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THE REQUIREMENT FOR THE DEGREE OF LL.M (BUSINESS  
LAWS)**

**TOPIC:**

**OPENING THE DOORS FOR NON-CONVENTIONAL  
TRADEMARKS: A STUDY OF OLFATORY AND AURAL  
MARKS**

**UNDER THE GUIDANCE AND SUPERVISION OF**

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**Id: LLM/938/2020**

## DECLARATION

I, **Lalitha Lakshmi Harika Kota**, do hereby declare that this dissertation titled **“Opening the Doors for Non-Conventional Trademarks: A Study of Olfactory and Aural Marks”** is an original work of research undertaken solely by me in partial fulfilment of LL.M (Business Laws) at National Law School of India University, Bengaluru. This dissertation has been made under the able guidance and supervision of Professor Dr. T. Ramakrishna. This is an original piece of work and all the sources have been cited and duly acknowledged. I further declare that no portion of this dissertation has been submitted anywhere for any degree or diploma.

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## CERTIFICATE

This is to certify that this Dissertation titled “**Opening the Doors for Non-Conventional Trademarks: A Study of Olfactory and Aural Marks**”, submitted by **Lalitha Lakshmi Harika Kota (ID: LLM/938/2020)** for her LL.M Degree for the academic year 2020-21 at the National Law School of India University, Bengaluru, is the result of bonafide research satisfactorily carried on by her under my guidance and supervision. This dissertation or any part thereof has not been submitted elsewhere for any other degree.

Date:

**Dr. T. Ramakrishna**

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Lalitha Lakshmi Harika Kota

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# **RESEARCH DESIGN**

## **STATEMENT OF PROBLEM**

The objective of the Trademark law is to distinguish the goods and services of a particular brand owner from that of his competitor and to prevent consumer confusion with respect to those goods or services. The traditional scope of trademarks includes any signs, symbols, words, logos, numerals or letters, shapes, packaging etc or any combination thereof. With the increasing competitiveness among the industries, it has become imperative for them to retain their consumer base by innovatively protecting their brand image and goodwill. This has led to expanding the frontiers of traditional trademarks to even include non-visual sensory perceptions like scents, textures, sounds, tastes to act as source identifiers. Therefore, there is a need to understand the significance of sensory marks in the era of immersive and sensory marketing.

Sensory marks like smells and sounds have faced serious handicaps in securing trademark protection. In the light of growing emphasis on immersive and sensory marketing, the role of smell marks and sound marks with regard to consumer perception of brand, their regulation across various jurisdictions, the challenges pertaining to their registration and the possible solutions deserves to be studied.

## **RESEARCH OBJECTIVE**

The objective of the research is to assess the scope and future prospects of olfactory and aural marks in modern branding and marketing strategies together with their impact on the consumer buying choices. It is also intended to study the framework of regulation of these marks across jurisdictions and the challenges associated with their registrability as trademarks. It is also the aim to examine the relevance of these marks in the Indian intellectual property landscape and suggest reforms to facilitate their incorporation into the trademark regime.

## **HYPOTHESIS**

The hypothesis of this research is that smell marks and sound marks, species of sensory marks, are significant and indispensable for the emerging era of immersive branding and deserve to be protected under the law of trademarks. Technological advances greatly aid in the representation of these marks and embracing them at the

earliest would enable the enterprises to innovate their approaches of reaching out to customers thereby boosting the competition in the market place.

## **RESEARCH QUESTIONS**

An attempt has been made to answer the following questions through this research:

1. In the current age of innovative branding, whether sensory marks like smells and sounds should be considered non-conventional at all?
2. How has the jurisprudence on smell and sound marks evolved across the jurisdictions of USA, EU and India?
3. Challenges encountered by the smell and sound marks in the course of their registration?
4. In the light of removal of graphical representation requirement under the EU trademark regime, what should be the standard form of representation for smell marks and sound marks?
5. What should be the approach of India towards protection of smell and sound marks?

## **RESEARCH METHODOLOGY**

This research is an exercise in qualitative research in order to evaluate and analyse the legal and regulatory framework pertaining to the non-conventional smell and sound marks and their growing significance in this digital era of innovative branding. It also reviews the position of smell and sound marks across the jurisdictions of USA, EU and India along with the international conventions, legal provisions and case laws. This study has utilized the doctrinal research methodology.

## **SOURCES OF DATA**

The inputs and the information used for this research have been obtained from the primary and second sources. Primary sources consisted of statutory enactments of various jurisdictions, regulations, international conventions and reports of international bodies. The secondary sources relied upon include books, journal articles and internet resources.

## **METHOD OF CITATION**

The method of citation used in this research is the “OSCOLA” style of legal citation (4<sup>th</sup> edition).



## **CHAPTERISATION**

This research work has been divided into 7 chapters including an introductory chapter and a concluding chapter. There are 5 substantive chapters.

### **CHAPTER 1: INTRODUCTION**

It sets out the backdrop for the project and provides insights into the nature of non-conventional trademarks and a brief description of the international regulatory regime.

### **CHAPTER 2: SENSORY BRANDING**

This chapter focusses on the evolving concept of sensory marketing and explores whether non-conventional marks remain so non-conventional in this era of rapid digitalisation. It concludes that these marks are no longer non-conventional in the strict sense of the term and are slowly evolving to become the new norm.

### **CHAPTER 3: OLFACTORY AND AURAL MARKS**

This chapter deals with smell and sound marks, the international and various national level regulatory mechanisms in place that deal with these marks. Reference has been made to the important judicial decisions that govern the registrability of smell and sound marks.

### **CHAPTER 4: CHALLENGES**

This chapter addresses the various challenges pertaining to registration of smells and sounds as trademarks.

### **CHAPTER 5: INDIA'S APPROACH TO SENSORY MARKS**

The thrust of this chapter has been to present the legislative framework governing the smell and sound marks in India and also emphasize the necessity for India to facilitate the incorporation of sensory marks into its trademark regime. It is stated that efficient utilization of latest technological progress to accommodate the sensory marks (smells and sounds in particular) could boost India's innovation and start-up ecosystem and place India as a global leader in intellectual property innovation.

## CHAPTER 6: CONVERGENCE OF TECHNOLOGY AND TRADEMARKS

This chapter provides insight into the various olfaction technologies available that can be used to bring about systemic changes in the trademark registration practices and welcome the smell and sound marks.

