Marks Act, 1999, posit unattainable standards, contrasting with “visual perceptibility” under Article 15(1) of the TRIPS Agreement.

Internationally, cases like *Shield Mark* and *Sieckmann* illustrate the standardization dilemmas for non-traditional marks (NTMs) in India, compounded by erratic registrations and refusals. Additionally, legislative gaps, such as inadequate guidelines for NTMs in the 2009 Draft Manual, non-recognition, along issues related to the product's functionality, further complicate the situation.

II. Introduction

“A trademark is a company's person and identity in the marketplace”

– Dr. Kalyan C. Kankanala

Dr. Kankanala precisely emphasizes the significant impact that trademarks have on modern consumers, as well as their effect on a business's reputation²⁴⁶⁷ and market position. Continuing the line of thought, it can, straightforwardly, be observed that the cut-throat market competition would give occasion to inflated trademark protection, resulting in the need for an established framework.

In India, the 1999 TM Act and the 2017 Rules framed thereunder serve as the inclusive enactment governing the diverse trademark-

related aspects—ranging from registration to infringement and protection. Harmonizing with the global standards laid down by TRIPS and the 1883 Paris Convention, it contains numerous unique features designed for the Indian markets, aimed at providing enhanced protection to these marks, including both G&S, simultaneously, preventing the use of any fraudulent marks in the trade.

The High Court of Judicature at Delhi has also bolstered the intent of the 1999 Act in *Cadbury India Limited v. Neeraj Food Products*,²⁴⁶⁸ by maintaining that the spirit, intent, and purport of the TM legislation is the protection of both traders and consumers from dishonest use, fraudulent profit gain or dishonest product association. Any interpretation deviating from this legislative intention would run contrary to the core principles of the Act.²⁴⁶⁹ The aim was

²⁴⁶⁷ John McCarthy iterates that the goodwill of a brand is also inherently connected with the trademark. See also, John Thomas McCarthy, McCarthy on Trademarks and Unfair Competition 86 (Clark Boardman Callaghan, New York 1973); Mohan Lal v. Sona Paint & Hardwares, AIR 2013 Del 143 (FB); Microlube India Ltd. v. Rakesh Kumar Trading as Saurabh Industries, 2013 (55) P.T.C. 61 (Del) (FB).

²⁴⁶⁸ 2007 SCC OnLine Del 841.

²⁴⁶⁹ Cadbury India Ltd. v. Neeraj Food Products, Id.

further corroborated in *American Home Products Corporation v. Mac Laboratories Private Limited*,²⁴⁷⁰ when the court weighed, the 1999 Act intends to prevent trafficking in trademarks, deeming it a cardinal sin.²⁴⁷¹ The emphasis was understandably pragmatic and underscored the legislative intent.

Alluding to the varied uses of trademarks, the Court cited *Gujarat Bottling Co Ltd v. Coca Cola*,²⁴⁷² *Bengal Waterproof Ltd v. Bombay Waterproof Manufacturing Co*,²⁴⁷³ and *N R Dongre v. Whirlpool Corporation*,²⁴⁷⁴ accentuating the mechanism created by the Act intended to protect consumers from deception.

Furthermore, the court has adduced to the extent of importance that a trademark inheres in relation to a business's goodwill, whose transfer, otherwise, would be considered invalid, propping up the necessity for protection against deceptive practices in the remarkable judgment of *Ramdev Foods Products (P) Ltd v. Arvindbhai Rambhai Patel*^{2475, 2476}

The aforementioned pronouncements reinforce the gravity of the TM law, the aim to be achieved, meanwhile highlighting the exigency for its enactment. It can be inferred from the judgments explored in the foregoing paragraphs that the court has only once invoked the Utilitarian Theory²⁴⁷⁷ and even then, it was not explicitly stated but rather implicitly considered for justifying the existing trademark law.

III. Non-Visual: The Sensory Trademarks
Historically, the marketing strategies majorly centered on the audio-visual stimuli for gaining

reputation or positive credit for their brands.²⁴⁷⁸ However, owing to information overload, businesses have started turning to “sensory marketing” aimed at engaging their audience through their senses—sight, sound, smell, taste, touch.²⁴⁷⁹ This change in business strategy highlights the prestige of understanding non-visual trademarks, enabling a thorough examination of the registration process and infringement.

