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TRADEMARKS FOR OLFACTORY MARKS: THE CHALLENGES WITHIN

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ABSTRACT

Smell Marks, which is one of the non-conventional marks is allowed to get trademark in many developed countries like UK, US and EU. They have a much liberal approach to trademarking smell marks. But, when it comes to India, smell marks cannot be trademarked, due to the rigid laws it holds. There are quite a lot of issues behind trademarking smell marks. In this research paper, the researcher would be trying to analysis the issues and challenges that is associated with olfactory or smell trademarks. In this process, the author would try to analyses the position of different developed countries and how the tackled the issues pertaining to smell marks, and with the help of it, would try to come up with ideas to tackle the issues. In total, this paper would be a mix of comparative and critical analysis of smell trademarks.

KEYWORDS: SMELL, OLFACTORY MARKS, TRADEMARKS, BUSINESS

INTRODUCTION

Do you remember that one specific kind of smell, that we experienced at one point of time or another, bringing a certain memory of our life, back to our mind? Sometime, the smell could bring in a sense of nostalgic feel, while in some cases, it would bring back some memories, which we never wanted to think off[2]. However, the fact is that, smells have the capacity to influence what we think. This is just an example. Smells is connected to us in lot of other ways also. It might be

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attached to a certain memory, an emotion, a mood, or even an action. Even our intrinsic abilities and instinctive behaviours have been found to be significantly impacted by smell.

Taking this into account, many businesses flourish and carry out their marketing goals only by giving consumers a sensory experience. Customers get drawn in by the aroma, which impacts their subliminal behaviour and persuades them to purchase a certain product. The fragrance of a product can often have a negative and disparaging effect on some customers, causing them to avoid certain items. However, at the end, scent has been proved to be important for business and sales, generating higher levels of client retention and revenue.

In order to achieve that success rate and build an established customer base, many firms and corporations continually force and push themselves to stand out with their products and be distinctive in the commercial world[3]. Businesses employ a variety of strategies to achieve this goal, including promoting and offering deals to customers. However, trademarks are yet another very significant strategy they employ.

In the usual sense, trademark refers to a “word, phrase, symbol and/or design” which helps in identifying and distinguishing the source of the goods of one from another. Though the purpose of trademarks does not stop here, this is what it primarily seeks to achieve[4].

The term "trademark" is often used to describe a "word, phrase, symbol and/or design" that aids in determining and contrasting the source of one product or the product itself from one another. This is the main goal of trademarks (Even though there are other goals as well)

The issue emerges when tangible products are frequently granted trademark protection since they are regarded as "conventional forms of trademarks." Given the current significance of smells for

[3] Jenner, Mark SR. "Follow your nose? Smell, smelling, and their histories." *The American Historical Review* 116.2 (2011): 335-351.
[4] Stockley, Paula, Lisa Bottell, and Jane L. Hurst. "Wake up and smell the conflict: odour signals in female competition." Philosophical Transactions of the Royal Society B: Biological Sciences 368.1631 (2013): 20130082.

many sorts of businesses, the trademark law has seen the creation of unusual forms of intangible trademarks, which encompass elements like smell, taste, and even sound. The frontiers of intellectual property are clearly expanding around the world. But this growth is not without its share of issues and roadblocks. The same holds true for trademarking smells and scents. Problems include ambiguous meanings of terminology like "smell marks." Smell markings would undoubtedly prove to be one of the more difficult components for graphical representation. This study paper will examine these difficulties, in a country where a common law system is being followed, where the trademark law stipulates that these kinds of registrations must be recorded in a permanent form on paper. In order to accommodate such olfactory indicators, it will further assess the scope and determine if revisions to the legislation are required.

REVIEW OF LITERATURE

"Position of smell marks and taste marks: India vs developed nations"

This literature sources titled "Position of smell marks and taste marks: India Vs. Developed Nations" is a research paper authored by Choudhary, Akanksha, and Ashna Shah and published by Indian Journal of Law Management and Humanities. These research paper aided the on-going research work by helping the author understand the position of India in the context of olfactory marks compared to other developed nations like United states, United Kingdom and European Union. Even though, the on-going research paper is not a comparative analysis, it was necessary to know the position of India in the subject matter if smell trademarks, for the better understanding of the issues behind and coming up with better solutions, and the above-mentioned literature source helped in a great way by facilitating it.