## CHAPTER 7: CONCLUSION

## **LITERATURE REVIEW**

1. Adekola T A, 'Abolition of Graphical Representation in EU Trademark Directive: Should Countries with Similar Provisions Follow EU's Footsteps' (2019) 24 Journal of Intellectual Property Rights 62.
  - This article critically evaluates the impact of removal of graphical representation on smell, sound and taste marks.
2. Bahattacharjee S and Rao G, 'The Broadening Horizons of Trademark Law – Registrability smell, Sports Merchandise and Building designs as Trademarks' (2005) 10 Journal of Intellectual Property Rights.
  - This article explores the registrability of smell marks.
3. Castaldi C, Block J and Flikkema M J, 'Editorial: Why and When Do Firms Trademark? Bridging Perspectives from Industrial Organisation, Innovation and Entrepreneurship, Industry and Innovation' (2020) 27 Industry and Innovation 1.
  - This paper explores the role of trademarks in innovation, entrepreneurship and industrial organization.
4. Conti C, Guarino M and Bacenetti J, 'Measurements Techniques and Models to Assess Odor Annoyance: A Review' (2020) 134 Environmental International.
  - An article elaborating the available olfactory technologies.
5. Chapagai R R, 'Economic Perspectives of Trademarks' (2018) 9 The Saptagandaki Journal 73.
  - An article on the economic significance of trademarks and its role in generating high incomes, value and surplus in the economy.
6. Chasser A H and C Wolfe J C, *Brand Review, Connecting Intellectual Property, Branding, and Creativity Strategy* (John Wiley & Sons, Inc 2010).
7. Eames C, 'Non -Traditional Trade Marks: Past Practice and a Look to the Future' (2017) 44 Exeter Law Review 37, 53.
  - An article arguing that removal of graphical representation has very little impact for smell marks because of the retention of Sieckmann criteria.

8. Elias B, 'Do Scents Signify Source – An Argument against Trademark Protection for Fragrances' (1992) 82 *The Trademark Reporter* 475, 476.
  - A classic article advocating against the registration of smell marks as they are highly subjective and do not identify the source.
9. Friedmann D, 'EU Opens Door for Soundmarks: Will Scentmarks follow?' (2015) 10 *Journal of Intellectual Property Law and Practice* 931.
  - This paper advocates for the utilization of technology to grant protection to the smell and sound marks. Author contends that after EU trademark amendments, these marks are no longer non-conventional.
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  - An article arguing in favour of non-traditional marks which prove to be memorable and long lasting.
11. Hammersley F M, 'The Smell of Success: Trade Dress Protection for Scent Marks' (1998) 2 *Marquette Intellectual Property Law Review* 105, 125.
12. Hawes J E, 'Fragrances as Trademarks' (1989) 79 *The Trademark Reporter* 134, 137.
  - A seminal article advocating in favour of the capability of smells to act as trademarks.
13. Karapapa S, 'Registering scents as community trademarks' (2010) 100 *The Trademark Reporter* 1335, 1336.
  - An article on the challenges faced by smell marks and the possible ways to meet the threshold of Sieckmann criteria.
14. Krishna A, 'An integrative review of sensory marketing: Engaging the senses to affect perception, judgement and behavior' (2012) 22 *Journal of Consumer Psychology* 332, 334.
  - An article examining the significance of sensory marketing for firms.
15. Lyalkov S, Carmona M, Congregado E, Ana Millan and Jose Maria Millan, 'Trademarks and Their Association with Kirznerian Entrepreneurs' (2020) 27 *Industry and Innovation* 153, 159.
  - An article studying the relationship between trademark registration and entrepreneurial activity across the European nations.

16. Porangaba L H, 'Acquired distinctiveness in the European Union: When Nontraditional Marks Meet a (Fragmented) Single Market' (2019) 109 The Trademark Reporter 620.
17. Reimer E M, 'A Semiotic Analysis: Developing a New Standard for Scent Marks' (2012) 14 Vanderbilt Journal of Entertainment and Technology Law 693.
  - An article proposing a different standard for determining the trademark infringement.
18. Sahay V, 'Conventionalising Non-Conventional Trademarks of Sounds and Scents: A Cross-Jurisdictional Study' (2011) 9 Nalsar Student Law Review 128, 135.
  - A cross-jurisdictional study of non-conventional mark protection under US, EU and India.
19. Shambarta M, 'Can non-traditional signs, such as colours, scents and sounds be protected under Trade Mark law? If not, what are the alternatives to do so? A comparative analysis between Europe and United States of America' (2014).
  - It is a comparative study of the trademark regime of US and EU and explores the alternative ways to make registration of smell, sound and color marks possible.
20. Sodhi G, Jain A and Singh R, 'Linkages between IP Protection and Start-ups in India' (2019) CUTS Institute for Regulation and Competition < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3589334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589334) > accessed 21 August 2021.
21. Strandberg J, 'Scents as Trademarks Today' (Bachelor's thesis, Tallinn University of Technology 2018).
  - It advocates that the dynamic nature of trademarks demands a clear and certain legal definition and robust enforcement mechanism for smell and sound marks.
22. Trillet G, 'Registrability of Smells, Colors and Sounds: How to Overcome the Challenges Dressed by the Requirements of Graphical Representation and Distinctiveness within European Union Law?' [2012] SSRN Electronic Journal 4.

- An article advocating for the registration of smell marks in keeping pace with the growing technology and competition and the need for enterprises to adopt sensory marks.

23. Viswanathan S M, 'Digital Scent Technology – A Critical Overview' (2020) 4 International Journal of Trend in Scientific Research and Development 218, 219

- This paper explains the digital scent technology and its working mechanism.

**Books:**

1. Lindstrom M, *Brand Sense: Build powerful Brands Through Touch, Taste, Smell, Sight and Sound* (Free Press 2005).

- It provides valuable inputs on the necessity of sensory branding for firms as well as the methods for engaging the senses of the consumers.

2. McCarthy T, *McCarthy on Trademarks and Unfair Competition* (5th edn, Thomas Reuters 2021).

- An authority on law of trademarks, this book helped in getting the basics of trademark right and get a grasp of the core trademark law concepts.

## CHAPTER 1: INTRODUCTION TO NON-CONVENTIONAL TRADEMARKS

A trademark refers to any sign that performs the function of distinguishing the goods and services of one enterprise from those of the other.<sup>1</sup> Trademarks function as badges of origin and serve to assure the customer of the quality of the products coming from a particular brand owner.<sup>2</sup> The objective of the Trademark law is to distinguish the goods and services of a particular brand owner from that of his competitor and to prevent consumer confusion with respect to those goods or services. Trademarked goods and services being traceable to the source, incentivise the producers to maintain an output of consistent good quality products.<sup>3</sup> They also act as promotional and advertising devices by enabling the customers to associate the goods and services with a particular brand. Trademarks also perform a market function of guiding and directing the consumers' purchase decisions by projecting the brand image of the products thereby helping the consumers to identify not only the products that they wish to purchase but also those that they wish to avoid.<sup>4</sup>

A trademark may consist of any sign or names, symbols, numerals or any combination thereof capable of distinguishing the goods or services of one enterprise from that of another.<sup>5</sup> Traditionally, trademarks have revolved around signs, symbols, words, logos, numerals or letters, shapes. The golden arches of McDonald's, Nike's swoosh, font of Google Inc, a bitten apple of tech giant Apple are a few popular and well-known marks. On the periphery of the traditional marks, lie those marks that engage all the five human senses. These marks, known as non-conventional or non-traditional or sensory marks, consist of visible and non-visible signs such as sounds, smells, texture, taste, moving images, colours etc.<sup>6</sup> Growing competitiveness of the

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<sup>1</sup> World Intellectual Property Organisation, 'Trademarks' <<http://www.wipo.int/trademarks/en/>> accessed 21 August 2021.