Aligning with the direction of thought, WIPO remarked that the range of signs recognized as capable of constituting a mark has expanded beyond just words and figurative devices.²⁴⁸⁰ Qian Zhan additionally inscribes that the registrable signs are now divided into two categories—visually perceivable and those experienced through various senses.²⁴⁸¹ The latter encompasses sound marks (musical or non-musical), gustatory marks, olfactory marks, and tactile marks. Against this backdrop, the current research focuses singularly on the subject of Non-Visual Trademarks, whose varied kinds are explored below:

A. Auditory Marks

Non-visual marks identify the commercial or trade origin of any goods or service utilizing notations (musical or non-musical), audio clips, jingles, catchphrases or like. The “MGM’s Lion Roar”,²⁴⁸² 1st auditory mark to get registered. In 2008, Yahoo!’s Yodel²⁴⁸³ became India’s first registered sound mark, quickly followed by Nokia Mobile Phone’s Ringtone, ICICI Bank jingle, Airtel Ringtone, and more.

To certify for registration as an auditory mark, the sound must be distinctly identifiable and

²⁴⁷⁰ AIR 1986 S.C. 137.

²⁴⁷¹ *American Home Products Corporation v. Mac Laboratories Pvt. Ltd.*, Id.

²⁴⁷² (1995) 5 S.C.C. 545.

²⁴⁷³ AIR 1997 S.C. 1398.

²⁴⁷⁴ (1996) 5 S.C.C. 714.

²⁴⁷⁵ AIR 2006 S.C. 3304.

²⁴⁷⁶ *Sumat Prasad Jain v. Sheoanam Prasad* (1973) 1 SCC 56; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.*, 1999 R.P.C. 117; *Baker Hughes Ltd v. Hiroo Khushalani*, (2015) 13 S.C.C. 473.

²⁴⁷⁷ Jeremy Bentham’s theory of utilitarianism, which aims for the “greatest good for the greatest number of people”, is applied in intellectual property when a creation benefits society as a whole, prioritizing societal benefits over individual interests. See also, V.K. Ahuja, *Law Relating to Intellectual Property Rights* 5-6 (Lexis Nexis 2017).

²⁴⁷⁸ Terhi Suhonen and Jenny Tengvall, *Branding in the Air: A Study about the Impact of Sensory Marketing* (2009) (unpublished B.A. thesis, Jonkoping Int’l Bus. Sch.).

²⁴⁷⁹ Id.

²⁴⁸⁰ World Intell. Prop. Org. [WIPO], Standing Comm. on the Law of Trademarks, Indus. Designs and Geographical Indications, *New Types of Marks*, SCT/16/2 (Sept. 1, 2006).

²⁴⁸¹ Id.; Qian Zhan, *The International Registration of Non-Traditional Trademarks: Compliance with the TRIPS Agreement and the Paris Convention*, 16 *World Trade Rev.* 111, 111-140 (2017).

²⁴⁸² *Metro-Goldwyn-Mayer Lion Corp. v. OHIM*, Case R 781/1999-4 (Fourth Bd. App. OHIM Aug. 25, 2003) (EU).

²⁴⁸³ P. Manoj, *Yahoo awarded India’s first sound mark; Nokia in Queue, Livemint* (Jan. 30, 2025), <https://www.livemint.com/Home-Page/5z2B1NQUy3YyPkpRDp789M/Yahoo-awarded-India8217s-first-sound-mark-Nokia-in-queue.html>

memorable for consumers, while not serving any functional purpose. Simply put, the consumer, upon hearing the music, must associate it with that particular brand. It is claimed that this could pave the way for trademark protection for the most discernible sounds.²⁴⁸⁴

B. Gustatory Marks

The conceptualization of taste marks warrants a differentiation between the product's natural flavour from the chef's adopted recipe, causing difficulties in distinguishing the resulting goods. The concept also contradicts "Doctrine of Functionality", the very functionality of the product, being its taste, as can be exemplified by the rejection of *Eli Lilly & Co. Appeal*²⁴⁸⁵.