1. **"Protection of Non-Conventional Trademarks: An Analysis"**

This literature source titled "Protection of Non-Conventional Trademarks: An Analysis" is a research paper authored by Kriti Krishna and published by Indian Journal for Law and Legal

Research. This literature source helped the on-going research paper by aiding the author to understand the need for trademarking non-conventional trademarks like taste marks, sound marks and smell marks. It gave a detailed explanation on the importance of these types of trademarks, along with the challenges behind trademarking such markers. The author was able to gain knowledge about the different types of trademarks and was also able to know the positive and negatives of trademarking the non-conventional trademarks, which helped in the better progress of the research paper.

2. **"Olfactory Trademarks in India: Status and Challenges"**

This literature source titled "Olfactory Trademarks in India: Status and Challenges" is a research journal authored and published by a law firm called the Indian Law Office. This research journal aided the on-going research paper by helping the author gain knowledge on the different issues and challenges that lies behind trademarking olfactory marks in India. This literature source gave a detailed explanation on the different problems that lies behind smell trademarks, that too, especially in a country like India, where the laws related to trademarking are quite stringent and strict.

RESEARCH OBJECTIVES

1. To compare and analyse the position of India in the context of non-conventional trademarks like smell marks, to that of another jurisdiction like USA, UK and EU.

2. To analyse the different issues and challenges related to trademarking non-conventional markers like smell in India.

3. To analyse and suggest the different ways through which the issues related to olfactory trademarks can be resolved.

RESEARCH QUESTIONS

1. What is the position of India with regards to olfactory trademarks compared to another Jurisdiction?
2. What are the different issues related to trademarking olfactory smells in India?
3. What are some of the ways through which the different challenges related to trademarking olfactory marks in India can be resolved?

RESEARCH METHODOLOGY

The empirical methodology of research has been adopted for this paper, where various primary sources such as statutes and cases will be analysed, to understand how they operate in this specific area, and what effects they have. I will also be focusing on certain relevant case laws for the purpose of backing up my arguments.

CHAPTER I: OLFACTORY MARKS- AN UNCONVENTIONAL TRADEMARK?

To understand the intricacies of scents being registered as trademarks, one needs to first comprehend what a scent mark comprises. Considering the sense of smell is one of the most powerful memory triggers, businesses are increasingly interested in combining their products with intriguing fragrances or smells, as a result, smell marks refer to the particular aroma that a business delivers the products in order to distinguish them from one another.

Sumitomo Rubber Co.[5] applied for the first smell mark in the United Kingdom, intending to trademark "a floral fragrance or smell reminiscent of roses as applied to tyres." This was officially recognized as the country's very first "olfactory trademark" to be registered. Unicorn Products, which attempted to register the "strong smell of bitter beer applied to dart flights," was another

[5] *See* Essl, Reg. v. Geruchsmarken, *ÖBl.* 2001

successful registration. These incidents indicated the conceptual beginning of the registration of smell trademarks, but a beginning with complexities of its own.

Such unconventional trademarks, which lacked a tangible form, started gaining a remarkable amount of significance in the late 1990s. Scientists have improved to the point that they are now devising new, calculated ways of employing fragrances to enhance the business experience. This is a result of the technology's fast progress, which requires concepts of intellectual property to continuously alter and adapt to new needs. Problems in designating smell as a trademark have led to uncertainty and non-uniformity in national law in this area. The various arguments concerning the legitimacy of the registration of such scent marks show the unstable legal framework that currently regulates this scenario. Given the relevance and regular usage of scent marks in business every day, the defence of unconventionality cannot be applied in the long term.

