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ARTICLES

UNDERSTANDING THE LEGAL LANDSCAPE OF NON-CONVENTIONAL TRADEMARKS IN INDIA

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Abstract

Among contemporary intellectual property debates, non-conventional trademarks (such as sounds, smells, tastes, shapes, and holograms) present unique challenges. They serve the primary function of trademarks to distinguish the goods or services of one proprietor from those of another. For example, customers often associate the distinct shape of the Coca-Cola bottle with the beverage itself, the peculiar blue colour of Tiffany with the company, the very popular "Tudum" sound of Netflix with its brand identity. Such trademarks help the companies to enhance their brand recognition through unique sensory memory. The aim of this paper is to critically study the legal recognition, registration, and protection of non-conventional trademarks under Indian law, emphasizing both legal and practical difficulties by analyzing various examples of these marks. Extensive case law has been analyzed to elaborate the scope of infringement of these marks and the defenses available against such claims. Further, this paper highlights that a thorough understanding of the important role of non-conventional trademarks is essential for shaping today's intellectual property landscape, offering valuable insights into both the challenges and opportunities they present for businesses. The absence of objective standards and the requirement for visual representation often complicate establishing distinctiveness, proving infringement, or demonstrating consumer association.

Keywords

trademarks, infringement, distinctiveness, graphical representation, non-conventional trademarks

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СТАТЬИ

ПРАВОВОЙ РЕЖИМ НЕТРАДИЦИОННЫХ ТОВАРНЫХ ЗНАКОВ В ИНДИИ

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Аннотация

Среди современных дискуссий в области интеллектуального права нетрадиционные товарные знаки (такие, как звуки, запахи, вкусы, формы и голограммы) представляют собой уникальную проблему. Как и у традиционных товарных знаков, их основная функция заключается в том, чтобы отличать товары или услуги одного предпринимателя от товаров или услуг другого. Например, потребители часто ассоциируют характерную форму бутылки *Coca-Cola* с самим напитком, а очень популярный звук «Tudum» компании *Netflix* — с идентичностью бренда. Такие товарные знаки помогают компаниям повысить узнаваемость своего бренда за счет уникальной сенсорной памяти. Цель данной статьи — критически изучить правовое признание, регистрацию и защиту нетрадиционных товарных знаков в соответствии с индийским правом, уделяя особое внимание как юридическим, так и практическим трудностям путем анализа различных примеров таких знаков. В ходе исследования была проанализирована обширная судебная практика, чтобы подробно описать сферу нарушения прав на эти знаки и возможные способы их защиты. Кроме того, в данной статье подчеркивается, что глубокое понимание важной роли нетрадиционных товарных знаков имеет решающее значение для формирования современной системы интеллектуальных прав. Размышления автора о специфических проблемах нетрадиционных средств индивидуализации товара раскрывают идеи и возможности, которые могут представлять ценность как для теории, так и бизнеса. Отсутствие единых стандартов, а также необходимость визуального представления зачастую усложняют задачу установления уникальности товарного знака или доказывания факта нарушения.

Ключевые слова

нетрадиционные товарные знаки, нарушение прав, отличительность, графическое изображение, нестандартные товарные знаки

Конфликт интересов	Автор сообщает об отсутствии конфликта интересов.
Финансирование	Исследование не имеет спонсорской поддержки.
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Introduction

In today's fast-evolving field of intellectual property, trademarks are no longer limited to names, logos, or catchy symbols. The scope of what may be protected as a trademark is expanding, giving rise to what are now known as non-conventional trademarks. These marks move beyond traditional categories and enter more creative territory, encompassing specific colors, distinctive shapes, memorable jingles, signature scents, motions, and even holograms. This shift is redefining the traditional boundaries of trademark law and introducing new possibilities for how brands express their identity.[1]

Non-conventional trademarks challenge conventional perceptions of what a trademark is. Rather than relying solely on names or visual logos, these marks engage the senses — sight, sound, and even smell — to help products stand out. They offer businesses innovative and creative avenues for shaping brand identity. By incorporating unique sensory elements, companies can create stronger and more lasting impressions, fostering deeper and more meaningful brand connections with consumers (Desai, 2019, pp. 129–135).