<sup>2</sup> Sudipta Bahattacharjee and Ganesh Rao, 'The Broadening Horizons of Trademark Law – Registrability smell, Sports Merchandise and Building designs as Trademarks' (2005) 10 Journal of Intellectual Property Rights 119.

<sup>3</sup> J Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (5<sup>th</sup> edn, Thomas Reuters 2021).

<sup>4</sup> Garry Trillet, 'Registrability of Smells, Colors and Sounds: How to Overcome the Challenges Dressed by the Requirements of Graphical Representation and Distinctiveness within European Union Law?' [2012] SSRN Electronic Journal 4.

<sup>5</sup> The Agreement on Trade Related Aspects of intellectual Property Rights, Article 15.

<sup>6</sup> WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications.

market has made it imperative for the firms to innovate and protect the brand image and goodwill of their products.<sup>7</sup> Non-traditional marks, with their ability to evoke sensory experiences, could prove to be gamechangers for the firms embarking to secure customer loyalty towards the brand and reduce the customers' search costs of acquiring information about the products. For instance, the plumerian blossom scented yarn, Pillsbury's doughboy giggle, MGM lion's roar etc.<sup>8</sup>

**The Paris Convention for the Protection of Industrial Property**, provides that the countries shall determine the conditions for filing of trademarks through domestic legislations.<sup>9</sup> It is silent as to the registrability of non-traditional trademarks.

**The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989** deals with the procedural aspects of international registration of a mark. It neither discusses the definition of a mark nor the criteria for a mark to qualify for international protection across several contracting parties.<sup>10</sup>

**The Agreement on Trade Related Aspects of Intellectual Property Rights (hereafter, TRIPS) Agreement, 1994** has provided for an open-ended definition of trademark by allowing the contracting parties freedom to make visual perceptibility a condition for trademark registration. It does not explicitly exclude non-conventional trademarks from the ambit of trademark protection.<sup>11</sup>

**The Trademark Law Treaty concluded in 1994**, to standardize the registration of trademarks, is the only international regulation that has explicitly prohibited aural and olfactory marks from being registered as trademarks.

**The Singapore Treaty on Law of Trademarks, 2006** recognizes the non-traditional trademarks and provides for the procedural aspects pertaining to representation of the marks, preparation of applications for securing trademark protection for these non-

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<sup>7</sup> Javvadshaikh, 'Olfactory Marks (Smell Marks)' <<http://www.legalserviceindia.com/legal/article-2928-olfactory-marks-smell-marks-.html>> accessed 21 August 2021.

<sup>8</sup> Anne H Chasser and Jennifer C Wolfe, *Brand Review, Connecting Intellectual Property, Branding, and Creativity Strategy* (John Wiley & Sons, Inc 2010).

<sup>9</sup> Paris Convention for the Protection of Industrial Property, as amended on September 28, 1979, Art.6(1).

<[http://www.wipo.int/treaties/en/text.jsp?file\\_id=288514#P147\\_20484](http://www.wipo.int/treaties/en/text.jsp?file_id=288514#P147_20484)> accessed 21 August 2021

<sup>10</sup> Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989 <[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283484#P98\\_1764](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283484#P98_1764)> accessed 29 August 2021.

<sup>11</sup> The Agreement on Trade Related Aspects of Intellectual Property Rights, Article 15.



conventional marks.<sup>12</sup> The treaty recognizes a range of non-conventional marks including hologram marks, motion marks and 3D marks.

Non-conventional marks face difficulties in obtaining registration as trademarks owing to their lack of inherent distinctiveness as well as the stringent requirements of graphical representability which act as barriers for registration of non-visible signs like scents and tastes.<sup>13</sup> Trademarks in the European Union (hereafter, EU) are regulated through two instruments, the Trademark Regulation and the Trademark Directive. In 2015, the European Council has adopted new directives to govern the community trademarks namely the Trademark Regulation 2015/2424<sup>14</sup> and Trademark Directive 2015/2436.<sup>15</sup> Article 4 of the amended European Union Trade Mark Regulation provides that the mark may consist of any signs or words or personal names or designs, letters, numerals, colours, shape or packaging of goods, sounds must be capable of distinguishing the goods or services and that it must be represented in a manner which enables competent authorities and the public to determine the subject matter of the protection afforded to its proprietor.<sup>16</sup> The amendments have the potential of easing the procedure for the registration of some non-conventional marks if not all. Technological progress plays a decisive role in eliminating the subjectivity associated with the registration of certain non-conventional marks (say smells, tactile marks) and evolving a standard of representation for non-visually perceptible marks sufficient for the purposes of the trademark registries.<sup>17</sup>

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<sup>12</sup> Singapore Treaty on the Law of Trademarks, 2006; Regulations under the Singapore Treaty on the Law of Trademarks, 2011 (Rule 3) <[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=290013](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=290013)> accessed on 21 August 2021.

<sup>13</sup> Marilena Shambarta, 'Can non-traditional signs, such as colours, scents and sounds be protected under Trade Mark law? If not, what are the alternatives to do so? A comparative analysis between Europe and United States of America' (2014).

<sup>14</sup> EU Trademark Directive 2015/2436 <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32015L2436>> accessed 21 August 2021.

<sup>15</sup> EU Trademark Regulation 2015/2424 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015R2424>> accessed 21 August 2021.

<sup>16</sup> Article 4 of Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015.

<sup>17</sup> Tolulope Anthony Adekola, 'Abolition of Graphical Representation in EU Trademark Directive: Should Countries with Similar Provisions Follow EU's Footsteps' (2019) 24 Journal of Intellectual Property Rights 62.

## CHAPTER 2: SENSORY BRANDING

### 2.1 Growth of Sensory Marketing: Blurring Lines Between Conventional and Non-Conventional Trademarks

The familiar sonic sound that the users of MasterCard hear after a successful transaction generates a sense of certainty, satisfaction and trust which they associate with the brand.<sup>18</sup> The smell of freshly grounded coffee beans pervading the stores of Starbucks evokes a sensory reaction so strong that the customers are consistently drawn to the coffee from the brand thereby increasing the sales and fostering customer loyalty.<sup>19</sup> The clicking sound when an iPhone is locked leaves the owners of the phone with a sense of security. Similarly, the minimalist and clean-white interiors of Apple stores, Hasbro's musk scented Play-Doh, Coco-Cola's distinct taste, amplified engine sound of BMW cars create a memorable and unique customer experience that translates to goodwill, brand loyalty and positive feedback.<sup>20</sup>

To keep pace with the competitive market, branding needs to evolve and be innovative. Contemporary branding strategies rely not merely on logos or signs or names to capture the attention of the consumers but on the power of senses i.e., sight, smell, touch, sound, taste, to create long lasting bond with the customers. This innovative branding, known as sensory branding, appeals to multiple human senses to create a positive impression for the brand and win the customer trust.<sup>21</sup> The purpose of sensory branding is to engage with the customers at an emotional level and build a loyal relationship between the customer and the brand such that the customer is habituated to making purchases from a particular brand and distinguishing the competing brands.<sup>22</sup> Sensory branding provides an opportunity to the brand owners to create new identities for their brands in order to differentiate their products and stand apart from their competitors.