CHAPTER II: SMELL TRADEMARKS: A BRIEF HISTORY

Even though the concept of trademarks came into existence in the late 19th century, through different agreements and conventions related to intellectual property rights like the "Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989" and "Paris Convention for the Protection of Industrial Property of 1883", none of the agreements or convention related to IP rights gave a clear cut definition for the word "trademarks, nor did give a proper specification on what can be trademarked and what all cannot be trademarked. It was only through the **TRIPS** Agreement, a clear definition for the word trademark was introduced.

where Article 15(1) of the Trips agreement defines "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. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that

signs be visually perceptible." But one of the main problems with the definition is that, it doesn't include unconventional trademarks like sound marks, taste marks and smell marks under the ambit of trademark, but it also doesn't evidently exclude it also. In simple words, it didn't recognize the unconventional trademarks, but also didn't totally ignore it. It was the "Singapore Treaty on the Law of Trademarks, 2006" and its 2011 Regulations specifically recognized non-traditional trademarks such as sound, scent, and colour.

When it comes to the status of unconventional trademarks in developed nations such as the EU, the United Kingdom, and the United States, they appear to be extremely adaptable and liberal to non-traditional forms of trademarks. Talking about the European Union, in the past, the **EU Directive 89/104/EEC's Article 2** stated that a trademark's graphic representation was an essential feature. However, it was only inevitable that this requirement would create several issues when it came to the trademark registration of smells. Someone couldn't truly describe a smell using words, a chemical formula, or any other customary method. However, nowhere in the statute was it stated explicitly that scent markings could not be protected. One of the landmark judgements was in the **Ralf Seickman v. German Patent Office** [6] case. In this particular case, the graphical representation requirements were not met, hence the registration of the scent mark was refused. The primary question raised in this case concerned was whether an olfactory mark—described as a balsamically fruity aroma with a hint of cinnamon—could be registered as a trademark with regard to particular services. Also, the question of whether a chemical formula of the scent be considered as graphical representation was also answered in the case**. In this decision, the ECJ noted that graphical representation is not adequate and that it must be exact and unambiguous in order to establish the right of exclusivity. It must also be understood by those who are interested in reviewing registers. In simple words, the graphical representation must be in such a way that it is easily understandable by any common man.** Chemical formula cannot come under the ambit of something which can be easily understood by a person with no

[6] *See* Ralf Sieckmann v Deutsches Patent and Markenamt, C-273/00, 12002, European Court of Justice

knowledge about it. Also, chemical formula only denotes the substance present, and not the scent[7] Hence, the method graphical representation of the smell through chemical formula was rejected.

However, the necessity for "graphical representation" was largely eliminated by the Regulation (EU) 2017/1001 on the European Trademark, which went into force immediately following the Unicorn Products case in 2017. it was unequivocally established that the main purpose of trademark protection or registration was to help distinguish a good or service from similar ones. This helped to successfully identify the "subject matter of the protection" that was being provided to the owner. This statement underlines the idea that it did not matter to whom protection was offered as long as the technique of representation was precise and transparent. The same was created under Article 4 of the **EUTMR**.

Nevertheless, the problem was not entirely simple for smell markers. The issue was further illustrated by the case of Odeur de fraise mure[8], where the trademark registration application for the "smell of ripe strawberries" was denied since the scent of ripe strawberries would vary depending on the variety.

Also, the non-exhaustive list of marks under Article 3(3) makes no explicit mention of olfactory markers anywhere. It is also important to note that, with the state of technology today, a fragrance mark cannot be conveyed in a way that would make it registerable for trademarks. Thus, as far as the EU jurisdiction is concerned, an application for a smell mark was most likely to get denied easily, under Article 7 (1) a of EUTMR.