Consider the familiar chime heard when powering on a *Nokia* phone, the distinctive contour of a *Coca-Cola* bottle, or the elegant shade of blue instantly associated with *Tiffany & Co.* — these are all examples of non-conventional trademarks. They are not merely clever branding strategies; they have become integral to how consumers identify and relate to these brands.

However, securing legal protection for such marks is not always straightforward. Because trademark laws vary across jurisdictions, businesses often face complex challenges, such as demonstrating that the mark is truly distinctive, proving that it serves more than just a decorative or functional purpose, and presenting it in a manner that meets legal requirements for clarity and protection (Kurup & Pradeep, 2020, pp. 131–148).

Despite these hurdles, there is growing recognition of the value non-conventional trademarks hold in today's branding landscape. They represent more than creative expression — they are powerful tools for differentiation in an increasingly saturated market. This paper examines non-conventional trademarks in detail: what they are, the various forms they may take, and the legal systems designed to protect them. It explores the practical challenges companies encounter in registering and enforcing such marks, as well as the opportunities they present. Through analysis of key cases and legal developments, this paper aims to offer a comprehensive understanding of how non-conventional trademarks fit into the broader framework of intellectual property today.

Non-Conventional Trademarks (NCTs)

Let us now explore the evolving landscape of non-conventional trademarks (NCTs) in India, where creativity intersects with legal protection. This section begins by defining NCTs and distinguishing them from the well-established category of traditional trademarks, such as logos and brand names. NCTs extend beyond conventional forms by engaging a broader range of human senses — sight, sound, smell, taste, and touch (Kahkeshan & Ansari, 2022, p. 1118).

Here's a breakdown of the various categories of NCTs:

i. **Sounds:** The scope of auditory NCTs extends beyond catchy jingles. The distinct aural notification that plays upon activation of an *Apple* device, or the satisfying click that accompanies the latching

[1] Balaji, G. (2024, March 27). *Unconventional trademarks: Can sounds, smells, colours and other non-traditional trademarks be protected in India?* De Penning & De Penning. https://depenning.com/blog/unconventional-trademarks-evolution/

of a seatbelt, can both serve as powerful trademarks. These everyday sounds have the potential to become ingrained in our memories, thereby triggering instant brand recognition. Furthermore, the category encompasses not only traditional jingles but also unique product sounds, such as the iconic roar associated with *Harley-Davidson* motorcycles or the gratifying click of *Lego* bricks connecting. Even the specific way a brand name is pronounced can be protected, as exemplified by the sing-song delivery of 'Olive Garden'.

ii. **Shapes:** The three-dimensional shape of a product or its packaging can serve as a powerful brand identifier, fostering immediate recognition and brand loyalty (Jahan et al., 2024). Consider, for example, the instantly recognizable silhouettes of a *Coca-Cola* bottle or a *Toblerone* chocolate bar. The sleek curves of the *Coca-Cola* bottle have become so iconic that they are identifiable worldwide, even without any logos or branding. Similarly, the distinctive triangular prism shape of the *Toblerone* bar — designed to look like the peaks of the Matterhorn mountain range in Switzerland — acts as a unique visual cue for the brand. These shape trademarks provide a significant competitive advantage, making it difficult for competitors to replicate the distinctive design and brand association.

iii. **Colors:** Specific color combinations can evoke strong brand associations and become synonymous with a particular company or product.[2] The elegant *Tiffany & Co*. blue immediately suggests the brand's luxurious jewelry, while the vibrant red of a *Coca-Cola* can is recognized worldwide. Even color gradients or specific color palettes can be trademarked. For example, the rainbow color spectrum associated with the *Skittles* candy brand is a registered trademark. These color combinations serve as powerful marketing tools, creating a distinctive visual identity for a brand and fostering lasting brand recognition.