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<sup>18</sup> Carmine Gallo, 'Brands That Engage all 5 Senses Stand Out From The Competition' (Forbes.com, 24 February 2021) <<https://www.forbes.com/sites/carminegallo/2021/02/24/brands-that-engage-all-5-senses-stand-out-from-the-competition/?sh=15ab9acf72b3>> accessed 21 August 2021.

<sup>19</sup> Hilfer Law, 'The Power of Sensory Trademarks' (kbhilferlaw.com, 22 November 2013) <<https://kbhilferlaw.com/the-power-of-sensory-trademarks/>> accessed 21 August 2021.

<sup>20</sup> Martin Lindstrom, *Brand Sense: Build powerful Brands Through Touch, Taste, Smell, Sight and Sound* (Free Press 2005).

<sup>21</sup> Megan, '15 Ways to Use Sensory Marketing in 2021' (brandastic.com, 19 July 2021) <<https://brandastic.com/blog/sensory-marketing/>> accessed 21 August 2021.

<sup>22</sup> Lindstrom (n 20) 107.

## **2.2 Interplay between Sensory Marketing and Trademark Law**

The traditional scope of trademark law has been to positively distinguish a brand from its competitor and enable the customers to recall a brand at the time of making purchases.<sup>23</sup> Trademarks also signify a product's reliability and quality. As more and more brands begin leveraging the sensory elements of their products to stand out from the crowd, they veered towards the trademark law to protect their unique intangible identities.<sup>24</sup> Sensory attributes of products such as smell, sound, or taste are non-conventional identifiers of the product origin in contrast to the traditional source identifiers like brand name or a logo. Those sensory attributes which are distinctive and indicative of product origin, have secured protection under the law of trademarks. Broad definition of what constitutes a trademark under multiple jurisdictions has furthered their development.<sup>25</sup>

With ever-growing gamut of advertisement campaigns for thousands of products in the marketplace, the new approach of integrating and interacting with the consumer senses to promote the brand seems promising. Through the medium of sensory marketing, brands are keen on enhancing the consumption experiences and swaying the future buying patterns of the consumers in their favor. Sensory branding relies on embodied cognition which means that our bodily sensations direct our actions without any conscious or deliberate decision making on our part.<sup>26</sup> These non-conscious stimuli which engage with the human senses are a more effective way of influencing the consumer brand perception, emotion, preference or evaluation.<sup>27</sup> Utilizing the sensory triggers to persuade the consumers is an innovative marketing strategy that creates a multidimensional dialogue between the brand and the consumers, whereby the products advertise their attributes themselves.

We use our five senses continually to pick up information about our surroundings. Non-conventional marks which seek to use these perceptions should be welcome as

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<sup>23</sup> Michal Wolangiewicz, 'How, If At All, Should the Law of Trademarks Adapt to the Rise of Sensory Marketing' (2018) 7 Wroclaw Review of Law, Administration and Economics 40, 44.

<sup>24</sup> *ibid.*

<sup>25</sup> Lanham Act 1946, 15 USC; First Council Directive 1988, art 2.

<sup>26</sup> Harvard Business Review, 'The Science of Sensory Marketing' (hbr.org, March 2015) <<https://hbr.org/2015/03/the-science-of-sensory-marketing>> accessed 21 August 2021.

<sup>27</sup> Aradhna Krishna, 'An integrative review of sensory marketing: Engaging the senses to affect perception, judgement and behavior' (2012) 22 Journal of Consumer Psychology 332, 334.

long as they perform essential trademark functions of being distinctive and non-functional.

We interact with the world around us through our senses which aid in linking our experiences to memory and generate emotional attachment with the things around.<sup>28</sup> Senses are the primitive tools over which humans depended to ward off dangers and survive. They are highly reliable and inform the human judgement about the surrounding environment. We use our senses quite unconsciously in carrying out the daily tasks. We smell to check if the food is stale and we touch vegetables and fruits to ascertain their freshness.

Human senses are intertwined and often function in concert. An appeal to multiple senses produces evokes effective reception of the products. No wonder Kellogg's has spent years altogether in producing a perfect crunch for their cornflakes which is both good to hear and feel in our mouths.<sup>29</sup> Sensory perceptions, being such a rudimentary component of our existence, are being roped in to foster a link or association between the products and the consumers to enable them pick the right product and distinguish goods of other competitors. Looking from this view, senses are our natural ability and utilizing them to serve as trademarks cannot in any way be considered non-conventional.

Latest technological advances aid the brand owners in sufficiently representing and effectively integrating the sensory appeals in their products and services to make a lasting impression on the minds of the consumers and secure protection under the trademark law.<sup>30</sup> The amendment to Article 3 and recital 13 of the EU Directive removing the requirement of graphical representation and permitting representation using any available technology, points to a more accommodative approach with respect to non-conventional trademarks.<sup>31</sup> The directive explicitly included color and sound marks in its definition of trademark. In the light of these legal and technical developments coupled with growing marketplace competition, the strict compartmentalization of trademarks into conventional and non-conventional marks

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<sup>28</sup> Lindstrom (n 20) 10.

<sup>29</sup> Lindstrom (n 20) 12.

<sup>30</sup> Hal Hodson, 'Smell-o-vision Screens Let You Really Smell the Coffee' (New Scientist 26 March 2013) <<https://www.newscientist.com/article/mg21729105-900-smell-o-vision-screens-let-you-really-smell-the-coffee/>> accessed 21 August 2021.

<sup>31</sup> EU Trademark Directive 2015/2436 <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32015L2436>> accessed 21 August 2021.

doesn't hold ground. Non-conventional marks are slowly becoming conventionalized with more and more companies reaching out to sensorial triggers for building better and strong brands. This new reality, of the contrast between non-conventional marks and conventional marks gradually fading into obscurity, should direct the design of legislative framework to facilitate the registrability and protection of these marks.