The next country in the list of analysis is the United Kingdom. Earlier, all trademarks, whether conventional or unconventional, must fulfil a specific criterion in order to be registrable in the UK, called as Sieckmann criteria[9]. This explicitly states that a trade mark must be "clear, precise, objective, intelligible, easily accessible, self-contained, and durable" in order to be "graphically

[7] *See* Annanya Bannerji ed.al, *Importance and Challenges of Protecting Smell Marks in India,* S.S.Rana & Co.,(2022)
[8] EU:T:2005:38
[9] *Accord "Trade Mark Representation Requirements",* Trade Signatures, (2022)

represented" in the register, which is one of the conditions. For word and logo marks, this criterion is rather simple, but it is more challenging for things like scents. A smell mark, for instance, wouldn't be "durable" and its description, like the one given in the US registration for Play-Doh, wouldn't be "objective." However, in January 2019, modifications were made to give effect to the **TMD** of 2015 (Trade markings Directive), altering the **TMA** and eliminating the necessity for a mark to be graphically represented, making it simpler to register unconventional markings. Even after becoming less rigid in this aspect, there are just two in the UK to date, both of which were successfully applied for in 1994. "Dart feathers that smell like bitter beer" and "a floral fragrance reminiscent of roses applied to road vehicle tyres" are what they are.

Despite the lack of statutory conviction, the US judiciary is likely the most broad and flexible when it comes to the registration and recognition of non-conventional marks. The situation may be deemed considerably more favourable in United States, where scent registration is permitted, provided that one crucial factor, that is to be taken into account. The factor was that, the scent should be “a non-functional in nature". For example, the main function of perfumes or air fresheners is to give fragrances, which means, the fragrances are the function and hence cannot be trademarked. Otherwise, if it was not useful in nature and was distinct, there was a considerable chance that the fragrance would be recognised. In the case of in re Clarke[10], the Court held that the aroma of "plumeria blossoms" contained in sewing thread and embroidery yarn had the potential to be registered as a trademark. Smell markings were to be classified as having "standard character," as well as being a "non-visual mark." Among the relevant fragrance marks registered in this jurisdiction are "minty scent and menthol" by Hisamitsu Pharmaceutical Co, Inc. and "grape scent of the goods" by Power Plus Lubricants LLC.

[10] *See* In re Clarke, 17 USPQ2d 1238, 1239-40 (TTAB 1990)

CHAPTER III: SMELL MARKS IN INDIA: ISSUES AND CHALLENGES

When it comes to India, the most basic and essential requirement to trademark a product is the capability to graphically represent the product or services. According to Section 2(1) (zb) of the Trade Marks Act, 1999, a 'trademark' means "a mark which is capable of being represented graphically and capable of distinguishing the goods or services of one person from those of others, and may include the shape of goods or their packaging and combinations of colours." The definition evidently says that, only if a product is capable to be graphically represented, it can qualify for registration of trademarks, which is totally impossible, when it comes to olfactory marks. As discussed earlier, the smell cannot be represented graphically using chemical composition[11], because of the fact that chemical formula only denotes the substance present, and not the scent. Also, graphical representation should be in such a way that, it is easily understandable by any person. But chemical formula cannot be easily understood by a common man. Given that the scent could not be represented on paper, smell marks could not be registered under Rule 2(1)(k) of the Trade Mark Rules, 2017. As a result, there was no possibility of registering smell marks in the country.

Despite the fact that, there is a need for India to advance itself in the area of intellectual property rights and consider the registration of non-conventional like olfactory marks, there are undoubtedly several barriers that prevent this from succeeding[12]. In stark contrast to what other developed countries follow with regard to trademarking smell marks, India has not opted to take the lenient stance towards enabling the registration of such marks. The barrier still exists in the absence of the technology that makes it easier to represent the smell visually or on paper. Even though sound and colour markings also come under the Non-traditional marks group, there are classifications for them on a global scale, such as musical notation or international colour codes,

[11] *See* Craig, Carys J. "Perfume by Any Other Name May Smell as Sweet… But Who Can Say? A Comment on L'Oreal v. Bellure." Intellectual Property Journal 22 (2010): 321-334.
[12] *See* Bainbridge, David. "Smell, sound, colour and shape trademarks: an unhappy flirtation?" Journal of business law (2004): 219-219

which made it easier to be considered. However, the lack of a globally recognised code or classification for smells is a significant barrier to registration.