iv. **Textures:** The way a product feels can be a powerful differentiator, shaping consumer perception of quality and brand value. Consider the luxurious feel of a high-quality cashmere sweater against the skin, the smooth surface of a perfectly ripened peach, or the satisfying grip of a well-worn baseball glove. These tactile experiences can be trademarked, creating a unique sensory connection between the consumer and the brand. For example, a company that manufactures athletic wear might trademark the specific moisture-wicking fabric used in its garments, offering a distinctive user experience that sets it apart from competitors. Similarly, a high-end bedding manufacturer could trademark the unique weave and softness of its sheets, establishing a feeling of luxury and comfort closely associated with the brand.

v. **Smells:** Our sense of smell is one of the most powerful tools for memory and brand association (Kurup & Pradeep, 2020; Kumar, 2016, p. 136).[3] For instance, the signature scent of a luxury hotel chain can evoke feelings of relaxation and exclusivity, instantly transporting guests to a specific environment. Likewise, the distinctive aroma of freshly brewed *Starbucks* coffee or the enticing smell of baked cookies from a bakery can trigger cravings and encourage impulse purchases. Though the smell of *Starbucks* coffee is not yet trademarked in India or the United States, there are several examples where smell marks have been successfully registered. For example, in the famous *Re Celia, dba Clarke's Osewez*[4] case, the mark was for "a high-impact, fresh, floral fragrance reminiscent of Plumeria blossoms," used in connection with sewing thread and embroidery yarn. Similarly, in 1996, the United Kingdom allowed registration of its first-ever 'smell' trademark: the scent of a rose, used for tires. It was originally registered by *Sumitomo Rubber Industries* (later acquired by *Dunlop Tyres*). Another well-known example in

[2] Ibid.

[3] Smell marks are also called as olfactory marks.

[4] 17 U.S.P.Q.2d 1238 (U.S. T.T.A.B. 1990).

this unusual category is the familiar scent of *Play-Doh*, registered by *Hasbro Inc.* — a smell that many people instantly recognize from childhood.[5]

By trademarking such distinctive scents, companies can safeguard their brand identity and the powerful emotional connections they create with consumers. Furthermore, in India, smells hold particular cultural significance, as incense sticks (*agarbattis*) are used daily in worship and rituals across various religions. In my opinion, the smell of *agarbattis* cannot be trademarked, as it is functional in nature.[6] However, the scent of the packaging could serve as an important branding tool. The functionality doctrine[7] in trademark law is based on the anti-competitive effects of granting a single producer a monopoly over a useful product feature.

vi. **Taste:** Unique flavor profiles may also be eligible for trademark protection.[8] Consider the unmistakable taste of *Coca-Cola* — a complex blend of natural and artificial flavors that has become synonymous with the brand. The specific blend of spices in *Maggi Masala* can similarly be attributed to *Nestlé*.[9] This concept extends beyond food products as well. The minty freshness associated with a particular brand of toothpaste or the distinct flavor of a medicated cough syrup can serve as branding tools, helping companies protect their unique formulations and the sensory experiences they create for consumers.

However, to date, no taste mark has been successfully registered, as such applications have often been denied on the grounds that the marks failed to meet the criteria for distinctiveness. Nonetheless, these applications have not been outrightly rejected, leaving open the possibility of successful registration in the future.

vii. **Motion/Ambience:** The world of motion and ambience trademarks encompasses a wide range of visual and sensory experiences (Elliott, 2019, pp. 243–259). Consider the animation sequence of a company logo that appears before every movie produced by a particular film studio. This instantly recognizable animation can become a trademark, creating a sense of anticipation and excitement for viewers. For example, *20th Century Fox* holds US registered motion marks No. 1928423 and No. 1928424. Similarly, several production houses — such as *Columbia Pictures* (USTM No. 1975999) and *Hanna-Barbera* (Star USTM No. 1339596) — have also registered motion marks.

