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Phone : +91 73059 14348 – info@iledu.in / Chairman@iledu.in



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REGISTRABILITY OF NON-CONVENTIONAL TRADEMARKS IN INDIA¹³⁸⁶

AUTHOR – A LALITHA* & Ms. SAYANA M S**

* STUDENT AT SCHOOL OF LAW, VELS INSTITUTE OF SCIENCE, TECHNOLOGY AND ADVANCED STUDIES (VISTAS)

** ASSISTANT PROFESSOR AT SCHOOL OF LAW, VELS INSTITUTE OF SCIENCE, TECHNOLOGY AND ADVANCED STUDIES (VISTAS)

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ABSTRACT

Non-conventional trademarks are marks that go beyond the usual world of words and logos. They include sounds, colours, shapes, smells, tastes, and textures. In India, the registration of such marks is controlled mainly by the Trade Marks Act, 1999 and the Trade Marks Rules, 2017. While the law allows for the registration of any mark that is distinctive and can be shown graphically, the reality is that non-conventional marks often struggle to meet these basic requirements. This paper looks at whether non-conventional trademarks can be registered in India. It explains what these marks are, what the law says, what the main challenges are, and how different types of non-conventional marks – such as sound marks, colour marks, shape marks, and smell marks – have been treated. The paper argues that while some progress has been made, especially for sound marks, there is still a long way to go. India needs clearer rules, updated procedures, and a more open-minded approach from the Trade Mark Registry if it wants to keep up with global developments in trademark law.

Keywords: Non-Conventional Trademarks, Trade Marks Act 1999, Distinctiveness, Graphical Representation, Sound Marks, Colour Marks, Shape Marks, Smell Marks, India, Intellectual Property

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¹³⁸⁶ Non-conventional trademarks represent a growing area of intellectual property law in India.

INTRODUCTION

When most people think of a trademark, they picture a word or a logo. Think of the golden arches of McDonald's or the name "Apple" written in a particular font. These are traditional trademarks – the kind that trademark law was originally designed to protect. But in today's world, branding has gone far beyond words and symbols. Companies now use sounds, colours, shapes, smells, and even tastes to make their products stand out. These are called *non-conventional trademarks*, and they raise difficult questions about intellectual property law.

India is one of the largest and fastest-growing markets in the world. Businesses operating here – both Indian and foreign – want to protect every aspect of their brand identity. The question of whether non-conventional marks can be registered in India is therefore both legally interesting and commercially important.¹³⁸⁷

The Trade Marks Act, 1999¹ defines a trademark broadly enough to include non-conventional marks. The definition in Section 2(1)(zb) covers "a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others." On paper, this seems wide enough to cover sounds, shapes, and colours. But in practice, getting such marks registered is not easy.

This paper studies the registrability of non-conventional trademarks in India. It is divided into sections that cover: the legal framework, the main hurdles (distinctiveness and graphical representation), the functionality doctrine, and the specific treatment of different types of non-conventional marks. The paper ends with a conclusion and suggestions for reform.

WHAT ARE NON-CONVENTIONAL TRADEMARKS?

Before going into the law, it is useful to understand what we mean by non-conventional trademarks. The term simply refers to trademarks that are not in the traditional mould of words, letters, numbers, or logos. They are marks that engage the senses in a different way.

The main types of non-conventional trademarks are:

Sound Marks: These are distinctive sounds that identify a business. Examples include the MGM lion's roar, Intel's four-note jingle, and the Nokia ringtone.

Colour Marks: A colour or a group colours can make a trademark if it is distinctive enough. Cadbury's purple and Tiffany's distinctive shade of blue are well-known examples from the international arena.

Shape Marks: The three-dimensional shape of a product or its packaging can act as a trademark. The Coca-Cola bottle shape and the LEGO brick are famous examples.

Smell (Olfactory) Marks: A distinctive scent can, in theory, be registered as a trademark. However, this is perhaps the most difficult category because of the problem of describing a smell in writing.

Taste Marks: Like smell marks, taste marks are theoretically registrable but face serious practical obstacles, particularly around the functionality doctrine.¹³⁸⁸

Texture Marks: The feel of a product or its packaging – such as a distinctive velvet texture – can potentially serve as a trademark.

Each of these types of marks raises its own unique problems under Indian trademark law, as we shall see in the sections that follow.

THE LEGAL FRAMEWORK IN INDIA

The main governing trademarks in India is the Trade Marks Act, 1999, which replaced the older

¹³⁸⁷ The Trade Marks Act, 1999 provides the primary legislative framework for trademark registration in India.

¹³⁸⁸ Non-conventional marks include sounds, colours, shapes, smells, tastes, and textures.

