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LEGAL PROTECTION OF UNCONVENTIONAL TRADEMARKS: A COMPARATIVE STUDY OF INDIAN AND INTERNATIONAL FRAMEWORKS

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ABSTRACT

An image is not simply a trademark, a design, a slogan, or an easily remembered picture. studiously crafted personality profile of an individual institution, corporation, product, or service.

~ Daniel J. Bourstin

The article provides an insightful analysis of non-conventional trademarks, which is one of the fastest-growing fields in intellectual property law because it covers more than traditional trademarks, as it includes sensory and three-dimensional trademarks such as sounds, colors, shapes, and other indications. There have been many developments in the Indian trademark law system in response to global changes in commerce and branding. Traditional trademarks have been well established and protected under the Trademark Act, 1999; on the other hand, unconventional types of trademarks have made an impact on the legal framework of intellectual property law, not just in India but also across the world. The importance of the Trademark Act 1999 lies in its ability to create a legal basis for the recognition of such a trademark in India, but its application is limited according to many legal, technical, and cultural factors. The research paper also examines the situation with unconventional trademarks in other countries and regions. The articles discuss the most important issues of Indian law concerning the concept of distinctiveness, graphical representation, and functionality.

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The paper ends with a suggestion for reform of the trademark system in India, aimed at making it more international in character and thus encouraging innovation and differentiation of brands in the international marketplace.

Keywords: *Unconventional Trademark, Distinctiveness, Graphical Representation, Intellectual Property, Trademark Act 1999.*

INTRODUCTION

A trademark is a sign, logo, phrase, or name that distinguishes a company's product/services.² Trademarks were traditionally limited to words and logos, but technological advancement led to the emergence of trademarks that can refer to sounds, scents, taste, movement, or holograms.³ A trademark grants a business exclusive rights to use a specific sign on its products and protects it from consumer confusion caused by similar signs used by other firms. The use of a trademark helps preserve competition integrity, avoid misleading practices, and maintain a business's good image and reputation.⁴

Under the traditional trademark law regime, any trademark should have a "graphic representation"⁵ since the possibility for it to be represented graphically is what distinguishes products. Conventional trademarks are registered and protected, so they are recognized by everyone. Non-conventional trademarks (or non-traditional trademarks) are typically non-graphical and are not represented in the usual way.⁶ These trademarks widen the understanding of the trademark concept.⁷

In India, unconventional trademarks are afforded lesser protection compared to that in the EU and the US due to more intricate representations and standards of distinctiveness. However, the idea of an unconventional trademark is not recent; the EU and the US have been adopting a

² Vatsala Sahay, *Conventionalizing Trademarks of Sounds and Scents: A Cross-Jurisdictional Study*, 6 NALSAR Student L. Rev. 128, 128–41 (2011).

³ S. Chandana & Anisha S. Malagi, *Non-Traditional Trademarks: A Comparative Analysis of the Indian, US, and European Legal Frameworks*, 6 Int'l J. Advanced Legal Rsch. (Issue 1) (2025).

⁴ Vaibhav Sharma & Bharat Rakesh Bhardwaj, *Unconventional Trademarks: The Requirement of Graphical Representation Under the Indian Law*, 5 E-J. Acad. Innovation & Rsch. Intell. Prop. Assets 25 (2024).

⁵ Trade Marks Act, No. 47 of 1999, § 2(1)(zb) (India).

⁶ Sanya Kapoor & Riya Gupta, *The Five Senses and Non-Traditional Trademarks*, 8 Supremo Amicus 214 (2018).

⁷ Graeme B. Dinwoodie & Mark D. Janis, *Trademarks and Unfair Competition: Law and Policy* 45-47 (4th ed. 2014).

broader view of the term.⁸ This is because it has been many decades since different parts of the world, including the EU and the US, recognized and provided protection for such trademarks. Nevertheless, in India, the non-conventional trademark concept is still in the nascent phase of development. By means of the Indian Trademark Act, 1999, which lays down the foundation for registration of trademarks in India, it is evident that the Act is predominantly focused on conventional trademarks. Consequently, this raises several challenges that the registration and enforcement of non-conventional trademarks in India encounter in terms of distinctiveness and graphic representation issues⁹.

SCOPE OF THE STUDY

This study examined the unconventional products of trademark: taste, smell, shape, and so on. The scope will encompass regulatory mechanisms that are involved in the registration of an unconventional trademark.