In addition, the carefully curated atmosphere of a retail store may also be eligible for trademark protection. This ambience might include a specific lighting scheme, the use of signature music, or

[5] Suri, R. (2024). *Registration of unconventional 'smell' trademarks.* https://ipbusinessacademy.org/registration-of-unconventional-smell-trademarks

[6] See Somal, T. (2021). *Attars and Agarbattis: Protecting traditional cultural expressions through non-conventional trademarks.* https://spicyip.com/2021/07/attars-and-agarbattis-protecting-traditional-cultural-expressions-through-non-conventional-trademarks.html

[7] In *Norwich Pharmacal Co. v. Sterling Drug, Inc.* 271 F.2d 569 (2d Cir. 1959), the U.S. Court of Appeals held that the use of the colour pink for a liquid preparation intended to treat stomach disorders was functional in nature. The court reasoned that the colour served a practical purpose by offering a "pleasing appearance to the customer and sufferer," and thus could not be monopolised by a single manufacturer as a trademark.

[8] WIPO Magazine (2009, February 25). *Smell, sound and taste – getting a sense of non-traditional marks.* https://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html In multiple judgments across various jurisdictions, applications for taste marks have been denied registration as they did not fulfill the requirements of distinctiveness. See *NY. Pizzeria v. Ravinder Syal,* 56 F. Supp. 3d 875 (U.S. S.D. Tex. 2014), *Eli Lilly*, R 120/2001-2 (2004) ETMR 4. However, they have not been outrightly denied registration.

[9] Maheshwari & Co. (2023, January 18). *Taste as an unconventional trademark in India.* https://www.maheshwariandco.com/blog/taste-as-an-unconventional-trademark-in-india/

even the incorporation of particular scents. For instance, a high-end department store might trademark the unique combination of soft lighting, classical music, and the subtle fragrance of its signature perfume, all contributing to a luxurious and sophisticated shopping experience for customers. Recently, due to its distinctive features, the *Apple* retail store[10] was granted a trademark in the United States.

In India, motion marks have also been registered — for example, *Toshiba Corporation* (Reg. No. 4093005) and *UPL Ltd.* (Reg. Nos. 4192672 and 4192678). While ambience itself has not been registered as a trademark in India, it may be protected under the broader concept of trade dress.

Legal Framework Governing the Registrability of Non-Conventional Trademarks

Having established the diverse nature of NCTs, we now shift our focus to the legal framework governing their registration in India. This section analyzes the key requirements set out in the Trade Marks Act, 1999, for successfully registering a non-conventional trademark. Sections 2(1)(zb)[11] and 18[12] outline the criteria for registration; however, they do not specifically address the issue of how non-conventional trademarks should be graphically represented. This omission presents several challenges, which require thorough discussion:

i. **Distinctiveness:** A non-conventional trademark (NCT) must be capable of distinguishing the goods or services of one proprietor from those of others.[13] For example, the jingle used in *Intel*'s 'Intel Inside' campaign has acquired distinctiveness through extensive and consistent use, allowing it to function as a trademark. Similarly, the specific blue color associated with *Tiffany & Co.* and the unique triangular shape of a *Toblerone* chocolate bar are both examples of NCTs that have achieved distinctiveness and serve as effective brand identifiers.
ii. **Non-Functionality:** This requirement is derived from Section 9(3)[14] of the Trade Marks Act, 1999. An NCT cannot consist of a feature that is essential to the function of the product itself. For example, the shape of a spoon would not be registrable as a trademark, as it serves a functional purpose. Similarly, the color yellow for a school bus would likely be deemed functional, as it enhances visibility and safety. The horizontal ridges on a tire tread, designed to improve traction, would also fall within this category. However, a uniquely shaped bottle design that does not serve a purely functional purpose could potentially be registered as a trademark — such as the *Coca-Cola* bottle or the *Toblerone* chocolate bar — where the shapes have acquired distinctiveness and serve as brand identifiers.
iii. **Graphical Representation:** This presents a unique challenge for NCTs compared to traditional trademarks. The Trade Marks Act mandates that a trademark be capable of graphical

[10] Rodriguez, R. (2013, January 29). Apple granted U.S. trademark for its retail store design. *Los Angeles Times*, https://www.latimes.com/business/la-xpm-2013-jan-29-la-fi-tn-apple-store-trademark-20130129-story.html

[11] The Trade Marks Act, 1999, § 2(1)(zb) (India); defines the term 'trademark' as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.