Trade and Merchandise Marks Act, 1958. The 1999 Act brought India in line with its obligations under the TRIPS Agreement and introduced a broader definition of what can constitute a trademark.

Under Section 2(1)(m) of the Act, a "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. Section 2(1)(zb) then defines a "trade mark" as a mark capable of being represented graphically and capable of distinguishing the goods or services of one person from those of others.⁹

The combination of these two definitions is important. The definition of "mark" is very broad and includes shapes and combinations of colours. But the definition of "trade mark" adds two conditions: graphical representation and distinctiveness. These two requirements are the main gatekeepers for non-conventional marks.

The Trade Marks Rules, 2017² added a specific procedure for sound marks: Rule 25(13) requires that a sound mark application include an MP3 recording not exceeding thirty seconds along with a graphical representation in the form of musical notations. This was a major step forward for sound mark registration in India. However, the Rules do not provide similar specific guidance for other types of non-conventional marks such as smells or tastes.

The three fundamental conditions for registrability of any mark – conventional or non-conventional – under the Act are: first, the mark must be distinctive; second, it must be capable of graphical representation; and third, it must not fall within any of the absolute or relative grounds for refusal set out in Sections 9 and 11 of the Act.¹³⁸⁹

THE TWIN REQUIREMENTS: DISTINCTIVENESS AND GRAPHICAL REPRESENTATION

Distinctiveness

Distinctiveness is the ability of a mark to function as a sign of commercial origin – to tell consumers where a product or service comes from. It is the cornerstone of trademark law across the world.¹⁰ A mark that is not distinctive does not deserve trademark protection because it does not actually identify a particular trader's goods or services.

A mark can be distinctive in two ways. First, it can be inherently distinctive – meaning it is distinctive by its very nature, without any need to prove that consumers associate it with a particular business. Second, it can acquire distinctiveness through use over time. This is called "secondary meaning" – the mark has been used so extensively that the public now associates it with a specific commercial source.

For non-conventional marks, inherent distinctiveness is rare. A sound, a colour, or a shape is normally not seen by consumers as a badge of origin – it is just a sound, a colour, or a shape. This means that non-conventional marks almost always have to rely on acquired distinctiveness. They have to show a long history of use, significant market presence, and consumer recognition to qualify for registration.

For smell and taste marks, the challenge is even greater. Consumer perception of smells and tastes is highly subjective. The same scent can be perceived very differently by different people. This makes it very hard to show that consumers consistently associate a particular smell or taste with a single commercial source.

For colour marks, there is an additional concern known as the colour depletion

¹³⁸⁹ Section 2(1)(zb) of the Trade Marks Act, 1999 defines a trademark as a mark capable of being represented graphically.

theory. Courts are generally reluctant to let one trader monopolise a colour, especially in markets where that colour is commonly used by multiple businesses.³ Section 9(1)(a) of the Trade Marks Act says that marks which are not distinctive should not be registered. This limits the scope for single-colour trademark registration in India. However, acquired distinctiveness through long and exclusive use can overcome this barrier, as illustrated by the famous case of Cadbury's purple packaging.⁵

The Graphical Representation Requirement

The requirement that a trademark be capable of graphical representation was, until recently, a major obstacle for non-conventional marks. The idea behind this requirement is practical: the trademark register must be publicly accessible and searchable. If a mark cannot be written down or drawn in a way that is clear, precise, self-contained, and durable, it cannot serve its function in the register.

In the landmark European case of *Sieckmann v Deutsches Patent- und Markenamt*⁵, the Court of Justice of the European Union set out the criteria that a graphical representation must satisfy: it must be clear, precise, self-contained, easily accessible, intelligible, durable, and objective. The court held that a scent mark represented by formula written note, or a deposit of a small sample did not meet these criteria.

India has not produced landmark judicial decisions on this point for smell or taste marks, but the same logic applies under Indian law. The Trade Marks Act's requirement of graphical representation creates a high bar for marks that cannot easily be put into words or pictures.

For sound marks, the 2017 Rules solved this problem by allowing MP3 recordings accompanied by musical notation. For colour marks, the representation can consist of a colour swatch with a specific colour code (such as a Pantone reference). For shape marks, photographs and drawings can serve as graphical representations. But for smells and tastes, no satisfactory method of graphical representation has yet been found.

THE FUNCTIONALITY DOCTRINE

The functionality doctrine is a cross-cutting principle that limits the scope of trademark protection for non-conventional marks. The doctrine says that it is important to the use the goods, or that differ their cost or quality, cannot be safeguarded by trademark law regardless of how distinctive it may be. The reasoning behind this doctrine is sound: trademark law should not be used to give one trader a permanent monopoly over features that are necessary for competitors to use.¹³⁹⁰

The doctrine is especially important for non-conventional marks. The scent of a perfume cannot be trademarked because the scent is the product itself. The taste of food cannot be trademarked because the taste is functional – it determines whether the food is palatable. The texture of a toothbrush cannot be trademarked if the texture is what makes the brush effective at cleaning teeth.