OBJECTIVE OF RESEARCH

This study aims to highlight numerous other non-conventional marks (smell, shape, taste, and others) in connection with their registration. It also discusses the challenges faced in registering non-conventional marks and measures to overcome them.

RESEARCH QUESTION

1. Are there other peculiar categories that can be considered trademarks, like smell, taste, shape, and so on?
2. In both jurisdictions, what real and formal issues arise in the registration and protection of non-traditional trademarks, especially sensory marks like those of smell and noise?
3. What is the role of graphical representation in the Indian context, as it does for the US and the EU, for non-traditional signs?
4. How does the recent acceptance of a scent-mark application in India offer lessons for future reform?

RESEARCH METHODOLOGY

This paper is doctrinal and comparative. It relies on primary sources such as the Trade Marks Act, 1999, the Trade Marks Rules, 2017, the Lanham Act, 1946, Directive (EU) 2015/2436,

⁸ European Union Intellectual Property Office, *Guidelines for Examination of European Union Trade Marks*, pt. B, § 4, ch. 2, § 2 ('Non-Traditional' Trade Marks and Article 7(1)(a) EUTMR).

⁹ Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999 (India).

Regulation (EU) 2017/1001, and TRIPS, along with the reported judgments delivered by the courts in India, the United States, and the EU. Context is given through secondary sources (law journals and practitioners' analysis). The comparative approach does not call for the wholesale importation of rules from one jurisdiction, here the rules of other jurisdictions; it focuses, instead, on structural options, such as the representation requirement, which impact the results of the registrability analysis.

EVOLUTION OF NON-TRADITIONAL TRADEMARKS

Trademarks have been used historically to distinguish goods and services in the marketplace by serving as a visual identifier, including a name, logo, or symbols. However, the world of commerce has evolved beyond the traditional trademark, and today non-traditional trademarks are available that include sound and colours, shapes and aromas, movement and holograms, and even digital elements. As their economic and branding value has increased, jurisdictions around the world have gradually adapted their trademark laws to allow for the protection of these marks, including the United Kingdom, the European Union, and the United States.¹⁰ These are an ever-increasing part of the trademark landscape and are increasingly recognized and protected by jurisdictions around the world, such as the United Kingdom, the European Union, and the United States. While there are some mechanisms in the Act and the Trade Marks Rules 2017 (“hereinafter Rules”) in India, the protection of non-traditional marks is still limited in India, despite some provisions in the Act and the Trade Marks Rules 2017.¹¹

LEGAL FRAMEWORK FOR NON-CONVENTIONAL TRADEMARKS IN INDIA

Unconventional trademarks are non-traditional trademarks that are used to identify and distinguish a specific product or service from others, as described above. Conventional trademarks, which are normally logos, slogans, or names likely to be perceived than unconventional trademarks may be colour, sound, shapes, scents, etc., but are likely to be perceived.

The Trademark Act 1999 *defines a trademark in section 2(1) (zb) as a mark that can be graphically represented and distinguishes a person’s goods or services from those of others. This definition includes different forms, including shapes, packaging, and a combination of*

¹⁰ Shreya Patel, *Comparative Study of Non-Traditional Trademarks in India and USA* (May 1, 2026).

¹¹ G Balaji, *Non-Traditional Trademarks in India – Challenges, Milestones & Future*, De Penning & De Penning (Nov. 12, 2025), <https://depenning.com/blog/securing-non-traditional-trademarks-in-india-challenges-milestones-and-future-prospects/> (last visited Dec. 13, 2025).

colors.¹² As explained in section 2(1)(m)¹³ a 'mark' includes devices, brands, logos, names, signatures, words, and more.

The focus of the paper is to examine the position of unconventional trademarks in India. This was not included in the 1999 Act and had to be taken into account only by judicial decisions. The Trade Marks Manual was last updated in 2015 and mentions 'unconventional trademarks', which include 'color trademarks', 'sound marks', 'shape of goods, packaging', and 'smell trademarks. Under the Trademarks Act, 1999, "shapes of goods and packaging" is considered a mark.

