



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2025

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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INDIA'S FIRST SMELL TRADEMARK: WHAT THE SUMITOMO ROSE FRAGRANCE ORDER MEANS FOR COPYRIGHT LAW

~ Tanisha Chauhan

ABSTRACT

Perfume houses can trademark a bottle's name, packaging, and advertising, but not the scent itself. The reasoning has always been practical: no one could pin a smell down precisely enough for a court. That changed in November 2025, when the Trade Marks Registry approved India's first olfactory trademark, the rose fragrance Sumitomo Rubber Industries has applied to its tyres since the 1990s¹, based on a seven-dimensional model that translated the smell into data. It is a trademark decision, not a copyright one, but it confronts the old excuse that smell cannot be precisely represented.

A FAMILIAR GAP IN PERFUME PROTECTION

What a perfume house has never been able to claim is fragrance protection. In 2006, the French Cour de Cassation held in *Bsiri-Barbir v. Haarmann & Reimer*² that a perfume is a product of technical know-how, not authorial expression, and so isn't a protectable "work of the mind." Three days earlier, the Dutch Supreme Court in *Lancôme v. Kecofa*³ reached the opposite conclusion, holding that the open-ended definition of a "work" under Dutch copyright law could include a scent bearing its creator's personal stamp. That division has never been resolved, and when the debate returned to French courts in 2013, they went the other way again. There is, however, a more fundamental, evidentiary objection, articulated by the CJEU in *Sieckmann*⁴ in 2002. An applicant sought to register the smell of methyl cinnamate using a chemical formula, a written description, and a physical sample. The Court rejected all three: the formula meant nothing to an ordinary person, the description was subjective, and the sample would degrade. That case produced a seven-part test, a representation must be clear, precise, self-contained, accessible, intelligible, durable and objective, that has shaped scent-mark law

¹Sumitomo Rubber Indus. Ltd., Application No. 5860303, Trade Marks Registry (CGPDTM), Order dated 21 Nov. 2025 (India).

²*Bsiri-Barbir v. Haarmann & Reimer*, Cass. com., 13 June 2006 (Fr.).

³*Lancôme v. Kecofa*, HR 16 June 2006 (Neth.).

⁴Case C-273/00, *Sieckmann v. Deutsches Patent- und Markenamt*, 2002 E.C.R. I-11737 (CJEU 2002).

ever since. Sixteen years later, in *Levola Hengelo*⁵, the CJEU held that the taste of a cheese spread could not be copyrighted, because taste is too subjective to pin down. Courts have since treated smell and taste as functionally unrepresentable.

WHAT CHANGED WITH SUMITOMO

Sumitomo filed its application for the rose-scented tyre mark in March 2023, and the Registry's first objection was the one Sieckmann had anticipated: the mark could not be graphically represented. With no Indian precedent on scent marks, the Registry appointed senior counsel Pravin Anand as *amicus curiae*, and the case turned on scientific work from IIT Allahabad, where researchers had translated a smell into a seven-dimensional vector, scored against categories like floral, fruity, woody, nutty, pungent, sweet, and minty, and plotted on a graph with fixed axes. Rather than a prose description, the applicant gave the court a number to work with.

The argument was that this representation satisfied Sieckmann's criteria: clear, precise, and accessible, since a trained examiner could read it consistently. The Registry accepted this, along with Sumitomo's argument that a rose scent has no functional connection to a tyre and is therefore inherently distinctive⁶ rather than descriptive. The application was ordered advertised under Section 20 of the Trade Marks Act, 1999⁷, making it India's first olfactory mark. This isn't the end of the story: a notice of opposition has since been filed, and critics note there is no scientific consensus on how many "basic" odour dimensions exist, so a different team could have built a different model.

WHAT IT MEANS FOR COPYRIGHT, EVEN THOUGH IT ISN'T A COPYRIGHT CASE

Treating the Sumitomo order as resolving copyright questions would be a mistake. Trademark law asks a narrow question, does this sign distinguish one trader's goods from another's? Copyright asks a different one, is this work original, and can it be identified with the requisite clarity? Satisfying the former does not answer the latter. The functionality doctrine that let the Registry treat the tyres' rose scent as arbitrary, and therefore protectable, has no proper analogy in a copyright claim over a perfume, where the scent is the entire product rather than an adjunct. What the order does settle is narrower but still significant. Read alongside *Sieckmann*, *Levola Hengelo*, and the French case law, it shows scent has never been captured with the precision legal standards for words, images, and sounds demand, harder to defend now that Gas Chromatography-Mass Spectrometry and the Electronic Nose can yield reproducible chemical

⁵Case C-310/17, *Levola Hengelo BV v. Smilde Foods BV*, ECLI:EU:C:2018:899 (CJEU 2018).

⁶Cf. Case C-487/07, *L'Oréal SA v. Bellure NV*, 2009 E.C.R. I-5185 (CJEU 2009) (on distinctiveness and unfair advantage in trade mark law).

⁷The Trade Marks Act, No. 47 of 1999, §§ 2(1)(zb), 9(1)(a), 20, India Code (1999).

fingerprints. The IIIT Allahabad model shows a smell can, in at least one instance, be reduced to a fixed, numerical representation a national registry found adequate.

WHERE THIS LEAVES THE COPYRIGHT QUESTION

The takeaway is narrow. A court can no longer dismiss a copyright claim over a scent by simply assuming a smell is beyond objective description, that assumption must now be argued, not presumed. A court could still reject a seven-dimensional model as inconclusive, or hold that the originality test in *Eastern Book Co. v. D.B. Modak*⁸ demands a higher threshold of creativity and skill than the trademark test does.

That would be a reasoned dismissal, not a 2002-era, technologically outdated one. With India's ₹4,500-crore fragrance market and a large unregulated 'dupe' scent industry⁹, the stakes are real. For now, Sumitomo remains a trademark ruling, but it has dismantled a key argument against copyright protecting scent.

CONCLUSION

The CGPDTM's decision to register Sumitomo's rose-scented tyre mark does not touch copyright law¹⁰, and was never meant to. Its real significance is that, for the first time in the Indian regulatory framework, a scent can be articulated in a form a legal system finds adequate, answering a question copyright law has treated as closed for two decades. Whether Indian courts would protect a fragrance¹¹ remains unknown; given the concerns around originality, functionality, and the lack of scientific consensus, the answer will probably still be no. What is certain is that the question will now be answered on evidence, not assumption.

⁸*Eastern Book Co. v. D.B. Modak*, (2008) 1 S.C.C. 1 (India).

⁹See, e.g., *Zino Davidoff SA v. Ramsons Perfumes Pvt. Ltd.*, Delhi Dist. Ct. (India); *Burberry Ltd. v. Petrol Perfume*, Delhi H.C. (India) (illustrating the scale of perfume-related trade mark disputes in India).

¹⁰The Copyright Act, No. 14 of 1957, India Code (1957).

¹¹See *Eastern Book Co. v. D.B. Modak*, supra note 8.