## **CHAPTER 3: OLFATORY AND AURAL MARKS**

### **3.1 Olfactory Marks**

Scents have long been used in a multitude of products to enhance their appeal to the customers and to differentiate them from similar products of the competitors.<sup>32</sup> The sense of olfaction stands apart from the other human senses in that it has the potential to evoke and stimulate memories. This is known as the Proustian memory. It is proven that olfactory memory is the most reliable forms of memory with the ability to influence the human behavior on a subconscious plane.<sup>33</sup> Individuals show an emotional response when they smell a familiar scent connected to a significant event in their lives.<sup>34</sup> This memory association of smells to products has found commercial significance for the companies which they seek to protect through olfactory trademarks.<sup>35</sup> The potential of olfactory branding has been deftly leveraged by famous companies like Rolls Royce and Abercrombie and Fitch which diffuse signature aromas in their cars and stores respectively.<sup>36</sup>

Scents can be classified into two categories: primary scents and secondary scents.<sup>37</sup> Primary scents pertain to those products that are purchased for their fragrance. These include air fresheners, perfumes and deodorants.<sup>38</sup> Secondary scents are fragrances pertaining to products whose principal function does not relate to smell. These include personal care products like soaps, shampoos and household cleaners.<sup>39</sup> There is another category of emerging smell marks, known as unique smell marks, that relate to products which are traditionally unscented.<sup>40</sup> Trademark protection has been granted to unique scent marks like scented lubricants for combustion engines of

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<sup>32</sup> James E Hawes, 'Fragrances as Trademarks' (1989) 79 The Trademark Reporter 134, 137.

<sup>33</sup> Stavroula Karapapa, 'Registering scents as community trademarks' (2010) 100 The Trademark Reporter 1335, 1336.

<sup>34</sup> Yasemin Saplakoglu, 'Why Do Smells Trigger Strong Memories' (livescience.com, 8 December 2019) <<https://www.livescience.com/why-smells-trigger-memories.html>> accessed 21 August 2021.

<sup>35</sup> *ibid.*

<sup>36</sup> Scent Company, 'Olfactory Marketing: The Best Examples of Scent Branding' (blog.scentcompany.info, 29 April 2021) <<http://blog.scentcompany.info/olfactory-marketing-the-best-examples-of-scent-branding/>> accessed 21 August 2021.

<sup>37</sup> Bettina Elias, 'Do Scents Signify Source – An Argument against Trademark Protection for Fragrances' (1992) 82 The Trademark Reporter 475, 476.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> Faye M Hammersley, 'The Smell of Success: Trade Dress Protection for Scent Marks' (1998) 2 Marquette Intellectual Property Law Review 105, 125.

vehicles,<sup>41</sup> floral scented yarn,<sup>42</sup> rose scented automobile tyres.<sup>43</sup> To obtain trademark protection for a smell, it must be shown that the scent is distinctive and capable of distinguishing the products of one manufacturer from that of others and that it does not constitute the product itself. Courts have been reluctant to grant trademark protection to primary scents as they are the constitute the very nature of the product.<sup>44</sup>

### **3.1.1 International Framework Regulating Olfactory Marks**

The Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS, 1994) has maintained a neutral stand with respect to scents. It neither expressly provides for nor prohibits the registration of smells as trademarks. Article 15 of the TRIPS agreement lays down that any sign capable of distinguishing the goods or services of an enterprise from other shall be protected.<sup>45</sup> However, it allows the members to prescribe visual perceptibility a precondition for such protection.

The Singapore Treaty on Law of Trademarks, 2006 and the associated regulations of 2011, while expressly recognizing sounds, holograms and motion marks, are conspicuously omitted smell marks. Instead, provision has been made for the “Marks consisting of non-visible sign other than a sound mark” for the representation of which the contracting parties may prescribe rules according to their law.<sup>46</sup>

### **3.1.2 Position in USA**

Trademarks in the United States of America are governed by the Lanham Act of 1946.<sup>47</sup> The Act defines trademark<sup>48</sup> as follows:

“The term “trademark” includes any word, name, symbol, or device,  
or any combination thereof—

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<sup>41</sup> U.S. Reg. No. 2463044 (26 June 2001).

<sup>42</sup> In re Clarke, 17 U.S.P.Q.2d 1238 (TTAB 1990).

<sup>43</sup> Sumitomo Rubber Company’s application No 2001416 (1996).

<sup>44</sup> Chanel failed in 1994 to register the fragrance of its perfume ‘Chanel No. 5’ through a verbal description of the smell.

<sup>45</sup> The Agreement on Trade Related Aspects of intellectual Property Rights, Article 15.

<sup>46</sup> Singapore Treaty on the Law of Trademarks, 2006 & Regulations under the Singapore Treaty on the Law of Trademarks, 2011 (Rule 3) <[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=290013](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=290013)> accessed 21 August 2021.

<sup>47</sup> Lanham Act 1946,  
<[https://www.uspto.gov/sites/default/files/trademarks/law/Trademark\\_Statutes.pdf](https://www.uspto.gov/sites/default/files/trademarks/law/Trademark_Statutes.pdf) > accessed 21 August 2021.

<sup>48</sup> Lanham Act 1946, § 45 (15 U.S.C. § 1127).

(1) used by a person, or

(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”

The definition indicates that any symbol can be registered as a trademark as long as it performs the source identification function. The act also provides that registration could be provided only those symbols that are not functional and are distinctive, capable of distinguishing the goods of one from the other.<sup>49</sup> This expansive definition of trademark, which does not impede the registration of smells and sounds, coupled with the liberal judicial interpretation of the same has facilitated the registration of non-conventional marks in USA. In *Qualitex*, the court affirmed that the prerequisite of a trademark is its source distinguishing ability rather than its ontological status of fragrance, shape or colour.<sup>50</sup>

The first scent mark application to have successfully secured the trademark protection is for the Plumerian blossom scented embroidery yarn.<sup>51</sup> The Trademark Trial and appellate Board (TTAB) recognized that the mark had acquired distinctiveness through use. It stated that while graphical representation of scents is not necessary, a verbal description is necessary. Over the years, several smells have been granted trademark protection by the United States Patent and Trademark office (USPTO), for instance coconut smelling beach accessories,<sup>52</sup> gum scented jelly sandals<sup>53</sup> and strawberry scented toothbrushes.<sup>54</sup>

The courts in America have adopted an inclusive approach towards the admission of smell marks.

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<sup>49</sup> Lanham Act 1946, § 2 (15 U.S.C. § 1052).

<sup>50</sup> *Qualitex Co v Jacobson Products Co* 514 U.S 159 (1995).

<sup>51</sup> *Clarke*, 17 U.S.P.Q.2d 1238 (T.T.A.B. 1990).

<sup>52</sup>

<[http://tsdr.uspto.gov/#caseNumber=85063625&caseType=SERIAL\\_NO&searchType=statusSearch](http://tsdr.uspto.gov/#caseNumber=85063625&caseType=SERIAL_NO&searchType=statusSearch)> accessed on 21 August 2021.

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<[http://tsdr.uspto.gov/#caseNumber=86265443&caseType=SERIAL\\_NO&searchType=statusSearch](http://tsdr.uspto.gov/#caseNumber=86265443&caseType=SERIAL_NO&searchType=statusSearch)> accessed on 21 August 2021.