In order to harmonize domestic trademark law with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), moves were made in this direction. *Article 15 of the TRIPS Agreement provides that the term trademark is only applicable to "representable" marks.*¹⁴ But the new Trademark Rules of 2017 have designated a specific provision for an unconventional trademark. Rule 26, sub-rule 5, "Representation of Trademark" allows sounds to be registered as a trademark where they are provided in MP3 format, 30 seconds in duration, are clearly audible, and are accompanied by graphical notation.¹⁵

CATEGORIES OF NON-CONVENTIONAL TRADE MARKS IN INDIA

1. SOUND MARKS

Sound marks commonly exist in the form of "audio" marks like jingles, tunes, and sound logos that serve the purpose of identifying a business or product. In India, sound marks can be registered by submitting audio clips and musical notations, which will ensure the local representation of the sound. While the Act does not clarify what is meant by sound marks, any trademark capable of being graphically represented and distinguishing the goods/services shall be registered in accordance with Section 2(1) (zb) of the Act. Further, Rule 26(5) provides the procedure for registering sound marks.

- i. The sound mark was first registered in India by Yahoo

¹² Trade Marks Act, No. 47 of 1999, § 2(1)(zb), India Code (1999).

¹³ Trade Marks Act, 1999, § 2(1)(m), India Code (1999) (defining "mark" to include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging, combination of colours, or any combination thereof).

¹⁴ Article 15(1) of the TRIPS Agreement provides that any sign capable of distinguishing the goods or services of one undertaking from those of others may constitute a trademark, and Members may require visual perceptibility as a condition of registration. See TRIPS Agreement, *supra* note 27, art. 15(1).

¹⁵ Trade Marks Rules, 2017, r. 26(5), Gazette of India, Extraordinary, Part II, sec. 3(i) (Mar. 6, 2017).

- ii. The famous ICICI jingle is also an example of a registered sound mark.

The applicant for registration of sound marks has to give a sound representation of the sound, usually in the form of musical notes or a sound spectrogram. In addition, the sound should be distinctive and should be capable of indicating the source of the goods/services.¹⁶

2. COLOUR MARKS

Colour marks are made up of specific colors, or particular combinations of colours, that are used to identify and distinguish goods or services. In India, colours are generally considered functional or descriptive, and registration of colour marks is strictly examined. A prominent illustration is Cadbury's efforts to register the color purple (Pantone 2685c) for its chocolate packaging. At first, Cadbury managed to register the mark, but this was overturned because colour did not have inherent distinctiveness.¹⁷ The colour must have acquired distinctiveness through extensive use, and it must be exclusively used in connection with the applicant's goods or services to be registered as a colour mark.

The Delhi High Court has issued mixed verdicts. A red and white color combination was saved by the Delhi High Court from getting cancelled in *Colgate Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd. (2011)*¹⁸ It was filed for protection as a trademark by the company. However, inconsistencies have been shown in subsequent cases, with some colour marks not being registered for lack of distinctiveness or functionality.

In the earlier case, in 2007, Cipla Ltd. brought suit against MKI Pharmaceuticals for an injunction against its use of an orange colour similar to that used on the plaintiff's products; the court took a different approach from the previous one. By contrast, the court ruled that colours may not be monopolised, and copying the colour of another product is not considered to be passing off.¹⁹

3. SHAPE TRADEMARKS

The shape of a product may be protected as a trademark where the consumer is strongly associated with the product. Trademark protection extends beyond the colour and texture of a product and may cover its shape where the consumer is strongly connected to the product. The Trademark Act, 1999, and the UK Trademark Act 1994 recognized that shape can be

¹⁶ Indian Trademark Registry, Guidelines for Registration of Sound Marks (2017), <https://ipindia.gov.in>.

¹⁷ Cadbury UK Ltd. v. Comptroller General of Patents, Designs, and Trademarks, (2018) 248 DLT 1 (India).

¹⁸ Colgate Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd., (2003) 108 DLT 51 (Del.).

¹⁹ Cipla Ltd. v. M.K. Pharms., 2008 (36) P.T.C. 166 (Del. 2007).

trademarked. But the difficulties of registering shape marks, alongside other nontraditional trademarks, are substantial, particularly in terms of the challenges of how to graphically represent a shape mark and how to establish its distinctiveness. Despite these challenges, many companies have managed to protect their shapes - examples: Toblerone triangle, Zippo lighter, Coca-Cola bottles, etc. In many cases, Indian courts have supported the use of shapes as trademarks, as shown in their rulings.²⁰

Example: *Lilly ICOS LLC and Anr. vs Maiden Pharmaceuticals Ltd.*²¹ The plaintiff said that the defendant copied their special almond shape. As a result, the court granted the defendant an injunction, knowing they had taken the shape to deceive.

