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Sensory Branding and Legal Reform: A Doctrinal Study on Scent Marks in Indian Trademark Law

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Abstract:

This paper examines the legal recognition of scent marks as a non-conventional trademark within the Indian trademark regime, situating the analysis within the broader context of sensory branding. With businesses increasingly exploring distinctive branding strategies that appeal to senses beyond sight and sound, olfactory marks represent a frontier in intellectual property protection. However, the Indian legal framework, particularly the Trade Marks Act of 1999, remains silent on the registrability of scent-based marks. A central obstacle lies in the statutory requirement for graphical representation, which poses a significant challenge for inherently intangible marks such as scents. Adopting a doctrinal and comparative methodology, the paper critically analyses Indian trademark law alongside international developments, including the European Union's Sieckmann decision and select registrations by the United States Patent and Trademark Office. The paper examines the absence of interpretative guidance and technological readiness in India as key barriers to legal reform. To address these issues, the paper suggests legislative clarification, standardised methods for scent depiction, and procedural reforms to align with global best practices. Finally, it argues that recognising scent marks could foster innovation and market differentiation in India, provided the legal system evolves to accommodate the unique nature of olfactory branding.

Keywords: *Graphical Representation Requirement, Indian Trademark Law, Non-Conventional Trademarks, Olfactory Trademarks, Sensory Branding*

1. Introduction:

The increasing importance of sensory experiences in modern commerce has led to the emergence of sensory branding. This marketing strategy engages senses beyond sight and sound to build lasting brand associations. Within this context, scent marks or olfactory trademarks have

gained global attention as distinctive non-conventional identifiers capable of fostering consumer recognition and loyalty. While jurisdictions such as the European Union and the United States have taken measured steps toward recognising scent-based trademarks (Sahni, 2022), the Indian legal framework remains underdeveloped in this area. The Trade Marks Act 1999, which governs trademark law in India, does not explicitly acknowledge olfactory marks nor provide interpretative or procedural clarity on their registration. This legislative silence presents a significant gap in India's intellectual property regime, particularly as businesses adopt more innovative forms of brand differentiation in a competitive global marketplace (Kumari, 2023).

This paper empoly a doctrinal and comparative legal analysis to evaluate whether Indian trademark law can accommodate the registration of scent marks and to determine the scope for legal reform. It explores the definitional and representational challenges of olfactory marks under current Indian law and identifies the statutory and administrative limitations that hinder their recognition. The paper then examines international developments, notably the Sieckmann judgment in the European Union and select registrations by the United States Patent and Trademark Office, to draw comparative insights relevant to Indian reform. It further analyses the practical and institutional barriers to implementing such recognition in India, including issues of graphical representation, technological inadequacies, and judicial inaction(Odintsov et al., 2020). Finally, the paper proposes specific legal and procedural reforms to integrate scent marks into India's trademark regime. These include amending statutory definitions, introducing interpretative guidelines, and adopting scientific methods for scent representation (Bhagra, 2025). In doing so, the paper argues for a more inclusive and forward-looking trademark system that aligns with global practices and enhances the protection of sensory-based brand identities in India.

2. Legal Framework Governing Trademarks in India:

The protection and registration of scent marks under Indian trademark law remains a largely unexplored domain. While the Trade Marks Act 1999 governs the broader trademark regime in India and is primarily aligned with the TRIPS Agreement and international standards, it does not explicitly address the status of olfactory marks. Section 2(1) (zb) of the Act defines a 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." Although this definition is broad enough to include non-conventional trademarks in principle, it imposes two fundamental requirements: graphical representation and distinctiveness. These pose considerable challenges in the context of scent marks (Aggarwal T., &Batra B., 2025).

The graphical representation requirement remains the primary legal impediment to registering olfactory marks in India. The Act does not provide a statutory definition or an illustrative list clarifying what constitutes an adequate graphical representation. In practice, the Indian Trade Marks

Registry interprets this condition narrowly, typically requiring the mark to be capable of visual depiction through words, logos, or images. Scent, being intangible and transient, resists such traditional forms of representation. This interpretative gap parallels issues examined in the European Court of Justice's *Sieckmann* v. *Deutsches Patent- und Markenamt* ruling, which established that a valid trademark must be clear, precise, self-contained, easily accessible, intelligible, durable, and objective in its graphical representation—standards difficult to meet for olfactory signs (Bhagra, 2025b).