The continuing debate, accentuated especially by Thomas Gallagher, regarding the taste marks registrability, has not yet reached any consensus.²⁴⁸⁶ Withal, scholars have frequently argued about the subjective nature of taste marks, which complicated the process of defining and comparing them. Moreover, businesses more often opt to keep their flavour or taste-related information as a trade secret, as expertly demonstrated by Coca-Cola.²⁴⁸⁷

C. Olfactory Marks

Smell is the most potent human sense, resulting in companies increasing their focus on linking their products to recognizable scents, enhancing appeal and enjoyment.²⁴⁸⁸ Thereby, logically, the NTTMs characterized by a particular scent or fragrance of any product are smell marks. The company "Clarke's Osewez" holds the first-ever scent mark for their yarn thread.²⁴⁸⁹

²⁴⁸⁴ V. K. Ahuja, *Modern Trade Marks*, 1 Lex Witness 8-11 (2010).

²⁴⁸⁵ *Eli Lilly and Co. v. OHIM*, Case R 120/2001-2, (Second Bd. App. OHIM Aug. 4, 2003) (EU). *Eli Lilly's* appeal was regarding registration of "artificial strawberry flavour" as a gustatory mark for pharmaceutical goods proved unsuccessful. The Board of Appeal denied the registration due to a lack of distinctive character.

²⁴⁸⁶ Thomas A. Gallagher, *Non-Traditional Trademarks: Taste/Flavour* 105 Trademark Rep. (2023).

²⁴⁸⁷ The Coca Cola Co., *Is the Coca-Cola formula kept secret because the company has something to hide?*, Coca-Cola (Jan. 30, 2025) <https://www.coca-cola.com/ke/en/about-us/faq/is-the-coca-cola-formula-kept-secret-because-the-company-has-som>

²⁴⁸⁸ World Intell. Prop. Org., *Smell, Sound and Taste – Getting a Sense of Non-Traditional Marks*, WIPO Mag., 2009, at 12.

²⁴⁸⁹ *In re Clarke's Osewez*, 17 U.S.P.Q.2d. (BNA) 1238 (T.T.A.B. 1990). The scent was described as a "high impact, fresh floral fragrance reminiscent of Plumeria Blossoms"—distinctive, if used in connection with the embroidery yarn and thread.

Akin to the taste marks registrability requirements, scent marks must also comprise a unique and distinctive smell, not being the fundamental characteristic of the product itself, as was remarkably exemplified in the instance of "Chanel no. 5"²⁴⁹⁰.

D. Tactile Marks

Perchance, the most challenging aspect of marketing a product is its touch or texture, making touch marks—the least sought-after trademarks. NTTMs regarding the tactile effect of a G&S regarding a certain material or texture allude to the Touch Marks.

The cracked glass texture of the Old Parr Scotch Whisky Bottle, owned by Diageo, was the first-ever texture mark to get registration.²⁴⁹¹ Although no texture or touch, or feel marks have been granted registration in India, the High Court of Judicature at Delhi recognized the "Epi Leather" surface pattern in *Louis Vuitton v. Malik*,²⁴⁹² briefly acknowledging the concept of touch mark. Reiterating the functionality doctrine, touch marks shall have a meaningful association beyond decorative purposes, whilst establishing distinctiveness.²⁴⁹³

IV. Legislative Perspectives: Registration and Protection

The ascent of non-visual marks has amplified the debate regarding the accreditation of NTTMs within the existing frameworks, both global and domestic.

On the one hand, by adopting an open-ended definition, trademark law underpins the functional aspects of a TM rather than its oncological status.²⁴⁹⁴ Resultantly, any sign serving the communicative function of a trademark and distinguishing G&S can get registered. On the other hand, the trademark registration systems have been classically

²⁴⁹⁰ *Institut pour la Prot. des Fragrances v. OHIM*, R-186/2000-4 (Fourth Bd. App. OHIM 2005), 2005 E.T.M.R. 42. Chane's attempt to register the scent of its No. 5 perfume as a scent trademark failed because the fragrance is the essence of the product, not a distinguishing feature.