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<[http://tsdr.uspto.gov/#caseNumber=76621553&caseType=SERIAL\\_NO&searchType=statusSearch](http://tsdr.uspto.gov/#caseNumber=76621553&caseType=SERIAL_NO&searchType=statusSearch)> accessed on 21 August 2021.



### **3.1.3 Position in EU**

Trademarks in Europe are regulated through the national legislations of the states formulated in accordance with the European Union Directives and the decisions of the European Court of Justice. In contrast with the liberal approach of US towards non-conventional marks, the EU has adopted a rigid and cautious approach to the registration of smell and sound marks. The European Union trademark regulations have required a mark to be graphically represented in order to avail trademark protection. It is observed that most of the cases centred on the provisions requiring graphical representation.

To facilitate the free movement of goods and services and promote competition, the First Council Directive has been adopted by the EU to harmonize the trademark laws of the member states.<sup>55</sup> Subsequently, the Community Trademark Regulation has been adopted to protect trademarks as community trademarks that shall have equal effect throughout the community.<sup>56</sup> The law on Community Trademark was further revised with the adoption of Council Regulation (EC) No 207/2009.<sup>57</sup> Article 4 of the regulation provided for the mark to be represented graphically. It states that:

A Community trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.

A relevant case for the successful registration of smell, decided by the UK court, under the United Kingdom Trademarks Act, 1994, pertains to application of “floral fragrance/smell reminiscent of roses” to the automobile tyres.<sup>58</sup>

The first ever smell mark under the EU was granted to Venootschap onder Firma Senta Aromatic Marketing.<sup>59</sup> The ruling was significant, as it accepted the verbal

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<sup>55</sup> Council Directive 89/104/EEC of 21 December 1988.

<sup>56</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the Community Trade Mark.

<sup>57</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community Trade Mark, 2:1 art 4.

<sup>58</sup> Sumitomo Rubber (n 40).

<sup>59</sup> Venootschap onder Firma Senta Aromatic Marketing Case R 156/1998-2.

description of the smell “freshly cut grass” for tennis balls. The Board of Appeal held that the smell of freshly cut grass reminds people of pleasant experiences and is distinctive enough to be recognized from experience.<sup>60</sup>

An application for protecting the “smell of raspberries” applied to engine fuels was made by Myles Ltd.<sup>61</sup> The court rejected the application on grounds of the scent being not distinctive of the product that it represents.

The decision of the European Court of justice in the Sieckmann v. Deutsches is recognised as a landmark decision. The ruling made it practically impossible for smells to be registered as trademarks by setting a high threshold of graphical representation. The criteria, famously known as the Sieckmann Seven criteria, continue to govern the registration of scents.<sup>62</sup> The applicant sought protection for the scent of a pure chemical substance, methyl cinnamate. He provided the chemical formula of the compound (C<sub>6</sub>H<sub>5</sub>-CH = CHCOOCH<sub>3</sub>) and deposited a sample of the scent with the registry. The scent was described as “balsamically fruity with a slight hint of cinnamon”.<sup>63</sup> The application has been rejected by the German Patents and Trademarks office. On appeal, the ECJ interpreted Article 2 of the Council Directive to mean that a sign that is not capable of being perceived visually can be trademarked provided that it can be represented graphically and such a representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective.<sup>64</sup>

The court then turned to the question of sufficiency of graphical representability of the smell through the means of verbal description, sample deposition and chemical formula. The chemical formula was found to be inadequate by the court since it is unintelligible to many people who consult the trademark register and that the formula represented the chemical itself rather than the scent.<sup>65</sup> Verbal description of the scent was held not to sufficiently represent the scent as it was not clear, precise or objective.<sup>66</sup> Odour sample too, was held, not to satisfy the graphical representation

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<sup>60</sup> *ibid* [14].

<sup>61</sup> Myles Ltd. (R 711/1999-3) < <http://www.copat.de/markenformen/wrp2002/wrp10.pdf>> accessed 21 August 2021.

<sup>62</sup> Sieckmann v. Deutsches Patent- und Markenamt, EU:C:2002:748, (C-273/00).

<sup>63</sup> *ibid* [13].

<sup>64</sup> Sieckmann (n 59) [55].

<sup>65</sup> Sieckmann (n 59) [69].

<sup>66</sup> Sieckmann (n 59) [70].

requirement owing to its instability and non-durability.<sup>67</sup> The court concluded that in respect of olfactory signs, the graphical representation requirement is not satisfied by verbal description, chemical formula, odour sample or a combination of those elements and thereby effectively barred the prospects of registration of olfactory marks. However, it is to be noted that the court has not laid down any criteria that would satisfy the graphical representation requirement under Article 2.

### **3.2 Aural Marks**

Sound is an all pervasive and powerful medium that influences the emotional state of the consumers and impacts their purchasing decisions.<sup>68</sup> Sounds are popularly used in commercial advertisements owing to their powerful impact on consumer behaviour.<sup>69</sup> Sound possess the ability to transcend the linguistic barriers and signal the source identifying attributes to the consumers. A sound mark utilizes the auditory means to function as source indicator and establish a connect between the goods/services of an enterprise and the mind of the listener.<sup>70</sup> Sounds generate a ‘nostalgic trigger’ and stay in the memory of the listeners for longer times. This offers a good chance for the enterprises to leverage sound to signal and promote their brand among the consumers and makes sound a suitable candidate for securing trademark protection.<sup>71</sup>

The World Intellectual Property Organisation (WIPO) Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) provides that a sound may be represented by a musical notation on a stave, a description of the sound constituting the mark, on an analog or digital recording of that sound or any other combinations.<sup>72</sup>

#### **3.2.1 International Framework Regulating Aural marks**

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<sup>67</sup> Sieckmann (n 59) [71].

<sup>68</sup> Trillet (n 4) 15.

<sup>69</sup> *ibid.*

<sup>70</sup> Roxana Sullivan, ‘Non-traditional trademarks through the lens of the USPTO’ (iam-media.com, 23 October 2015) <<https://www.iam-media.com/non-traditional-trademarks-through-lens-uspto>> accessed 21 August 2021.

<sup>71</sup> Abou Naja, ‘Sound Mark and Intellectual Property’ (abounaja.com, 21 February 2021) <<https://abounaja.com/blogs/sound-mark>> accessed on 21 August 2021.

<sup>72</sup> WIPO Standing Committee on the Law of Trademarks, industrial design and Geographical Indications (2006).

The TRIPS agreement does not explicitly provide for the registration of sound marks. It requires the mark to be distinctive and allows the member states to prescribe visual perceptibility as a precondition for granting the protection.<sup>73</sup>

The Singapore Treaty on the Law of Trademarks recognizes sound marks. Rule 3(9) reads as follows:

“Where the application contains a statement to the effect that the mark is a sound mark, the representation of the mark shall, at the option of the Office, consist of a musical notation on a staff, or a description of the sound constituting the mark, or an analog or digital recording of that sound, or any combination thereof”.<sup>74</sup>

### **3.2.2 Position in USA**

Trademarks are regulated by the Lanham Act and do not bar sounds from being registered as trademarks. Trademark registration for non-conventional signs has generally been liberal in the jurisdiction of US. It does not insist on a strict graphical representation and permits representation of sounds through written description, musical notation, onomatopoeia. This approach of US appears to be to strike a balance between trademark protection and free and fair competition. The cases decided by the TTAB provide insights into the nuances pertaining to registration of sound marks.