In *Gorbatschow Wodka KG v. John Distilleries Ltd. (2017)*,²² The Bombay High Court saved the unique bottle design of a vodka brand, which shows how important non-traditional marks are to brand identity.

4. MOTION TRADEMARKS/MOVEMENT TRADEMARKS

Only a few countries allow the registration of trademarks linked to motion pictures, videos, and films. Taste marks are especially hard to register, though some places may accept flavor trademarks if the taste is clearly described and not related to the product's functional features. Like scent marks, taste marks must be distinct from the product's natural use, and registering them for services is still widely discussed. As a result, motion marks are becoming more popular than other non-traditional trademarks.²³

In 2017, Amazon Technologies²⁴ Inc. registered the moving light sequence from its Echo device as a motion trademark in India.

5. SMELL TRADEMARKS

Smell is one of the strongest human senses and can easily evoke memories. While many countries now recognize product smells as trademarks, the registration process is still difficult because these smells cannot be visually shown and require considerable effort to prove their uniqueness from the product.

²⁰ Dr. Mohan Dewan, *Registering Shapes in India: Guidelines and Processes*, Lexology (July 29, 2023).

²¹ *Lilly ICOS LLC and Anr. v. Maiden Pharmaceuticals Ltd.*, 2009 (39) PTC 666 (Del.).

²² *Gorbatschow Wodka KG v. John Distilleries Ltd.*, 2011 (4) BomCR 1 (Bom.).

²³ Archi Bhatia, Registration of Motion as Trademark, iPleaders (July 27, 2023), <https://blog.ipleaders.in/motion-mark-as-trademark>.

²⁴ Indian Trade Mark Registration No. 3,468,096 (Class 35) (filed Jan. 27, 2017) (Amazon Technologies, Inc.), Trade Marks Registry, India.

As of May 2018, Hasbro Inc., a leading toy manufacturer, was granted registration for a sweet, subtly musky vanilla scent, highlighted with faint notes of cherry, combined with the smell of salted, wheat-based dough in its product 'Play-Doh'.²⁵

6. TASTE TRADEMARKS

It is challenging to register taste marks as non-traditional trademarks, although in certain nations, flavor markers can be used independently to differentiate products. A written description of the taste is commonly submitted by applicants. Just like smell marks, a taste mark must be unique and not reflect the product's natural function, so the flavor should be treated as if it were bottled up as an item. The registration of taste marks for services continues to be a subject of dispute, adding more complexity.²⁶

LEGAL FRAMEWORKS FOR INTERNATIONAL AGREEMENT

THE TRIPS AGREEMENT

In the formal sense, the TRIPS Agreement refers to the Agreement on Trade-Related Aspects of Intellectual Property Rights. It is an important international agreement that lays down the minimum standards for the protection of intellectual property rights, such as trademarks. According to Article 15 of the agreement,²⁷ a trademark means any sign or group of signs that allows the products and services of one company to be distinguished from those of another company.²⁸ Thanks to its broad definition, TRIPS includes some non-traditional signs like colors, forms, and sounds as long as they can be represented in some way and can identify particular products and services. Nevertheless, TRIPS do not require that each non-traditional symbol be registered as such, as enforcement of this rule is subject to the laws of a particular country.²⁹

THE PARIS CONVENTION

²⁵ U.S. Trademark Registration No. 5,467,089 (Class 28) (filed May 15, 2018) (Hasbro Inc.), U.S. Patent and Trademark Office.

²⁶ Thomas A. Gallagher, Non-Traditional Trademarks: Taste/Flavour, *The Trademark Reporter* (July 27, 2023), http://www.inta.org/TMR/Documents/Volume%20105/vol105_No3_a4.pdf.

²⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 15(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

²⁸ T. Saroja Devi, *An Analysis of New Developments in Unconventional Trademarks*, 6 *Int'l J. L. Mgmt. & Humans* (2023).

²⁹ TRIPS Agreement, *supra* note 27, art. 15.