²⁴⁹¹ Ecuador Registration No. 29597-04. See also, Vikrant Rana et al, *Tactile Marks: Can We Protect The Sense of Touch?*, Live Law (Nov. 23, 2024)

²⁴⁹² *Louis Vuitton v. S. Malik*, CS (OS) No. 1825/2003.

²⁴⁹³ Tanisha Agarwal & Vanshaj Mehta, *Hear Me, Touch Me, Taste Me, Smell Me: Conventionalizing Non-Conventional Trademark in India*, 3 J. Contemp. Issues of L. 1, 1-22 (2017).

²⁴⁹⁴ Dev Gangjee, *Non Conventional Trade Marks in India*, 22 Nat'l L. Sch. India Rev. 67, 67-95 (2010).

moulded around the conventional marks. The exigency of reconciling the two has necessitated a careful reconsideration related to the basic assumption that underscores the IP laws.

The inclusion of non-visual marks can be supported by interpreting Article 15(1) TRIPS. It states that “any sign, or combination of such, which is capable of establishing distinction between G&S of an undertaking from another, shall constitute a trademark”.²⁴⁹⁵ A liberal interpretation of the provision would result in recognition and inclusion of non-visual marks within the ambit.

On the continuing note, Section 2(1)(zb) of the TM Act, 1999, defines the term as— “a mark capable of graphical representation for distinguishing between G&S of a person from another”. This open-ended definition under the Indian TMs regime establishes three essentials²⁴⁹⁶ for a mark to be qualified as a “trademark” under the Act, it must entail:

- (i) Inherently Distinctive
- (ii) Capable of being graphically represented
- (iii) Distinguishes one good from another

The legislation, thus, clearly states that once the three above-mentioned criteria are met, any “mark” is qualified for registration as a “trademark” in India, considering that the mark is not prohibited, either under the Absolute grounds²⁴⁹⁷ or Relative grounds²⁴⁹⁸, granting the proprietor all rights and responsibilities outlined in the Act.

A. Distinctiveness

Justice S B Sinha, while pronouncing the unanimous verdict, in *Ramdev Foods Products Pvt Ltd v. Arvindbhai Rambhai Patel*,²⁴⁹⁹ traced the odyssey of trademarks from the times of Harappan Civilization, quoting from *Christopher*

*Morcom*²⁵⁰⁰ regarding the source-identification function of a TM. Adding onto the previous, in *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*,²⁵⁰¹ and *Laxmikant V. Patel v. Chetanbhai Shah*,²⁵⁰² the court underscored the importance of the connection enforced by the trademark between the goods and their source, indicating quality, making it an inseparable part of the business’s goodwill.²⁵⁰³ In essence, the judgments emphasized upon distinctiveness as a crucial requisite for trademark qualification.

The pre-requisite of “distinctiveness” for a mark, as established by Section 9(1)(a) of the Act, allows the mark to differentiate between the goods or services of one person from those of another. As remarkably exemplified in the cases of *The Imperial Tobacco Co. of India Ltd. v. The Registrar of Trade Marks*,²⁵⁰⁴ *W.N. Sharpe Ltd. v. Solomon Bros. Ltd.*,²⁵⁰⁵ *IHHR Hospitality Pvt. Ltd. v. Bestech India Pvt. Ltd.*,²⁵⁰⁶ etc.,²⁵⁰⁷ the courts stated that distinctiveness is an inherent characteristic of the trade marks, setting the marked goods apart from the goods of other producers. The parameters include—extent and period of use, goodwill and association in the minds of consumers, advertisement investments, recognition in trade and relevant class of customers.²⁵⁰⁸

Wadehra allocates two categories to kinds of distinctiveness—²⁵⁰⁹

- (i) Distinctiveness may be class-independent – A trademark, that is, distinctive for one class of goods, may not have the same distinctiveness for another class.
- (ii) Distinctiveness may be inherent or acquired – To be inherently distinctive, the mark

²⁴⁹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 15, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

²⁴⁹⁶ Trade Marks Act, 1999 § 2(1)(zb), No. 10, Acts of Parliament. 1999 (India).