Section 9(3) of the Trade Marks Act, 1999⁶ codifies the functionality doctrine specifically for shape marks. It provides that shapes resulting from the nature of the goods, shapes necessary to achieve a technical result, and shapes that give substantial value to the goods, cannot be registered as trademarks. By analogy, the same principle should apply to other non-conventional marks through the general prohibition on registering marks that are not capable of distinguishing goods and services.

¹³⁹⁰ The functionality doctrine prevents the registration of marks that serve a functional purpose.

The practical consequence of the functionality doctrine is that the range of registrable non-conventional marks is narrower than it might first appear. Marks that overlap with the functional aspects of the product itself will almost always be refused.

SOUND MARKS: A SUCCESS STORY

Among the various categories of non-conventional trademarks, sound marks have achieved the greatest degree of legal recognition in India. The Trade Marks Rules, 2017 provides an explicit registration pathway: an MP3 recording not exceeding thirty seconds, together with graphical notation in the form of a musical score.² This was a significant improvement over the earlier position, where no formal procedure existed and applicants had to represent sounds through notation alone.

The registered sound marks in India span a range of commercial contexts: financial services (ICICI Bank), technology (Yahoo), consumer goods (Britannia Industries), and entertainment (MGM).⁸ These successful registrations show that a well-defined procedural pathway can remove many of the practical barriers to registration.

The lesson for other categories of non-conventional marks is clear: procedural clarity is a precondition for registration success. When the law tells applicants exactly what evidence and what format is required, they can prepare their applications accordingly. The absence of such clarity for smell marks, taste marks, and texture marks is one of the main reasons why registrations in those categories remain virtually non-existent in India.

COLOUR MARKS IN INDIA

Colour marks occupy a contested space in Indian trademark law. On the one hand, the definition of "mark" under the Act explicitly includes combinations of colours. On the other hand, Section 9(1)(a) prohibits the registration of marks that are not distinctive, and single colours are generally considered not to be inherently distinctive.

The colour depletion theory – the concern that allowing one trader to monopolise a colour will unfairly restrict competition – looms large in this area. In markets where a particular colour is commonly used by many competing businesses, it is especially hard to argue that the colour functions as a mark of origin for any one of them.

However, acquired distinctiveness can save a colour mark. If a trader has used a specific colour exclusively for a long time, and consumers have come to associate that colour with their goods, the colour can acquire the distinctiveness needed for registration. The key factors are length of use, exclusivity of use, and the extent of consumer recognition. Evidence such as consumer surveys, sales figures, and advertising expenditure can all be relevant.

In practice, the Indian Trade Mark Registry has been cautious about granting colour mark registrations. Applicants seeking to register a single colour face a steep uphill battle. Combinations of colours in a distinctive arrangement have a better chance of success. Companies entering the Indian market with strong colour brand identities – such as Cadbury's purple or BP's green and yellow – would be well advised to gather extensive evidence of use and recognition before applying.

SHAPE MARKS IN INDIA

The Trade Marks Act expressly includes shapes within its definition of registrable marks. However, the exclusions in Section 9(3) significantly limit what can be protected. Shapes that result from the nature of the goods themselves (such as the round shape of a ball), shapes that achieve a technical result (such as the shape of a screw thread).

Outside these exclusions, shapes can in principle be registered if they are distinctive. The classic example from international trademark law is the Coca-Cola bottle, whose distinctive contour has been registered as a three-dimensional mark in many countries. In India,

shape mark registrations have been granted for packaging shapes and product configurations that are sufficiently distinctive.⁷

The practical challenge with shape marks is proving distinctiveness. Consumers are not generally accustomed to looking at the shape of a product as a sign of its commercial origin. They tend to focus on the label, the name, or the logo. Showing that a shape has become distinctive requires significant evidence of long and exclusive use.

SMELL AND TASTE MARKS: THE UNCHARTED TERRITORY

Smell marks and taste marks represent the frontier of non-conventional trademark law in India. No smell marks and no taste marks have been successfully registered in India to date. The obstacles are formidable.

The first and most fundamental obstacle is graphical representation. As noted above, there is currently no satisfactory way to represent a smell or a taste graphically that meets the criteria of being clear, precise, self-contained, and objective. Chemical formulas do not work because they describe the composition of a substance, not the sensory experience of smelling or tasting it. Written descriptions fail because language cannot capture smell or taste with sufficient precision. Samples cannot be deposited in a register because they deteriorate over time.