The first ever sound mark application to have successfully received trademark protection is the National Broadcasting Company’s sequence of three notes, known as the NBC chimes.<sup>75</sup> Another prominent sound mark is the Metro Goldwyn Mayer’s roar of the lion which was in use for a long time before receiving trademark protection. Tarzan’s yell, Pillsbury doughboy’s giggle, Intel’s bong sound mark, have all been granted trademark registration.

Despite its broad-minded approach to the sensory marks, the requirement of distinctiveness and non-functionality of the mark was considered fundamental before the mark could be protected under the jurisdiction of US. An application seeking

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<sup>73</sup> The Agreement on Trade Related Aspects of intellectual Property Rights, Article 15.

<sup>74</sup> Regulations under the Singapore treaty on the law of trademarks, 2011 (WIPO), Rule 3(9).

<sup>75</sup> United States Reg. No. 916,522 (23 January 1970).

sound mark protection for the sound of an alarm clock was refused on the ground of sound being a functional element of the clocks.<sup>76</sup> Harley Davidson made an application for the registration of the unique sound of their engine. The sound was verbally described as “poTAYto-poTAYto-poTAYto”, which was associated by the customers with the brand. The petition was opposed on the ground that the exhaust sound of the engine does not have any distinctiveness. The TTAB held that the sound constituted a functional feature of the working of the engine, which could be used by the competitors as well. Granting trademark protection to that sound would cause non-reputation related disadvantage to the competitors. The withdrawal of application by Harley Davidson has put an end to the trial.<sup>77</sup>

### **3.2.3 Position in EU**

Initially, sound marks in EU had to be represented graphically.<sup>78</sup> In 2005, The Office for Harmonization in the Internal Market (OHIM) ruled that applicants may attach digital sound files for representing the sounds.<sup>79</sup> The attachment should be in MP3 format, without loops and size less than one megabyte.<sup>80</sup> Accordingly, INLEX IP Expertise has become the first applicant to successfully register a community sound mark using electronic sound files.

The landmark decision on registration of sound marks in EU was delivered in the case of Shield Mark.<sup>81</sup> The questions before the ECJ are:

- Whether sounds could be trademarked.
- What would constitute a valid representation under Article 2 of the council directive?

The court observed that sounds could be trademarked provided that they are capable of distinguishing goods or one enterprise from the other and are capable of being

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<sup>76</sup> *In re Vertex Grp. LLC*, 89 USPQ2d 1694, 1702-03 (TTAB 2009).

<sup>77</sup> Vatsala Sahay, ‘Conventionalising Non-Conventional Trademarks of Sounds and Scents: A Cross-Jurisdictional Study’ (2011) 9 Nalsar Student Law Review 128, 135.

<sup>78</sup> WIPO Magazine ‘Smell, Sound and Taste – Getting a Sense of Non-Traditional Marks’ (wipo.int, February 2009) <[http://www.wipo.int/wipo\\_magazine/en/2009/01/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html)> accessed 21 August 2021.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> *Shield Mark BV v Joost Kist* [2004] Case C-283/01.

represented graphically.<sup>82</sup> The court held that the criteria of Sieckmann must be adhered to and the graphical representation should be clear, precise, self-contained, easily accessible, intelligible, durable and objective.<sup>83</sup> It reasoned that the objective of having a clear and precise graphical representation is to enable the third parties to ascertain which marks are protected.<sup>84</sup>

On the question of adequate graphical representation criteria, the court ruled that where a “sign is represented by a stave divided into measures and showing in particular, a clef, musical notes, and rests whose form indicated the relative values and, where necessary, accidentals”, the criteria for the same is satisfied.<sup>85</sup> Written descriptions of the sound or onomatopoeia or sequence of musical notes, was held insufficient to satisfy the graphical representation requirement. It is quite interesting to note the court’s observation that even though the description is not immediately comprehensible those who look up to the trademark registry, it may be easily intelligible.<sup>86</sup>

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<sup>82</sup> *ibid* [41].

<sup>83</sup> *Shield Mark* (n 78) [64].

<sup>84</sup> *Shield Mark* (n 78) [33].

<sup>85</sup> *Shield Mark* (n 78) [64].

<sup>86</sup> *Shield Mark* (n 78) [63].

## **CHAPTER 4: CHALLENGES IN THE WAY OF REGISTRATION OF SMELL AND SOUND MARKS**

To be eligible for trademark protection, a mark must satisfy certain requirements. The requirements for the registrability of non-conventional marks in general, and smell and sound marks in particular, vary across the countries. International conventions and agreements relating to trademarks do not provide a comprehensive procedure for the representation and registration of smell and sound marks and rather leave it to the state parties to determine the requirements according to their national legislations. The TRIPS agreement, for instance, provides that member states may prescribe for a mark to be distinctive or to be visually perceptible in order to secure trademark protection. A sign must be capable of distinguishing the goods and should not create confusion in the minds of the consumers. Owing to their non-visual nature, scent and sound marks face impediments in the course of their registration. It is pertinent to explore some of the challenges encountered by the smell and sound marks in the course of their registration.

### **4.1 Graphical Representation**

Graphical representation requirement, contained in the trademark laws of several countries, is considered to be the most significant requirement for the registration of trademarks. Graphical representation implies representation in a visible paper form or any digitized form.<sup>87</sup> The purpose of graphical representation is to define the mark so that it could be perceived unambiguously, be made accessible to the public to ascertain the precise protection granted to the mark and also to enable the competent authorities to effectively fulfil their obligations pertaining to the examination, registration and publication of the trademark applications.<sup>88</sup>

Article 4 of the European Union Trademark regulations provided that a trademark may consist of any sign that is capable of being represented graphically.<sup>89</sup> This requirement proved to be problematic for sensory signs such as smells and sounds. In keeping with the emerging commercial trends and technological developments

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<sup>87</sup> Indian Trademark Rules 2017, s 2(k).

<sup>88</sup> Sieckmann (n 59) [50].

<sup>89</sup> Article 4 Council Regulation (EC) No 207/2009.

together with the recommendation of the Max-Planck Institute of Intellectual Property to adopt a flexible approach to trademark registration, the European Commission had amended the Community Trademark Registry to eliminate the graphical representation requirement and facilitate registration of non-traditional trademarks.<sup>90</sup> The European parliament amended the council regulation 207/2009 on community trademark and the directive 2008/95.<sup>91</sup> The amendment provided for the representation of signs on the register using any available technology which allows the competent authorities to determine the subject matter of the trademark protection. Article 4 of amended regulation reads as follows:<sup>92</sup>

An EU trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

- a) Distinguishing the goods or services of one undertaking from those of other undertaking; and
- b) Being represented on the register of European Union Trademarks ('the Register), in a manner which enables the competent authorities and the public to determine the clear and precise subject matter afforded to its proprietor.