²⁴⁹⁷ Id.

²⁴⁹⁸ Id. § 11.

²⁴⁹⁹ AIR 2006 S.C. 3304.

²⁵⁰⁰ Christopher Morcom et al, *The Modern Law of Trademarks* (Butterworths Law 2012).

²⁵⁰¹ (1995) 5 S.C.C. 545.

²⁵⁰² AIR 2002 S.C. 275.

²⁵⁰³ *Supra* note 10.

²⁵⁰⁴ AIR 1977 Cal 413.

²⁵⁰⁵ (1915) R.P.C. 15.

²⁵⁰⁶ AIR 2013 Del 32.

²⁵⁰⁷ A.D. Padmasingh Isaac v. Aachi Cargo Channels Private Limited, AIR 2014 Mad 2; Parsons Bros. & Co. v. John Gillespie & Co., AIR 1972 S.C. 1359; R.J. Reuter Co. Ltd. v. Mulhens, (1954) Ch 50; Britannica Industries Ltd. v. Cremica Agro Foods Ltd., 2008 (38) P.T.C. 89 (Del).

²⁵⁰⁸ Kunj Aluminium Private Ltd. v. Koninklijke Phillips Electronics NC, (2011) 14 S.C.C. 595.

²⁵⁰⁹ B. L. Wadehra, *Law Relating to Intellectual Property* 135 (Universal Law Publishing 2011).

should be unique on its own, making it impossible for anyone to justifiably claim the right to use it. Distinctiveness attained through extensive commercial use of the mark makes it acquired distinctiveness.

“After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes”²⁵¹⁰ The remark accentuates a foundational aspect of trademarks—distinctiveness. It recognizes that consumers are unlikely to notice minor differences in the essential features of a product, essentially the mark, that enables the differentiation and source identification.

The aforementioned requisite is intertwined with the notion of “deceptive similarity”²⁵¹¹—refers to a trademark that is likely to confuse the trade circle owing to the resemblance with another mark.²⁵¹² Further emphasis on deceptiveness was laid when the court remarked, “As the world becomes more interconnected, the transnational nature of a trademark becomes less significant, while the acquisition of valuable goodwill grows increasingly important.”²⁵¹³

1. Deceptive Similarity

Deception can arise concerning the goods, trade origin, and trade connection.²⁵¹⁴ In *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories*,²⁵¹⁵ the court remarked that the similarity may be manifested in the form of phonetic, visual or structural, relative to the essential features. In addition to this, the question of similarity has to be considered from the point of view of a person of average intelligence, and an imperfect collection.²⁵¹⁶

Deceptive Similarity is particularly important for preventing consumer confusion, especially when assessing non-visual trademarks, as their

similarities may not be immediately apparent through visual inspection. For non-visual marks, deceptive similarity can be determined by phonetic and conceptual similarities, rather than visual appearance.

V. Graphical Representation Requirement

The primary concern for both registered and unregistered trademarks is the potential for consumer confusion, especially an unsuspecting buyer, getting misled by two identical or substantially similar marks. For addressing concerns related to deceptive similarity, the 1999 TM Act made “graphical representation” a fundamental prerequisite for trademark registration in India. Lisa P. Lukose emphasized the importance of graphic representation, noting that it is essential for traders, allowing them to clearly identify the registered trademark.²⁵¹⁷

Although Article 15 of the TRIPS does not require trademarks to have visual perceptibility, allowing member nations to decide, Indian trademark legislation specifically mandates visual perceptibility through graphical representation. The provision is certainly not in compliance with TRIPS, while the TRIPS provide a clear and objective definition, the 1999 Act adopts a subjective approach.²⁵¹⁸ This excessive discretion introduces ambiguity by granting the power to determine what qualifies as a trademark and what does not. By inference, the issue not only prohibits the registration of non-visual signs as trademarks but also wholly excludes them from the available legal safeguards, including potential remedies related to passing off. The situation aligns with Dev Gangjee’s assertion that “In India, non-visually perceptible marks are not only fighting for registration as trademarks but are also contesting for their status as trademarks.”²⁵¹⁹

“Graphical Representation” purports that the sign or mark is capable of being put on the

²⁵¹⁰ Ramdev Foods Products Pvt. Ltd. v. Arvindbhai Rambhai Patel, *supra* note 9.