The Paris Convention is one of the oldest international agreements regulating intellectual property. It obliges its parties to grant national treatment when it comes to the protection of trademarks; however, it does not specify non-traditional symbols. However, its basic principles support the idea that if a sign can become a trademark, it has to be protected, provided that the internal laws of certain states allow it.³⁰

THE MADRID SYSTEM

The Madrid Agreement and Madrid Protocol establish a framework for international trademark registration, known as the Madrid System. This mechanism is in place. The treaties don't specify which trademarks are permissible for registration, but the general principle is that trademarked products can be registered in an applicant's country of origin. A country that acknowledges non-traditional trademark rights, such as sound or color marks, can also register them in other countries through the Madrid System. By using this system, the brand owner's mark can be safeguarded against worldwide infringement.³¹

THE SINGAPORE TREATY ON THE LAW OF TRADEMARKS

International harmonization of trademark law was achieved through the Singapore Treaty of 2006. Various domains are covered by it, which safeguard virtual trademarks, such as color marks, motion marks, holograms, and position marks. The treaty also calls for clarification on how states should represent and describe these marks in trademark applications.³² While it doesn't specifically recognize all non-traditional marks, it does provide a basis for acknowledging and protecting these marked items.³³

COMPARATIVE ANALYSIS WITH GLOBAL PRACTICES

The increasing prevalence of non-traditional trademarks to differentiate brands in the global market has prompted countries worldwide to reconsider their patent protection policies. A few countries have implemented more extensive marketing strategies and administrative procedures, while others are less keen on registering unconventional trademarks, often because they prioritize making them predictable and uncomplicated rather than creating innovative products. This section evaluates the strategy of the United States, the European Union, and two

³⁰ *Paris Convention for the Protection of Industrial Property*, Mar. 20, 1883, 21 U.S.T. 1583.

³¹ Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, Dec. 27, 1989, 28 U.S.T. 764.

³² Chandana & Malagi, *supra* note 3.

³³ Singapore Treaty on the Law of Trademarks, Mar. 27, 2006, S. Treaty Doc. No. 110-2 (2007).

common law jurisdictions (Australia and the UK) and outlines their developments, procedural requirements, and achievements with respect to India's position.³⁴

EUROPEAN UNION (EU)

A robust system for safeguarding non-traditional trademarks is in place through the European Union Intellectual Property Office (EUIPO). The EU's preference for precise and unambiguous representations, which go beyond conventional visual imagery, is the reason for this in relation to non-traditional trademarks. The EU was one of the initial establishments to acknowledge sound marks.³⁵ It has registered both the sound marks, like the Nokia ringtone, and color mark for shoes, such as the red-colored Christian Louboutin soles. The EU's approach is certainly flexible and adaptable, allowing businesses to obtain protection for various non-standard trademarks. The EU's lessons can be utilized in India to create a robust trademark system that caters to diverse business and consumer preferences.³⁶

The European Court of Justice (ECJ) ruled in the case of *Sieckmann [C-273/00]* that to be eligible for trademark registration, a sign must be “clear, precise, self-contained, easily accessible, intelligible, durable, and objective.”³⁷ This decision has had an impact on how the EU views the registration of non-conventional trademarks, including sound trademarks, which are expressed through musical notations and sounds [4].

In the case of *Shield Mark BV v. Joost Kist [Case C-283/01]*, the court evaluated the possibility of the visual representation of a smell trademark and found that it was possible if it was represented transparently, for example, through chemical symbols or detailed descriptions.³⁸

UNITED STATES OF AMERICA

Non-traditional trademarks have gained wide acceptance in the US as a result of the extensive efforts of the country to ease the trademark process under the Lanham Act (15 U.S.C. § 1051 et seq). The US Patent and Trademark Office (USPTO) allows for registration of non-traditional trademarks (e.g., sounds, scents, colors), as long as the marks in the form of

³⁴ Adv. Pooja Kumari, *A New Dimension of Distinctiveness: Legal Frameworks Governing Unconventional Marks*, 2 *Advances Consumer Rsch.* 973 (2025).

³⁵ Anjali Shekhar & Nikhil Jain, *Beyond Logos: Non-Traditional Trademarks and Their Legal Perspective*, 4 *Int'l J. Jud. L.* 9 (2025).

³⁶ European Union Trade Mark Regulation, 2017/1001, art. 4, 2017 O.J. (L 154) 1.

³⁷ Case C-273/00, *Sieckmann v. Deutsches Patent- und Markenamt*, 2002 E.C.R. I-11737.

³⁸ Case C-283/01, *Shield Mark BV v. Joost Kist*, 2003 E.C.R. I-14313.

trademarks possess distinctiveness³⁹. Although graphical representation may be required at times when trademark registration occurs, it is still not strictly necessary.⁴⁰ Its aim is for the public to be made aware of the trademark.