There are many hurdles which doesn't allow trademarking of smell marks, particularly in our country. One of the main and basic hurdles associated with it is, as discussed earlier, "the incapability to represent the smell graphically". Smell, being an intangible element, doesn't have a shape or structure to visually portray it. Just like other human sense, it is also a kind of sense, which can only be experienced, but never be visualised. The only practical way the intellectuals came up with, for graphically representing the smell was either by describing the smell through words, or by writing down the chemical composition. But both the ideas had its own issues associated with it. Firstly, talking about description of smells, no smell can be described in such a way that it can be understood in the same sense by everyone reading it. The basic requirement of graphical representation is the clarity and preciseness. But both the elements get lost if the description makes different sense to different people. For example, if a smell is described as woody, with slight vanilla and chocolate smell mixed with it and two individuals read it, their interpretation would be different, because one person might be familiar with the smell of dark chocolate, while other would be familiar with the smell of milk chocolate. This is just a simple example. The reality would be much worse and complicated. And talking about chemical composition, the issue is simple. A chemical composition is just the structure of the substance present, and is never about the smell. The smell only should be graphically presented, not the substance.

The next issue with the trademarking the smell marks is the issue of distinctiveness. It is necessary to prove that the scent did not develop as a result of the items' or the product's natural characteristics in order to establish distinctiveness. For quite a number of years now, most of the products being sold have a smell attached to them. Because it is impossible to claim that a smell is exclusively connected with a certain brand, it becomes tough to prove the distinctiveness of a smell. Also, we have no technology to differentiate smell, except human nose. But the problem is, our nose is by itself not capable enough to differentiate two smells, of nearly the same charactertics, but has slight variation. The problem is, there might be chance of two smells to be similar, but not same. But we don't have any technology to find the difference. In simple words, even if a smell is

distinctive, due to the lack of technology to detect the distinctiveness, we would not find it, which might be unjustifiable to the person trying to register.

the doctrine of functionality is also one of the issues that stands in the way of registering smell marks. In accordance with the doctrine, "any feature of a product which is also a functional feature of the product is not eligible to be protected as a trade mark." This might be challenging practically because a product's smell or odour typically serves a purpose for the product itself. Smell marks generate a lot of questions since they contradict this doctrine and have far-reaching implications. In addition to this, there are additional areas where this doctrine causes issues with the procedure of registering trademarks for smells. **'Pohl Boskamp[13],'** a pharmaceutical firm, filed a request for trademark registration, which shows this. The application was for their nitro-glycerine spray, which was intended to relieve chest symptoms and had a peppermint flavour and aroma. The peppermint taste was shown to be significantly more effective in treating several categories of chest problems when testing was done to determine the validity of the registration. This illustrates the functional part of the peppermint taste, which became the justification for rejecting the application. On the one hand, despite the fact that this theory might be seen as essential for promoting healthy competition in business, situations like these impede progress and economic growth.

The smell cannot even be stored, because smell, like food is also subjected to decaying, which might totally change its charactertics. And it also has fair chance of getting escaped over a period of time, making it completely impossible to even think of the above-mentioned idea. To conclude, this are all the factors that This poses an immediate need for olfactory marks to be recognized in the trademark laws of India[14].

[13] *See* In re Pohl-Boskamp GmbH & Co., 106 U.S.P.Q.2d 1042 (2013)
[14] *See* Bystrom, Kerry. "Reading the South Atlantic: Chile, South Africa, the Cold War, and Mark Behr's The Smell of Apples." African Studies 71.1 (2012): 1-18. *Accord*

CHAPTER IV: SMELLS MARKS AND INDIA-THE CHANGES NEEDED

As we saw in the preceding chapter, trademarking smells in India is something which has lot of threats attaining to it. But on the other hand, there is a slight possibility for it to become true in the near future, if some serious changes are made to the legislation.