²⁵¹¹ *Supra* note 30, § 2(1)(h).

²⁵¹² Amritdhara Pharmacy v. Satyadeo Gupta, AIR 1963 S.C. 449.

²⁵¹³ Neon Laboratories Ltd. v. Medical Technologies Ltd., 2015 S.C.C. OnLine S.C. 905.

²⁵¹⁴ Prabhdeep Kaur Malhotra, *The Concept of Deceptive Similarity: Law & Public Policy*, 3 Indian J.L. & Pub. Pol’y (2016).

²⁵¹⁵ AIR 1965 S.C. 980.

²⁵¹⁶ BDH Industries Ltd. v. Croydon Chemical Works Pvt. Ltd., AIR 2002 Bom 361.

²⁵¹⁷ Lisa P Lukose, *Non-Traditional Trademarks: A Critique*, 57 J. Indian L. Inst. 197, 197-215 (2015).

²⁵¹⁸ Dr. Vandana Mahalwar, *Protection of Non-Visible Marks under the Trade Marks Act, 1999: Issues and Challenges* 5 J. of Visual Performing Arts 2199, 2199-2204 (2024).

²⁵¹⁹ *Supra* note 28.

register in a physical form and also being published in the journal.²⁵²⁰ The requirement of representation in paper form, including digitized form, is also incorporated in Rule 2 (1)(k) of the Trademark Rules, 2017. David Llewelyn also emphasized that the requirement of graphical representation provides a definitive point of reference, effectively illustrating what the mark represents.²⁵²¹

Deductively, particularly for non-visual marks, the aforementioned requirement can often be more practical than legal, as pictorial representation of non-visual marks is beyond the realms of possibility.

The TM Rules, 2017, have clarified the certification process for NTTMs. The test of distinctiveness continues to be an essential parameter guiding the registrability criteria. A successful registration of NTTMs must be supported by robust evidence of factual distinctiveness.

VI. Achieving Compliance

Non-visual marks pose obtrusive challenges in fulfilling the graphical representation requirement, indicated by the limited registrations over the past.

A. Sound Marks

For certification of sound marks, an audio clip (not more than 30 seconds) along with musical notations shall be uploaded.²⁵²² Essentially, the application must clearly indicate that a sound mark is being sought for registration.

Notably, regarding sound trademarks, India has adopted the “Shield Mark Doctrine”. In the case of *Shield Mark BV v. Joost Kist*,²⁵²³ the European Court of Justice established the standard for graphical representation, relating to sound marks—musical and non-musical. For the musical marks, a detailed notation would suffice. The sound must have a distinct imprint upon the listener, aiding him in distinguishing it

from other sounds. However, impediments arise with non-musical marks, as their descriptions (in words) are often imprecise. Eventually, ECJ’s final decision adopted representation to be made via digital sound recording accompanied by a graphical representation.²⁵²⁴

B. Taste Marks

In India, it is highly improbable for taste trademarks to be considered inherently distinctive without any evidence of acquired distinctiveness.²⁵²⁵ While a written description of a taste can be provided, the need for a graphical representation creates a barrier to the possibility of registration. Taste Marks are often refused due to non-qualification under the doctrine of functionality, since the taste is the functional feature of the product. The ongoing debate pertaining to the registration of taste marks, regarding services, further adds to the complexity of the issue.²⁵²⁶

C. Scent Marks

The 2009 Draft Manual on Trade Marks, released by the Trade Marks Registry, elucidated about “fragrance goods”—which can only be registered upon successful graphical representation,²⁵²⁷ along with distinctiveness. Moreover, the consumers of such fragranced goods are unlikely to associate the scent of the products with a specific trader.²⁵²⁸

India employs a registration system for scent marks, analogous to that of the European Union, as elaborated in the case of *Ralf Sieckmann v. Deutsches Patent- und Markenamt*,²⁵²⁹ where the scent of the substance was represented through its chemical structure and formula, along with a description of the smell in written form as “balsamically fruity with a slight hint of cinnamon”. Although the ECJ and German Trademark Office both denied registration based on—lack of clarity and precision, laying

²⁵²⁰ K C Kailasam et al, *Law of Trade Marks including International Registration under Madrid Protocol & Geographical Indications* 132 (Lexis Nexis India 2017).