[12] The Trade Marks Act, 1999, § 18 (Application for registration of trademark). This section mentions the application stage within procedure of registration of a trademark.

[13] Jhunjhunwala, V., & Manot, S. (2022). *Non-Conventional trademarks: Meaning, challenges and role in the metaverse*. https://www.lexology.com/library/detail.aspx?g=a0eb3733-6d18-41ab-8571-992793397aac

[14] The Trade Marks Act, 1999, § 9(3). "A mark shall not be registered as a trade mark if it consists exclusively of — (a) the shape of goods which results from the nature of the goods themselves; or (b) the shape of goods which is necessary to obtain a technical result; or (c) the shape which gives substantial value to the goods."

representation.[15] Unlike traditional trademarks, registering NCTs is particularly challenging because the Act requires the mark to be visually depicted in the application (Kumar, 2016, pp. 129–139). This requirement can be especially difficult to satisfy in the case of sounds, smells, and textures (Lukose, 2015, pp. 212–214).

However, there are strategies to overcome this hurdle. For sound marks, visual elements can be combined to meet the requirement. For instance, a jingle can be represented using musical notation or spectrograms (visual representations of sound waves). In the case of the well-known *Nirma* washing powder jingle, a combination of storyboard illustrations depicting key scenes from the commercial, along with musical notes, could effectively capture the rhythm and melody. Similarly, for the theme music of a popular cartoon show, screenshots or illustrations of iconic characters alongside musical notation could serve as a viable representation.

In the case of a smell trademark, such as that associated with a laundry detergent like *Daag Achhe Hain*, the description could detail the specific scent profile, including elements like freshness, floral notes, or a clean linen aroma. To depict a unique fabric texture, the application might describe the tactile sensation against the skin — such as smoothness, softness, or a subtle ribbed feel. Even a sound trademark like the *Thums Up*'s 'Taste the Thunder' tagline can be described using a combination of the written phrase and a description of the vocal delivery, for example: a strong, masculine voice conveying a sense of power and refreshment.

The landmark case of *Cadila Healthcare Ltd. v. Cadila Pharmaceuticals Ltd.*[16] primarily addressed issues of similarity and consumer confusion in conventional trademarks. However, the principles and guidelines established in this case can also be applied to non-conventional trademarks. The Supreme Court of India outlined several important guidelines:

i. *Overall Impression:* Assess the holistic effect of the mark on the consumer, taking into account elements such as sound, color, shape, scent, or motion in the context of NCTs.
ii. *Consumer Perception:* Evaluate the likelihood of confusion from the perspective of the average consumer, focusing on how sensory elements are perceived, processed, and remembered.
iii. *Nature of Goods and Services:* Consider how the sensory element is used in connection with the goods or services and whether it serves a source-identifying function.
iv. *Degree of Care and Attention:* Take into account the level of care and attention consumers typically pay to the sensory element when making purchasing decisions.
v. *Similarity and Distinctiveness:* Extend the analysis to sensory similarities — such as sound, scent, or color — and assess their distinctiveness in the relevant market.
vi. *Prior Use and Reputation:* Evaluate the extent of prior use and the degree of recognition the sensory mark has achieved in the marketplace.
vii. *Market Conditions and Consumer Behavior:* Analyze how consumers interact with and respond to sensory marks under the specific conditions of the relevant market.

While the case did not directly address NCTs, these guidelines provide a useful framework for evaluating their distinctiveness and the likelihood of consumer confusion. By applying these principles, courts can effectively assess the validity and potential infringement of non-conventional trademarks within the evolving landscape of intellectual property law.

[15] The Trade Marks Act, 1999, § 2(1)(zb).

[16] AIR 2001 SC 1952.