First and foremost, it is important to note that, the draft manual of the Trade Marks Act, 1999 is purely based on the decision made in the case of Sieckmann and follows the Sieckmann criterion to register trademarks. However, the legislation which knows to follows the Seickmann criterion, hasn't got updated with the latest version of the Criterion, which doesn't require the need for graphical representation. If the Indian legislation amends the Section 2 (1) (zb) of the TMA, it by itself is enough to take the concept of smell marks in India to a better position. The factor of graphical representation is the main hindrance to the introduction of trademarking smell marks in India. Thus, removing the need for a graphical representation would help in a great way to the issue of smell marks.

Secondly, talking about an important case that establishes a precedent for countries like India to follow is the case of **"Vennootschap onder Firma Senta Aromatic Marketing v. Office for Harmonisation in the Internal Market"[15].** The Board of Appeal held that "The smell of freshly cut grass is a distinct smell that everyone immediately recognises from experience,". The court also held that many people relate the smell of freshly cut grass with pleasant memories of spring or summer, well-kept lawns or fields, or similar events. The Board found that the description provided for the olfactory mark proposed to be registered for tennis balls satisfied the graphical representation requirement of Article 4 **CTMR**. Unfortunately, although being quite progressive, this judgement has not been followed in any other instances. It would be better if India do take such judgements into consideration, and adjust the present laws, for the better positioning of olfactory trademarks in India.

[15] *See* [1999] E.T.M.R. 429 (Eur. Comm. Trade marks Office, Second Board of Appeal)

Next, it is critical to note that India has changed the regulations controlling sound and colour marks significantly. The country follows the criteria set by the **ECJ** in **Shield Mark case**[16], particularly for sound markings. It would be beneficial if improvements were made for smell markings as well, considering that India has previously made changes for sound marks and has met certain European Union criteria in this regard.

Furthermore, it is critical that Indian trademark law facilitates a broader comprehension of the term "mark" and its implications. Given the number of times it has approved scent marks, the United States is the jurisdiction that India must follow. The scope of trademarks must be widened, and the definition of "Marks" in Article 2 of the TMA must be amended.

In simple words, the whole legislation related to trademark of non-conventional marks should be revised in first place, which is the only way through which the whole concept of trademarking olfactory marks gets even the slightest chance or scope in India. But no amendments or revision can be made, without the issue showing up in front of the judiciary. Till date, no attempts have been made in India to register a smell mark. Any changes needed can only be fulfilled, if an application is actually made first, gets rejected and the issue gets in front of the Supreme Court[17].

CONCLUSION

In today's world, businesses are keen to register their olfactory trademarks since they serve as psychological marketing techniques to pull clients based on their memories of a certain scent, which keeps them attached to the goods and improves sales. Despite the fact that many developed countries used to have a stringent policy against smell markings, olfactory marks, such as the fragrant perfume of roses in tyres, have obtained trademark protection. However, unlike India,

[16] *See* Shield Mark BV v. Joost Kist, RPC 315 (2004) (ECJ)
[17] *See* Fjlellestad, Danuta. "Towards an Aesthetics of Smell, or, the Foul and the Fragrant in Contemporary Literature." Cauce, 2001, (24): 637-651 (2001).

nations like as the United States eventually established a wide definition of a trademark, which is critical in today's world[18]. Although it has its own unique issues, a liberal approach in this sector would considerably help to the country's economic success.

In India, there is currently no legal precedence that permits for the registration of scents as trademarks. The most significant impediment to the registration process is graphical representation. Furthermore, since TRIPS does not specifically mention non-traditional (including fragrance) trademarks, India is having difficulty incorporating them into its trademark rules.

It is critical that India update its legal structure to guarantee that scent markers have a place in Indian law. The future of intellectual property may be extremely effectively guaranteed by scientific advancement and legal changes that allow for more non-traditional markings, such as scent marks. This, in turn, would increase developer motivation and build an atmosphere favourable to progress. The notion of graphical representation must be abandoned, and the definition of marks must be modified, potentially opening up new options for trademarks and businesses in the nation[19].

Only time will tell whether olfactory markers grow enough to merit protection in India. They cannot, however, be registered under Indian law at the moment.

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