Based on the ruling in *Qualitex Co. v. Jacobson Products Co.*⁴¹ In this case, the U.S. Supreme Court established that the uniqueness of the trademark is the main function of trademarks rather than graphics. At the same time, there is a U.S. functionality doctrine that states that trademarks must have nothing to do with the product's functionality.

Tiffany Blue is one of the best-known commercial examples of a color mark that has acquired distinctiveness through its extensive use, and the legal system also recognizes motion marks such as animated logos. The logo of The Walt Disney Company is one of the successfully registered motion marks. The candidates intending to register their marks have to file their applications with the USPTO by attaching a clear video of the motion.⁴²

The NBC Jingle, registered as a non-traditional mark in 1970, was one of the first and most well-known examples of this. It is known for its sensory marks. Other companies, including MGM's iconic lion-like sound and the distinctive 20th-century Hollywood sound, were also able to register their trademarks after this success. The United States has openly welcomed new developments in this area, always taking a more progressive approach than most concerning nontraditional markets.⁴³

UNITED KINGDOM

The EU's updated methodology has been largely followed by the UKIPO, despite Brexit. Impartiality and clarity are the main concerns, not graphics. The application supports the creation of detailed descriptions for position and multimedia markings, as well as digital files for sound and motion markers. The presence of color marks requires extensive proof of their acquired distinctiveness. Atypical marks in UK courts have been approached with caution and

³⁹ U.S. *Trademark Act (Lanham Act)*, 15 U.S.C. § 1051 et seq. (2018).

⁴⁰ Linda B. Samuels & Jeffrey M. Samuels, *Colour Trademarks: Protection Under U.S. Law*, 15 J. Pub. Pol'y & Mktg. 303, 303–07 (1996).

⁴¹ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995).

⁴² A. Kumar, *The Challenges of Non-Conventional Trademarks in India*, 9(2) Indian J. Intell. Prop. 112, 112–30 (2023).

⁴³ Swati Mehra, *Exploring the Realm of Non-Traditional Trademarks: An Indian Perspective*, Mondaq (Jan. 11, 2025)

a liberal attitude, with heightened scrutiny of market circumstances surrounding the occurrences and public perception.⁴⁴

OTHER JURISDICTIONS

In several countries, including Australia and Japan, the recognition of trademarks has become more unconventional. Australia permits the recording of sound, smell, and shapes if they are distinctive and can be presented graphically. Japan is a leader in trademark technology, with the registration of motion figures and holograms as evidence.⁴⁵ As India continues to update its legal system, it may draw inspiration from these locations where progressive approaches to trademark protection are crucial.

LEGAL CHALLENGES IN REGISTRATION AND ENFORCEMENT OF NON-CONVENTIONAL TRADEMARKS IN INDIA

To ensure compliance, non-traditional trademarks need not be registered. A mark that is highly recognizable by consumers can be granted trademark protection. Nevertheless, registration may provide additional exclusive rights to a trademark that can enhance its protection.⁴⁶ To be eligible for registration, any mark must have demonstrated distinctiveness and satisfy legal conditions. For example, non-traditional trademarks are determined by the unique features of a product, such as its shape, scent, hue, or texture, that the general public recognizes, rather than the product's title.⁴⁷

A. DISTINCTIVENESS

The first hurdle in this situation is proving that the entity is 'distinctive'. A trademark should be distinctive and distinctive enough to distinguish its products and services from the products and services of other companies.⁴⁸ Distinctiveness is a tricky thing to establish, especially if it is a color mark or any sound that can be heard. In most cases, the applicant will give evidence of its uniqueness having been established through continual use and consumer recognition.⁴⁹

⁴⁴ Pooja Kumari, *A New Dimension of Distinctiveness: Legal Frameworks Governing Unconventional Marks*, 2 *Advances Consumer Rsch.* 973 (2025).

⁴⁵ WIPO, *Comparative Analysis of Trademark Laws 45-50* (2020), <https://www.wipo.int>.

⁴⁶ Gautmi Goel & Kanika Tyagi, *Beyond Traditional Boundaries: Protection of Non-Conventional Trademarks in Modern Commerce*, 5 *Int'l J. Advanced Legal Rsch.*, no. 3 (2025).

⁴⁷ Mugdha Palsule & Nikita Lakhani, *India: Conventionalisation of Non-Conventional Trade Marks*, 1 *E-J. Acad. Innovation & Rsch. Intell. Prop. Assets* 67 (2020).

