

# DISCUSSION ON VARIOUS NON-CONVENTIONAL TRADEMARKS

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**ABSTRACT:** *It is known that companies spend a considerable amount of energy and time in building brand awareness, goodwill and reputation among consumers. As Jeff Bezos very rightly said, "A brand for a company is like a reputation for a person." therefore, it is likely expect a good return on their investment in terms of consumer satisfaction and higher sales. Given the lightning pace at which technology is advancing, industries were mainly evolving in terms of design and innovation processes. Which resulted in increase in threats of plagiarism, piracy and intellectual theft. Intellectual Property was thus, formulated with an aim of protecting the innovation capabilities of firms and stifling anti-competitive tendencies. Trademarks form an integral part and aim on safeguarding the delusion and improper use of the mark. The article will however focus on the area of trademark law - non-conventional trademarks, with reference to the recent Indian Trademark Rules of 2017.*

**KEYWORDS:** *Trademark Law, Non-Conventional Trademarks, Sound Mark, Smell Mark, Trademark Rules, 2017.*

## INTRODUCTION

In recent years, trade mark registers as courts have discussed unprecedented trade mark cases, ranging from requests for textures, fragrances and single colours to the scream of Tarzan. This stems from the sense, which is possibly vague and tightly closed, of the word itself.

Article 15(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that 'any sign or hybrid of signs capable of distinguishing the goods or object of an agreement from those of other undertakings constituting a trade mark.' The intent of this Agreement of the World Trade Organization was also to protect and encourage the rights of intellectual property.

A trademark is defined as "a mark capable of being represented graphically and capable of distinguishing one person's goods or services from those of others and may include the shape, packaging and combination of colours of the goods." according to Section 2(1)(zb) of the Indian Trade Marks Act, 1999. Thus, any sign that carries out the demonstrative work of a trademark may be registered as one. There are some requirements that a trade mark should comply with in order to be recognised as a non-conventional trade mark that it should be intrinsically recognisable, that it should be appropriate to be depicted graphically and that it should be capable of distinguishing between goods. Marketing experts believe that unusual brands such as fragrance, tone, movement and colour can act as distinctive points of sale (USP's) of particular products and help distinguish them from competition.

## DISCUSSION

*Different types of marks:*

- Sound Marks

Sound plays an important part in identifying a product or service and thus serves the very purpose of a trademark. The first recorded sound label was indeed the legendary 'Lion Roar' of the Metro Goldwyn Mayer Corporation (MGM). In pursuance of its application for approval, MGM submitted a "Lion's roar" sonogram. Their application was rejected in the European Union but accepted in the United States. This was because of the change in the requirements for the two jurisdictions.

Two distinct approaches concerning the registration of sound marks have emerged internationally. Emphasis was put on the submission of musical notations in the United Kingdom and with a description including its mark. US law, however, requires reproduction of the sound through audio or video since it may also be intelligible to laymen. In the *Shield Mark* case, the European Court of Justice will now need to focus on the degree of graphic representation needed for non-musical and musical sound marks. According to the court, for musical sounds, a detailed transcription would suffice.

- Colour Marks

It is very often where we associate different brands with different colours. For instance, the popular red Christian Louboutin shoes, the purple hue associated with Cadbury chocolates, and even the light pink shade attached to the Barbie dolls from Mattel.

One of the criteria for colour marks is that they should be associated with a brand for a sufficiently long duration to be licenced as a trademark, which depends on the sense in which the colour is used. If a colour for any product is kept functional, then it cannot be registered.

If it is too abstract to treat a colour as a label is the subject to be debated. In the case of *Libertel*, the European Court of Justice ruled that, "An abstract colour per se cannot be presumed to constitute a sign." A colour is usually a basic property of objects. In this aspect, the landmark case is Cadbury's application for registration of the colour purple that it has been using on chocolate wrappers for more than 150 years. The Court of Appeal of the United Kingdom refused the application, arguing that the definition of Cadbury was not appropriate for the judges of the section to determine the extent and degree of protection sought by it. The company introduced the purple coloured trademark as a rectangular slab in the application and described it as 'a purple colour, as indicated in the application form, which applied to the whole visible surface or was the predominant colour, applied to the entire visible surface, of the product packaging.' In its opinion, the Court argued that the 'representation of the mark would result in the

- Scent Marks

Scent marks are the type of scent marks that have already produced greater debate among specialists in the field of trademarks. Smell is one of the most significant human senses, with marketers placing significant emphasis on linking their products to certain fragrances.

Registration of these scent marks is less necessary due to the apparent complexity of graphical representation. Although perfume marks may be registered in theory, practical registration is highly unlikely. Ralf Seikmann applied to the German Registry for the registration of a fragrance sticker. He referred to the substance's chemical structure and described its formula as "balsamically fruity with only a slight hint of cinnamon" along with explaining in words its scent. The Court held that although the formula was readily available, it would not be clear to the layman and, more substantially, lacked objectivity in the description. Chanel, a leading

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player on the market, also applied for the registration as a fragrance mark of its No. 5 perfume because the unique fragrance was the very essence of the product which was not allowed.