Infringement of Non-Conventional Trademarks

The core principle governing the infringement of non-conventional trademarks in India centers on the likelihood of consumer confusion when encountering a competitor's mark. This confusion may arise from various factors, including similarities in the sights, sounds, smells, tastes, or textures associated with the respective trademarks.[17]

Consider a scenario in which a competitor uses a jingle that not only borrows the melody from the iconic 'Intel Inside' campaign but also replicates the same energetic voiceover and instrumentation. Such a high degree of similarity would likely be deemed infringing, given the strong association consumers have developed with the original *Intel* jingle. Conversely, if a competitor employs a jingle with a vaguely similar melody but presents it in a completely different musical style and with distinct vocals, a finding of infringement would be less likely.

The key question courts must address is whether the similarities between the two marks are likely to mislead consumers into believing that the competitor's goods or services originate from the owner of the registered NCT.

The Role of Distinctiveness

Non-conventional trademarks, such as sounds, smells, and textures, face a unique challenge in trademark law: the requirement to prove distinctiveness (Kahkeshan & Ansari, 2022, pp. 1117–1122). The strength of an NCT, measured either by its inherent distinctiveness or by distinctiveness acquired through use, determines the level of legal protection it receives.[18] Strong NCTs, such as the iconic 'Ting Ting Ti Ting' jingle of *Britannia Industries* (Reg. No. 1904243), enjoy broad protection. Even slight similarities with a competitor's sound may be considered infringement, as consumers readily associate the jingle with the original source. Similarly, the *Coca-Cola* bottle's distinctive shape is so deeply embedded in consumer memory that even minor design alterations by competitors could be perceived as imitation.

In contrast, weaker NCTs — such as generic colors used in packaging (e.g., beige for cardboard boxes) — require a significantly higher degree of similarity to establish infringement. This is because generic elements often serve functional purposes, thereby limiting the extent of legal protection available. In essence, the more memorable and unique an NCT is, the stronger its legal shield against potential imitators.

Factors to be Analyzed in Determining Infringement

Courts in India consider several factors when evaluating potential infringement, many of which can also be applied to non-conventional trademarks, such as:

i. **Similarity of Marks:** The degree of resemblance between the registered NCT and the allegedly infringing mark is of paramount importance. This analysis extends beyond a simple comparison of individual elements and focuses on the overall impression created in the consumer's mind. For example, encountering a brand logo that employs the same color scheme, typeface, and basic design layout as a highly recognized

[17] Sharma, H. (2015, November 16). *Confusion among confusions*. Mondaq https://www.mondaq.com/india/trademark/443686/confusion-among-confusions

[18] *See* Calboli and Senftleben (2018).

brand,[19] even if the individual components differ slightly, may still result in consumer confusion due to the cumulative similarity.

In assessing this, courts will consider factors such as the target audience, the nature of the goods or services, and the degree of care exercised by consumers when making purchasing decisions, in order to determine whether the allegedly infringing mark is likely to be mistaken for the registered NCT.

ii. **Nature of Goods/Services:** The type of goods or services involved can significantly influence the likelihood of confusion in non-conventional trademarks. For luxury items such as jewelry or high-end watches, consumers tend to exercise greater care in their purchasing decisions. Even minor similarities in NCTs — such as a distinctive shape or the texture of packaging — may be sufficient to cause confusion. In contrast, for everyday consumer products like pens or notebooks, a higher degree of similarity may be required to establish infringement, as consumers are likely to pay less attention to such details when making routine purchases.

Courts also consider the functional purpose of NCTs. For instance, a slightly different shade of blue used on the soles of athletic shoes may be less likely to cause confusion if it serves a functional purpose, such as enhancing traction. However, if the color is purely aesthetic and serves no functional role, the likelihood of confusion may be greater.