Section 9(1) of the Act further excludes registration marks devoid of distinctive character or functional in nature. This aligns with the functionality doctrine, which precludes trademark protection for features essential to the use or purpose of a product. For scent marks, this implies that naturally occurring or utilitarian smells, such as fragrances used to mask odour, would not qualify for registration (Singh, 2024).

Indian jurisprudence offers no judicial precedent interpreting these provisions in the context of scent marks. Likewise, the Manual of Trade Marks Practice and Procedure (2015) provides no procedural guidance for examining olfactory trademark applications. This legislative and administrative silence reflects a systemic lack of institutional readiness, deterring applicants and perpetuating legal uncertainty. Without statutory amendments or interpretative reform, including scent marks within India's trademark regime remains legally impractical (Chaitanya Prasad, 2015).

3. International Developments and Comparative Perspectives:

The recognition of scent marks as registrable trademarks has prompted significant legal debate due to their non-visual, intangible nature. Jurisdictions have responded variably, balancing innovation in branding with fundamental legal requirements such as graphical representation, distinctiveness, and non-functionality. These international developments offer important lessons for shaping India's approach to sensory trademarks (Odintsov et al., 2020b).

The European Union's jurisprudence on olfactory marks is principally shaped by the landmark case *Sieckmann v. Deutsches Patent- und Markenamt* (Case C-273/00). The European Court of Justice held that a scent, while theoretically registrable under Article 2 of Directive 89/104/EEC, must be represented in a manner that is clear, precise, intelligible, durable, and objective. The applicant's attempt to represent the scent of methyl cinnamate using a chemical formula, written description, and a scent sample failed to meet these criteria. This ruling set a high evidentiary and representational threshold for scent marks, limiting their acceptance in EU trademark practice (Saif, 2018).

In contrast, the United States adopts a more flexible regime. Under 37 C.F.R. § 2.52(e), the USPTO does not require a strict graphical representation for scent marks. Instead, applicants must provide a detailed written description and demonstrate acquired distinctiveness. Examples include

Hasbro's registration of the Play-Doh scent and a floral fragrance for sewing thread. While accommodating, the USPTO maintains strict scrutiny regarding the functionality doctrine, rejecting marks that serve a utilitarian purpose or are inherent to the product (U. S. Patent & Trademark Office, 2025).

Other jurisdictions offer mixed models. Australia and Singapore allow for the registration of non-traditional marks under their respective trademark statutes, yet scent mark registrations remain rare due to representational challenges (*21.1. Non-traditional Signs | IPA Manuals, 2022*). Singapore's IPOS, for instance, permits scent mark filings with precise descriptions and evidence of secondary meaning, though no scent marks have been registered to date. South Korea's legislation also allows scent marks, but implementation remains limited (*More Than Words: The Registrability of Non-Traditional Marks in Singapore*, 2024).

These comparative insights reveal key considerations for India. The graphical representation requirement under Section 2(1) (zb) of the Trade Marks Act, 1999, mirrors the EU's rigid standard, making scent mark registration impractical without reform. Additionally, the distinctiveness and functionality provisions in Section 9(1) require contextual reinterpretation for olfactory signs, as seen in the U.S. experience. India's lack of procedural mechanisms, technological infrastructure, and examiner training further exacerbates the uncertainty surrounding such applications (Bhatt, M., 2023).

To progress, India must establish clear regulatory guidelines, draw from international best practices, and consider scientific innovations, such as chemical identifiers or olfactory databases, for adequate representation. Legislative and institutional reforms are essential to align Indian law with evolving global standards and to accommodate sensory branding within its trademark system.

4. Challenges in Recognising Scent Marks in India:

Notwithstanding the theoretical possibility of accommodating non-conventional trademarks under Indian law, the registration and protection of scent marks remain highly problematic due to a range of doctrinal, procedural, and institutional challenges. Central among these is the requirement of graphical representation under Section 2(1) (zb) of the Trade Marks Act, 1999, which mandates that a trademark must be "capable of being represented graphically." Without a statutory or judicial definition of "graphical representation," Indian practice has historically favoured conventional visual forms such as logos, words, or images. Scent, by its very nature, resists such depiction. Unlike visual or auditory marks, olfactory signs cannot be directly captured in a clear, precise, and durable manner—attributes essential for legal certainty and public notice (Gowda, 2023).