- Movement Marks

Movement marks typically take the form of an animation created by a computer and are therefore regarded as involving moving objects and human movements. The most well-known of these brands is arguably Microsoft's animated sequence of coloured dots spinning to form its logo. As is the rule for non-conventional trademarks, the mark serves the function of graphical representation and characteristics in nature. Even though this is comparatively simpler for motion marks, although representing the collection of movements, it is necessary for the proper sequencing of images. The registration required by the contract must clearly identify the motion mark along with the correct order and gesture type. This is especially important because there is never a "pure form" of this type of mark and almost always a combination of marks. "Toyota Motor Corporation's commercial featured a freeze frame, which showed actors jumping into the air at the end of an advertisement accompanied by the catchphrase "Wow, What a Feeling" The Australian Trademark Office accepted the motion mark registration application in 2012. In the case of an application for registration of the distinctive door movement of Lamborghini,' Lambo do do door movement,'

*The Position of Non-Conventional Trademarks within the Indian Jurisdiction*

A trademark is defined by the Trademarks Act, 1999 as "a mark capable of being graphically interpreted and capable of distinguishing one person's goods or services or that of others and may include the shape of goods, their packaging and colour combinations." The Trade and Merchandise Act 1958 was replaced by the 1999 Act and combined and amended the various trademark laws. This is done in accordance with the TRIPS Agreement. The old Act did not accept non-conventional trademarks, such as sounds, colours and smells. However, it was clarified under the new act that the revised meaning of marks was continually updated to include sound, smells, holograms and taste. Furthermore, in the Draft Trademark Manual for Practice and Procedure, 'Mark' is specifically defined as having a broad definition, as opposed to excluding it from its reach. The Trade Mark Manual notes that the concept of a trade mark is an all-inclusive definition in which, in order to distinguish between the goods and services of one individual and another, a trade mark is only required.

The 2017 Trademark Laws, which replaced the earlier 2002 rules, updated the processes, crystallized the registration of sound marks and made specific provisions for the online filing of registrations. In 2008, India granted Yahoo Inc.'s three-note yodel the registration of the first sound mark and thus laid the foundation stone for the identification of non-conventional sound marks. Other foreign brands to be licenced include Allianz Aktiengesellschaft and Intel. The first Indian organisation to receive registration for its jingle in 2011 was ICICI Bank.<sup>1</sup> Sound marks have also been registered in India by the National Stock Exchange (theme song), Britannia Industries (four note bell sound), Cisco, Edgar Rice Burroughs and Nokia. The court held that a single colour is entitled to protection under the law of passing off in the case of Coalgate Palmolive, but it was stated in *Cipla v MK Pharma* that the single colour is not a trademark and is incapable of protection under the law of passing off. In addition, in the case of *Dabur India Limited vs. Shree Baidyanath Ayurved Bhawan Pvt. Seven Towns Ltd. Ltd. and Ors.* The theory laid down in *Coalgate* was accepted by the High Court of Delhi vs.

Kiddiland and Ors.<sup>2</sup>, This clearly shows the uncertainty and inconsistency in India surrounding single colour trademarks. With the recent decision on the colour Purple in the Cadbury case in the UK, it is hoped that countries such as India would also have some impact. On the other hand, under the Trade Marks Act, registration of a colour combination is permitted. The Act, Section 10(1). The court held that a mixture of colours was a trademark under the Act in Colgate Palmolive Company v Anchor Health.<sup>3</sup>, From Deere and Co. Trademark, a mixture of yellow and green colours, along with the term JOHN DEERE and the emblem of the leaping deer, both of which were deemed by the courts to be "well-known marks capable of being registered.<sup>4 5 6</sup>

As a non-conventional mark, the smell mark and movement mark cannot be said as the much debated subject matter by the Indian judiciary as opposed to other marks, possibly because of the absence of their argument made under India. But, because of the absence of an active impediment on the part of the law, the potential prospects in this field are enormous.

### CONCLUSION

In India, the number of non-conventional trademarks registered is comparatively low in comparison to other jurisdictions. In comparison to other jurisdictions, the key explanation for this could be the success rate of Indian trademark applications and their rules. The 2017 rules that replaced the 2002 rules have different provisions incorporating the non-conventional trademark, but global trends and technological advances in this arena should be taken into account in future laws and regulations to ensure a consistent and efficient defence of intellectual property.

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Colgate Palmolive Company v. Anchor Health & Beauty Care Pvt. Ltd., (2003) DLT 51.

<sup>3</sup> Cipla Limited v M.K. Pharmaceuticals, (2007) (36) PTC 166 Del.

<sup>4</sup> Dabur India Limited v Shree Baidyanath Ayurved Bhawan Pvt. Ltd., (2012) (51) PTC441 (Del).

<sup>5</sup> Seven Towns Ltd. and Ors. v Kiddiland and Ors., (2016) (68) PTC308 (Del).

<sup>6</sup> Deere and Co. and Ors. vs S. Harcharan Singh and Ors. (2015) (63) PTC433 (Del).