In essence, the nature of the goods or services and the functional characteristics of the NCT play pivotal roles in determining the degree of similarity required to establish infringement in trademark disputes (Kurup & Pradeep, 2020, p. 131). Courts have been less stringent in cases involving pharmaceuticals, as such products are typically prescribed by doctors and dispensed by pharmacists, who are expected to be knowledgeable about the medication.[20] Conversely, courts have taken a stricter approach in cases where there is a greater likelihood of consumer deception.

iii. **Marketing Channels:** When evaluating NCT infringement, the marketing channels through which the trademarks are used play a crucial role. Brands that employ similar NCTs — such as a jingle or signature store scent — in the same physical spaces (e.g., malls) or digital marketplaces (e.g., similar sound effects in online video advertisements) significantly increase the likelihood of consumer confusion.[21] Social media platforms are particularly relevant when targeting similar demographics; for instance, fitness brands using energetic music on Instagram may inadvertently overlap in their sensory branding.

The reach of traditional media is also a factor. A local bakery's jingle that resembles one used by a national brand may present a lower risk of confusion if its broadcast is limited to local radio. Conversely, niche marketing channels can help mitigate confusion. For example, a professional audio equipment brand using a specific technical sound mark in industry-specific podcasts may reduce the likelihood of consumer confusion, particularly if a competitor uses the same or similar term for a broader, non-specialist audience.

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19 IIPRD. (2023). *Tests for comparison of two similar marks comparing similar trademarks.* https://www.iiprd.com/tests-for-comparison-of-two-similar-marks-comparing-similar-trademarks/ See *Corn Products Refining Co. v. Shangrila Food Products Ltd.*, (1960) 1 SCR 968, *Hoffmann-La Roche & Co. Ltd. v. Geoffrey Manner & Co.* (P) Ltd., (1969) 2 SCC 716 and *Cadila Laboratories Ltd. & Anr. v. Dabur India Limited* (1997) DLT 741. These cases highlight that the similarity between two marks for which the marks have to be considered as a whole.

20 Lath, A. (2022, November 16). *Pharmaceutical trademark confusion: Poison pill or public health?* https://spicyip.com/2022/11/pharmaceutical-trademark-confusion-poison-pill-or-public-health.html

21 Pryor, J. (2023, August 27). *The role of trademarks in branding and marketing*. https://medium.com/@markmywordstrademarksau/the-role-of-trade-marks-in-branding-and-marketing-317582455add

By examining the marketing channels involved, courts can more accurately assess the potential for confusion resulting from similar non-conventional trademarks.

Evidentiary Challenges

Legally speaking, and even in terms of evidentiary standards, proving infringement of non-conventional trademarks — especially those involving subjective elements such as smell, taste, and sound — is particularly difficult. Unlike traditional trademarks, which are visual or verbal and can be objectively represented, NCTs rely on sensory perception, making them fundamentally subjective. There are no universally accepted methods for representing such marks, and their interpretation can vary widely due to individual sensitivities, cultural factors, and contextual influences.

Establishing a consistent and objective basis for comparison is therefore highly challenging. For example, perceptions of scents and sounds differ significantly among individuals, complicating the task of demonstrating similarity. These difficulties are compounded by technological limitations, as judicial systems often lack the necessary tools to accurately record, reproduce, and present such intangible elements in a courtroom setting. While audio recordings may allow for a degree of comparison in sound mark cases, there are still no widely accepted metrics for evaluating auditory similarity. The challenge becomes even greater in the case of olfactory marks, as reproducing a specific scent in court is both logistically impractical and vulnerable to degradation.

To overcome these obstacles and ensure fair adjudication in sensory trademark cases, specialized evidentiary procedures and advanced technological tools are essential. At present, however, the enforcement of rights in NCTs remains largely ineffective.

Legal Remedies in Cases of Infringement

An injunction serves as a powerful deterrent against ongoing infringement. Section 135[22] of the Trade Marks Act empowers courts to issue injunctions — either temporary or permanent — to restrain the infringing use of a non-conventional trademark (NCT).