⁴⁸ Palsule & Lakhani, *supra* note 47.

⁴⁹ Ayushman Singh, *The Rise of Non-Conventional Trademarks in India: Legal Framework, Challenges, and Future Prospects*, Khurana & Khurana (Aug. 19, 2024), <https://www.mondaq.com/india/trademark/1507624/the-rise-of-non-conventional-trademarks-in-india-legal-framework-challenges-and-future-prospects>.

In *Gillette v Reckitt Benckiser*, the Delhi HC stated that Reckitt using a blue razor in its advertisement was inappropriate. The court rejected Reckitt's argument that a different form set its razor apart, noting that the defendant could have chosen to have the razor a different color and that the blue color would create a perception in the mind of the viewer that the razor was Gillette's product.⁵⁰ The decision reveals the Indian Courts' attitude on the concept of colour as a distinguishing characteristic of a product.

In *N.R. Dongre v. Whirlpool Corporation*, the Apex Court upheld the finding that Whirlpool's use of the term “wash whirl” had created distinctiveness, with very wide customer familiarity. In addition, this case was one of the first to recognize the validity of multinational trademark claims.⁵¹

In *Christian Louboutin v Abu Baker & Ors*, the Delhi High Court ruled the red sole to be a well-known mark and registered it as a trademark on November 25, 2015.⁵² In the second Delhi High Court case, however, the court denied the same colour protection in another context, ruling that it was unfair to allow Louboutin to have a monopoly over the colour red in the context of shoes, as it would be too broad and not sufficiently distinctive.

B. GRAPHICAL REPRESENTATION

One of the most fundamental requirements of a trademark, as per tradition, is that it is a graphic trademark representable. This is easy to say if the mark is visual, but difficult if the mark relates to sound, smell, or taste. Other “senses” markings are still a controversial topic, but the Indian Trade Markings Registry has been quite liberal in enabling applicants to file the marks in any other form, such as a “spectrum of sound” in the case of sound marks.⁵³

In *Swizzels Matlow Ltd's Application (No. 2)*,⁵⁴ the Court expressly stated that, to enable traders to easily distinguish between the registered and the non-registered marks and to be able to clearly understand what the trademark is, there needs to be a “graphical representation” of an “unconventional” trademark. This also arises because the infringing criterion would apply to

⁵⁰ *Gillette India Ltd. v. Reckitt Benckiser (India) Ltd.*, CS(OS) No. 251/2016 (Del. H.C.).

⁵¹ Vrinda Chaturvedi, *Charting the Unconventional: Recognition and Challenges of Unconventional Trademarks in the Indian IPR Regime*, (Apr. 2, 2024).

⁵² *Christian Louboutin SAS v. Pawan Kumar*, 2018 (73) P.T.C. 403 (Del.).

⁵³ Ayushman Singh, *The Rise of Non-Conventional Trademarks in India: Legal Framework, Challenges, and Future Prospects*, Khurana & Khurana (Aug. 19, 2024).

⁵⁴ Anahida Bhardwaj, *Intellectual Property in Store Layouts*, 3 Int'l J. Legal Sci. & Innovation 263 (2020).

any mark that is inefficiently represented, as per the Trademark Act, Section 29, to the complainant's evidential advantage.

C. DOCTRINE OF FUNCTIONALITY

As per the concept of functionality, if something is essential to the use, purpose, cost, or quality of the product, it cannot be registered as a trademark, as it would grant one trader an unlawful monopoly. In brief, functional characteristics, both technical and aesthetic, are left open for competition and cannot be registered just because they help to identify a product.⁵⁵

D. CONFLICT WITH THE STATUTE

The first hurdle in getting Unconventional traditional registration in India is the trademark in 1999. The shape marks should comply with the conditions specified in Section 9(3) of the Trade Marks Act, 1999. An absolute ground of refusal to register a trade mark under Section 9(3) of the Trade Marks Act means that no shape of goods can be considered to be a trade mark if it is (a) inherent to the nature of the goods, (b) necessary to achieve a technical effect, and (c) provides substantial added value to the goods.⁵⁶ If a colour combination is used as a necessary part of a trade mark and is applied for as a trade mark, the Tribunal has freedom and/or discretion to decide what the distinctive character of the trade mark is under Section 10 of the Trade Marks Act.⁵⁷