The lack of technological infrastructure and procedural mechanisms for handling scent mark applications is a related challenge. Neither the Manual of Trade Marks Practice and Procedure (2015) nor any circulars issued by the Office of the Controller General of Patents, Designs and Trade

Marks (CGPDTM) guide filing, examining, or verifying olfactory trademarks. No standard has been established for describing or recording a scent in a legally acceptable format, whether via chemical formulas, written descriptions, or scent samples. This absence of procedural clarity prevents applicants from pursuing scent mark registration, regardless of their theoretical eligibility (Reimer, 2020).

Administrative and legal inertia further compounds the issue. While India has shown limited openness toward certain non-conventional marks, such as sound and colour marks, this recognition has not expanded to include olfactory signs. The lack of examiner training, institutional frameworks, or engagement with international practices indicates a regulatory hesitancy to venture into novel trademark categories.

Judicial silence adds to the interpretative vacuum. Indian courts have not adjudicated any cases involving scent marks, and the judiciary has yet to articulate principles relevant to their registration or enforceability. In contrast to jurisdictions like the European Union and the United States, where courts and administrative bodies have gradually developed jurisprudence around non-traditional marks, India remains untested. Without judicial interpretation or administrative direction, the scope for recognising scent marks in India remains severely constrained, hindering the evolution of trademark law in response to the demands of sensory branding.

5. Need for Legal and Procedural Reforms:

Both statutory and procedural reforms are essential to facilitate the recognition of scent marks in India. The principal legislative hurdle is Section 2(1) (zb) of the Trade Marks Act, 1999, which requires a trademark to be "capable of being represented graphically." While appropriate for traditional marks, this clause effectively excludes intangible scents that are not visually representable. Amending this section to permit alternative, objectively verifiable representations—such as written descriptions or scientific identifiers—would bring Indian law closer to international standards.

The European Union's shift, through Regulation (EU) 2017/1001, away from graphical representation toward clarity and precision in representation and the United States allowance for written descriptions under 37 C.F.R. § 2.52(e) provide workable models. These frameworks demonstrate that non-conventional marks can be registered without compromising legal certainty (*Regulation - 2017/1001 - EN - Eutmr - EUR-Lex*, 2017).

In addition, India must issue interpretative guidelines to clarify how scent marks can be submitted, described, and examined. This should include provisions for scientific techniques such as gas chromatography-mass spectrometry (GC-MS), which allow for the objective identification of scent compositions (Amlegals, 2023).

Institutional readiness is also vital. The Trade Marks Registry must train examiners, revise

the Manual of Trade Marks Practice and Procedure, and create protocols for assessing olfactory applications. Furthermore, awareness among businesses and legal professionals about the scope and limitations of scent trademarks must be improved.

Legal reform, technological adaptation, and administrative capacity-building are necessary to ensure that Indian trademark law evolves to accommodate the demands of sensory branding and global trademark practices.

6. Conclusion:

The evolution of branding strategies in modern commerce, particularly the rise of sensory branding, necessitates a corresponding evolution in trademark law. As a form of non-conventional trademark, Scent marks represent a powerful tool for brand distinction and consumer engagement. However, under the current Indian legal framework—most notably the Trade Marks Act, 1999—olfactory marks remain unrecognised due to doctrinal constraints, especially the rigid graphical representation requirement and a lack of administrative or judicial guidance.

This paper has demonstrated that India's existing trademark regime is ill-equipped to handle the complexities of scent mark registration. The absence of legislative clarity, procedural standards, and technological infrastructure impedes applicant access and regulatory enforcement. In contrast, jurisdictions such as the European Union and the United States have made cautious but meaningful progress in integrating scent marks into their trademark systems, offering viable models for reform.

To align Indian trademark law with global branding and innovation realities, statutory amendments must be undertaken to broaden the definition of trademarks and allow non-visual representations. Simultaneously, the issuance of interpretative guidelines, the incorporation of scientific methods for scent identification, and capacity-building within the Trade Marks Registry are essential steps forward.

Recognising scent marks within Indian law is not merely a legal formality—it is a necessary response to evolving commercial practices and a crucial step toward harmonisation with international trademark standards.

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