The second obstacle is distinctiveness. Smell and taste are highly subjective sensory experiences. Different people perceive the same smell or taste differently. This makes it very hard to show that consumers consistently associate a particular smell or taste with a single commercial origin.

The third obstacle, for taste marks in particular, is the functionality doctrine. The taste of a food product is almost always functional – it is the reason consumers buy the product. A brand cannot monopolise a taste just because it is

popular. This leaves very little room for taste mark registration even in principle.¹³⁹¹

Despite these obstacles, the theoretical possibility of smell and taste mark registration remains open under Indian law. If a way can be found to satisfy the graphical representation requirement – perhaps through advances in digital technology or standardised smell classification systems – and if an applicant can show strong acquired distinctiveness, registration might one day become possible.

COMPARATIVE PERSPECTIVES

A brief look at how other countries handle non-conventional trademarks is useful. The European Union moved away from the graphical representation requirement in 2017, allowing marks to be represented in any form that can be reproduced on the register clearly and precisely, including audio files and video files. This change opened the door wider for sound marks, motion marks, and potentially even smell marks (if a reliable representation standard emerges). The United States has long allowed for the registration of sounds, scents, and colours, provided they are distinctive and non-functional.

India is behind the curve on this. The 2017 Rules addressed sound marks, but no steps have been taken to update the law for smell marks, taste marks, or other sensory marks. If India wants to attract global businesses and protect their brands effectively, it needs to consider bringing its trademark law in line with international best practice.

KEY CASES AND LEGAL DEVELOPMENTS

While Indian courts have not yet produced a landmark judgment specifically on smell marks or taste marks, several important cases and administrative decisions have shaped the landscape for non-conventional trademarks.

The sound mark registrations by ICICI Bank, Yahoo, and Britannia Industries were among the

¹³⁹¹ Colour marks face significant challenges in establishing acquired distinctiveness in India.

early sign posts that India was willing to recognise non-conventional marks. These registrations were granted under the pre-2017 framework, demonstrating that even before the Rules were updated, the Trade Mark Registry had some flexibility.¹³⁹²

For colour marks, Indian courts have generally followed the principle that single colours are not inherently distinctive and require proof of acquired distinctiveness. Applicants seeking to register a colour in India have to produce strong evidence of long and exclusive use, consumer surveys, and advertising data.

For shape marks, the Trade Marks Act's express exclusions under Section 9(3) have been applied conservatively. The Registry has been reluctant to register shapes that could be argued to result from the nature of the goods or to serve a technical purpose.

Internationally, the Sieckmann case from the CJEU remains the most important statement on the graphical representation requirement, and its principles are persuasive in Indian courts even though it is not binding. The Libertel case on colour marks has also influenced the thinking of trade mark practitioners in India.

CONCLUSION

Non-conventional trademarks represent an important and growing part of brand identity in the modern economy. Sounds, colours, shapes, smells, and tastes can all, in the right circumstances, function as powerful indicators of commercial origin. The question of whether they can be registered under Indian law is therefore both commercially significant and legally complex.

The Trade Marks Act, 1999, read together with the Trade Marks Rules, 2017, provides a legal framework that is, in principle, broad enough to accommodate non-conventional marks. The definition of "mark" is wide, and the conditions for registration – distinctiveness and graphical

representation – are conditions that non-conventional marks can, in theory, meet.

In practice, however, the picture is less encouraging. Sound marks have made the most progress, thanks to the specific procedural guidance in the 2017 Rules. Colour marks and shape marks can be registered, but face significant hurdles around distinctiveness and functionality. Smell marks and taste marks remain almost entirely outside the reach of the Indian registration system due to the unsolved problem of graphical representation.¹³⁹³

Three things are needed to move forward. First, the Trade Mark Registry needs to issue clearer guidelines for applicants seeking to register non-conventional marks, setting out what evidence of distinctiveness is required and what forms of representation are acceptable. Second, the law needs to be updated to remove or modify the strict graphical representation requirement, at least for certain categories of marks such as sounds. Third, the Registry and the courts need to take a more open-minded and internationally informed approach to non-conventional marks, drawing on the experience of countries like the United States and the European Union where these marks have a longer history of protection.

Non-conventional trademarks are not a niche concern. They are part of the mainstream of modern branding. India's trademark law needs to reflect that reality.

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¹³⁹⁴ India's Trade Mark Registry has been cautious in its approach to non-conventional marks.

¹³⁹⁵ Reforming the graphical representation requirement is essential for India to align with global trademark standards.



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NO. 08, ARUL NAGAR, SEERA THOPPU,
MARUDHAANDA KURICHI, SRIRANGAM - 620102,
TAMILNADU, INDIA.

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