²⁵²¹ David Kitchin et al, *Kerly’s Law of Trade Marks and Trade Names* 10 (Sweet & Maxwell 2000).

²⁵²² Trade Mark Rules, 2017, r. 26(5) (India).

²⁵²³ (2004) R.P.C. 315 (E.C.J.), Judgment of the Court (Sixth Chamber) of Nov. 27, 2003.

²⁵²⁴ Id., Decision No. Ex-05-3 of the President of OHIM of Oct. 10, 2025.

²⁵²⁵ Vrinda Sehgal, *Touch, Taste & Position: Non-Conventional Trade Marks in The Evolving Landscape Of Branding*, Lexology (May 15, 2023).

²⁵²⁶ G.D. Pharmaceuticals Pvt. Ltd. v. Cento Products (India), 2024 S.C.C. OnLine Del 5678.

²⁵²⁷ Off. of Controller Gen. Patents, Designs & Trade Marks, *A Manual of Trade Marks: Practice & Procedure* 86 (draft 2017).

²⁵²⁸ Ibid.

²⁵²⁹ Case C-273/00, 2003 E.T.M.R. 37.

down the “Sieckmann seven-fold test”²⁵³⁰ for graphical representation.

D. Texture Marks

For successful registration of texture marks, the mark must hold a meaningful connection with the product itself, transcending beyond the realm of decorative packaging for the product. Akin to other NTTMs, these marks should not serve any functional purpose, barring their registration.

Tactile mark does not automatically function as a trademark upon its first use.²⁵³¹ Moreover, they are not eligible for automatic trademark protection. Rights to tactile marks are typically established through their use over time, making acquired distinctiveness a key factor in their registration.²⁵³²

VII. Compliance Complications

While a literal interpretation of the definition of “trademarks” under Section 2(1)(zb) of the 1999 Act suggests the inclusion of non-visual marks, the 2009 Draft Manual fails to acknowledge certain NTTMs, especially non-visual marks.²⁵³³ Instead, it outlines the graphical representation requirements for the marks, the necessary compliance with which is necessary for obtaining registration.

Moreover, India’s close alignment with the EU regime for the registration of NTTMs has significantly complicated the recognition, registration, and protection of non-visual marks.

VIII. Conclusion

The advent of sensory branding and global NTTMs’ recognition highlights the disconnect between India’s domestic trademark legislation and modern advertising. The inclusive phrasing of Section 2(1)(zb) is curtailed by the imposition of graphical representation requirement, with additional barriers placed upon it by the 2017 Rules. The rigidity stands in contrast to Article 15(1) of TRIPS, causing inadequacies in

addressing challenges of distinctiveness and functionality.

While Sound Marks have received protection through audio files and musical notation, other non-visual marks, such as taste and scent, are frequently rejected due to difficulties in subjective representation and functionality. Moreover, texture marks require proof of acquired distinctiveness, which makes their registration nearly impossible.

The absence of clear guidelines exacerbates the situation, leaving businesses that rely on sensory branding vulnerable to infringement. To address this issue, legislative reforms are necessary. The 1999 TM Act should be revised to align with TRIPS, substituting “graphical representation” for “digital representations”, and adopting a more flexible approach.

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²⁵³⁰ The Sieckmann Criteria stipulate that a representation must be—clear, precise, self-contained, easily accessible, intelligible, durable, and objective.

²⁵³¹ *Supra* note 52.

²⁵³² *Supra* note 53.

²⁵³³ Even the Trade Marks Rules, 2017, do not recognize non-visual marks, with the exception of sound marks.

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