E. LIMITED LEGAL PRECEDENTS

Another problem is that there are no legal cases or examples in India that deal with unusual trademarks. Some courts have acknowledged the importance of non-traditional marks, like the Nokia melody in the Nokia Corporation case. However, very few cases have given clear guidance on how these marks should be handled under Indian law.⁵⁸ The lack of court cases makes it hard for businesses to know how strong and enforceable non-traditional trademarks are in India. People are confused about how NTT protection works because there are inconsistent rulings, and it's unclear how to show that a mark is unique, especially when it's new or not used often.⁵⁹

⁵⁵ Mugdha Palsule & Nikita Lakhani, *India: Conventionalisation of Non-Conventional Trade Marks*, 1 E-J. Acad. Innovation & Rsch. Intell. Prop. Assets 67 (2020).

⁵⁶ Trade Marks Act, No. 47 of 1999, § 9(3) (India).

⁵⁷ Trade Marks Act, No. 47 of 1999, § 10 (India).

⁵⁸ *Nokia Corporation v. Unknown*, CS(OS) No. 1685/2002, Delhi High Court (2002).

⁵⁹ Anjali Shekhar & Nikhil Jain, *Beyond Logos: Non-Traditional Trademarks and Their Legal Perspective*, 4 Int'l J. Jud. L. 9 (2025).

F. REGULATION

Non-conventional trademark infringement can be harder to prove than regular trademark infringement since it may be necessary to show that the mark has been used in a way that is likely to confuse consumers.

G. MISCELLANEOUS

The process for atypical trademarks becomes harder because of extra factors like subjectivity, the complexity of the marks, and the lack of clear examples when dealing with trademarks based on smell or taste. It is hard for India to follow any foreign system that uses the TRIPS Agreement or court decisions to protect non-traditional trademarks, even when there's no set global process in place.⁶⁰

SUGGESTIONS FOR IMPROVING NON-TRADITIONAL TRADEMARK (NTT) PROTECTION IN INDIA

To establish a legal environment that fosters greater innovation in brands, there is a need for reform in the field of non-traditional trademarks in India in order to create a predictable legal environment and promote innovation in brands. Such changes include internationalization of the law, streamlining of registration procedures, the development of examiner and judicial competence, and raising public awareness.⁶¹

- i. **Relax graphical representation requirements:** Allow other means of representation (such as digital description for motion marks; sound recording for sound marks) under the Trademarks Act and Rules.⁶²
- ii. **Amendment to the *Trade Marks Act, Section 2(1)(m)* :** To include NTTs (sounds, fragrances, tastes, motions, holograms, etc.) in the Act and amend the section to cover those that are not easily visually representable.

⁶⁰ Vrinda Chaturvedi, *Charting the Unconventional: Recognition and Challenges of Unconventional Trademarks in the Indian IPR Regime*, [Website Name] (Apr. 2, 2024).

⁶¹ Anjali Shekhar & Nikhil Jain, *Beyond Logos: Non-Traditional Trademarks and Their Legal Perspective*, 4 Int'l J. Jud. L. 9 (2025).

⁶² S. Chandana & Anisha S. Malagi, *Non-Traditional Trademarks: A Comparative Analysis of the Indian, US, and European Legal Frameworks*, 6 Int'l J. Advanced Legal Rsch. (Issue 1) (2025), <https://www.ijalr.in/>.

- iii. **Transparency in proceedings** - Need to amend Trademark Rules to specify the procedure for filing a motion for taste and aroma trademarks and other related trademarks (such as chemical data, descriptions, and video formats).
- iv. **Establishment of Detailed rules:** The Indian Trademark Office should establish detailed examination rules for non-traditional marks for uniformity and certainty.
- v. **Best practices internationally:** Tried and tested approaches from the United States, the EU, and Australia; e.g., an online NTT registry/database, flexible representation criteria, etc.
- vi. **Outline Distinctiveness Standards:** based on empirical consumer perception research, set more precise standards of acquired and intrinsic distinctiveness in non-traditional marks.

CONCLUSION

Although non-traditional brands have become a significant and essential part of the modern-day brand system, Indian law is not yet sufficiently protective of these brands. The Trademarks Act of 1999 and the Trademarks Rules of 2017 give a general idea of the system, but some issues, like the new non-traditional brand's distinctiveness or graphic representation, and lack of experience in courts, make it difficult to accept and implement. Comparative investigation shows that the approaches to non-conventional trademarks, such as sound, colour, shapes, movement, etc., vary in other countries, including in the United States, the United Kingdom, and the EU.