i. **Temporary Injunctions:** These are granted swiftly, often before a final judgment is reached in the case. They are particularly effective in situations where continued infringement could cause irreparable harm to a brand's reputation or market share. In *M/S. Hindustan Pencils Pvt. Ltd. v. M/S. India Stationery Products Co. and Anr.*,[23] the court emphasized the importance of protecting unregistered but well-established trademarks. *Hindustan Pencils*, known for their 'NATRAJ' pencils, successfully obtained a temporary injunction against *India Stationery* for using a deceptively similar mark — also 'NATRAJ' — on their pencils, despite not having a registered trademark.
ii. **Permanent Injunctions:** These are court orders issued after a full trial, permanently prohibiting the infringer from using the mark. They provide a long-term remedy and are crucial for safeguarding the distinctiveness of a non-conventional trademark. In addition to halting the infringing activity, Section 135 of the Trade Marks Act, 1999[24] also allows the trademark owner to seek compensation for financial losses resulting from the unauthorized use of the NCT. Damages may include:

[22] The Trade Marks Act, 1999, § 135 (relief in suits for infringement or passing off).

[23] AIR 1990 DELHI 19.

[24] The Trade Marks Act, 1999, § 135(2) (provision for grant of injunctions).

a. **Lost Sales:** The revenue that would have been earned but for the infringement. In the 2003 case of *Colgate Palmolive Company v. Anchor Health & Beauty Care Pvt. Ltd.*,[25] *Colgate* filed a suit against *Anchor* for using confusingly similar packaging and trade dress for its tooth powder. The court acknowledged the likelihood of lost sales for *Colgate* due to consumer confusion caused by the visual similarities. This led to a favorable ruling for *Colgate*, with the court granting an injunction against Anchor and requiring them to alter their packaging.
b. **Damage to Brand Reputation:** The negative impact on brand image and goodwill can significantly harm a business. While this form of damage is often difficult to quantify in monetary terms, it is nonetheless critical. In *Tata Sons Ltd. v. Manu Kosuri & Ors.*,[26] *Tata Sons* brought legal action against *Manu Kosuri* for the unauthorized use of the domain name 'tatainfotecheducation.com'. The court held that using a well-known brand name in a domain without authorization constituted trademark infringement and passing off, thereby damaging *Tata*'s brand reputation and goodwill. The case underscored the importance of protecting brand reputation in the digital space and demonstrated how the misuse of a well-established trademark online can substantially harm a brand's public image.
c. **Costs of Combating Infringement:** These include the expenses incurred in investigating and pursuing legal action against the infringer. In *Dabur India Ltd. v. Rajesh Motors & Ors*,[27] *Dabur India Ltd*. filed a suit against *Rajesh Motors* and others for using the mark 'Dabur' in connection with their automobile parts business, arguing that such use created consumer confusion and resulted in potential lost sales. The Delhi High Court ruled in favor of *Dabur*, granting an injunction against *Rajesh Motors*. The court held that *Dabur*'s well-known trademark was closely associated with its reputation and goodwill, and that the unauthorized use by *Rajesh Motors* was likely to mislead consumers, causing financial harm and damaging the brand's image. This case emphasized the importance of protecting established trademarks across different market sectors to avoid consumer deception and economic loss.
d. **Accounting of Profits**: In certain cases, the court may order the infringer to disclose and surrender all profits earned through the unauthorized use of the infringed non-conventional trademark.

Conclusion

The trademark landscape is rapidly evolving to encompass non-traditional elements such as sounds, fragrances, colors, textures, shapes, and even tastes, alongside conventional logos, names, and slogans. These identifiers offer unique avenues for consumer engagement in an increasingly competitive market. However, significant legal and procedural challenges remain in identifying and protecting such unconventional trademarks in India. While remedies such as injunctions, damages, and accounts of profits are available, enforcing rights over these marks continues to be difficult. The absence of objective standards and the requirement for visual

[25] 2004(1) RAJ 214.
[26] 2001(2) RAJ 311.
[27] 149(2008) DLT 338.

representation often complicate efforts to establish distinctiveness, prove infringement, or demonstrate consumer association.

As discussed above, the concept of a trademark will inevitably expand as branding technologies advance — particularly through developments in artificial intelligence, augmented and virtual reality, and digital sensory design. This evolution demands a legal system that is both flexible and responsive. To remain innovative and competitive in the global market, India must update its trademark jurisprudence, strengthen judicial and administrative capabilities, and consider legislative reforms that address emerging forms of brand expression.

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