It is apposite to mention that the amended act, although conceding the flexibility of representation using available technology, has codified the Sieckmann criteria in order to ensure legal certainty.<sup>93</sup> The sufficiency of such a representation shall be measured on the basis of the criteria propounded in the Sieckmann case. In this context, it is necessary to evaluate and appraise the impact of removal of graphical representation on the registrability of smell and sound marks.

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<sup>90</sup> Council Regulation (EU) 2017/1001 recital 10.

<sup>91</sup> EU Trademark Regulation 2015/2424 and Trademark Directive 2015/2436.

<sup>92</sup> Article 4 Council Regulation (EU) 2017/1001.

<sup>93</sup> Council Regulation (n 87).



#### **4.1.1 Impact of Removal of Graphical Representation Requirement on Smell and Sound Marks:**

The objective of the amendment to remove graphical representation was to liberalize the EU trademark regime and to keep pace with the latest technological advancements for representation of non-conventional signs. However, the impact of the amendment is not uniform across the non-conventional marks. Sounds, for instance, benefit the most from the amendment whereas the possibility of representing smell marks, taste marks still remains obscure.

The removal of graphical representation criteria appears to have very little impact on the registrability of scent marks. Representation in an appropriate form using any technology has been circumscribed by the necessity of such representation to be clear, precise, self-contained, easily accessible, intelligible, durable, objective. Non-availability of requisite technology and the subjective nature of sense of smell makes it difficult to represent the smells.<sup>94</sup> With the Sieckmann ruling in force which held that neither verbal description nor chemical formula nor odour sample as sufficient for the purposes of trademark register, there is a need for exploring and adopting innovative technologies that suitably represent the smell.

Sophisticated technologies of recording smells like gas chromatography (GC), high performance liquid chromatography (HPLC), instrumental methods for analysing smells such as spectrometry (MS), nuclear magnetic resonance (NMR) or infra-red (IR) and ultraviolet (UV) spectroscopy may be used to represent the smells.<sup>95</sup>

The amended article 4 of the EU trademark regulation expressly includes sound marks which was absent in the earlier regulations.<sup>96</sup> The inclusion of sound, a non-visual sign, in the trademark legislation signifies the welcoming approach of EU towards registration of non-conventional trademarks. Removal of graphical representation requirement enormously eases the registration of sound marks. The amendment has

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<sup>94</sup> Adekola (n 16).

<sup>95</sup> Carsten Schaal, 'The Registration of Smell Trademarks in Europe: another EU Harmonisation Challenge' (inter-lawyer.com, 2003) <[http://www.inter-lawyer.com/lex-e-scripta/articles/trademarks-registration-smell-EU.htm#\\_ftn33](http://www.inter-lawyer.com/lex-e-scripta/articles/trademarks-registration-smell-EU.htm#_ftn33)> accessed 21 August 2021.

<sup>96</sup> Council Directive (EU) 2015/2436 to approximate the laws of the member states relating to trademarks, art 4(1)(b).

eliminated the need to represent sounds using musical notation or spectrograms. With the currently available digital technologies, it would be much easier to deposit a sound file with the trademark register. The Max-Planck study too recommends the representation of sounds by means of sound files.<sup>97</sup>

#### **4.1.2 Standard for Representation of Smell Marks**

To surpass the rigid Sieckmann criteria and avail the trademark protection, smell marks may rely upon digital scent technologies.<sup>98</sup> Similar to the representation of sounds through sound files, smells can also be encoded digitally and transmitted via internet to the trademark office to enable the competent authorities to examine and publish the mark.<sup>99</sup> The digital file shall be made available to the general public for download. Researchers of Harvard University have developed a device called oPhone that emits 32 distinct scents which can combine and produce as many as 32000 smells.<sup>100</sup> It uses cartridges that disperse odours when air is spun over them. Using a mobile app oSnap, aromas could be transmitted.<sup>101</sup> Trademark owners may utilize the advancements of technology and represent their mark. A semiotic analysis of the smell mark by differentiating it into a signifier, referent and signified would prove useful in assisting the authorities in determining the infringement of the mark.<sup>102</sup>

#### **4.2 Distinctiveness**

Distinctiveness is an essential prerequisite for a sign to be protected as trademark. A trademark should be capable of identifying and distinguishing the goods and services of one enterprise from that of others.<sup>103</sup> Distinctiveness maybe inherent or acquired. A mark that has no connection with the underlying goods that it represents and is

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<sup>97</sup> Max Planck Institute for Intellectual Property and Competition Law, 'Study on the Overall Functioning of the European Trade Mark System' < <https://op.europa.eu/en/publication-detail/-/publication/5f878564-9b8d-4624-ba68-72531215967e> > accessed on 20 August 2021.

<sup>98</sup> Sorna Mugi Viswanathan, 'Digital Scent Technology – A Critical Overview' (2020) 4 International Journal of Trend in Scientific Research and Development 218, 219.

<sup>99</sup> Danny Friedmann, 'EU Opens Door for Soundmarks: Will Scentmarks follow?' (2015) 10 Journal of Intellectual Property Law and Practice 931.

<sup>100</sup> Liz Stinson, 'This Magical Scent-Sending Phone Is Now Available to Order' (Wired, 16 June 2014) <<https://www.wired.com/2014/06/you-can-now-buy-this-scent-sending-phone/>> accessed on 21 August 2021.

<sup>101</sup> *ibid.*

<sup>102</sup> Erin M Reimer, 'A Semiotic Analysis: Developing a New Standard for Scent Marks' (2012) 14 Vanderbilt Journal of Entertainment and Technology Law 693.

<sup>103</sup> McCarthy (n 3).

significantly different from those goods is considered to be an inherently distinctive mark.<sup>104</sup> Fanciful and arbitrary words used for a mark are regarded as inherently distinctive. For instance, APPLE for computer and electronic products, WRANGLER for jeans, SHELL for oil and gas, are inherently distinctive. Signs that are not inherently distinctive could still function as trademarks provided that they acquire distinctiveness or secondary meaning. In other words, when consumers begin associating the mark with the origin/company, such marks are regarded to have acquired a secondary meaning.<sup>105</sup> A mark that is not distinctive and becomes incapable of distinguishing the goods of one entrepreneur and the other becomes a generic mark. In the present context, any smell that comes to be associated by the consumers with a class of products rather than a specific source, it becomes a generic scent. For instance, the smell of lemons was used for cleansing liquids for long. Such use has become so common to the products of this type that the smell of lemon no longer performs the origin indicating function.<sup>106</sup>

Under the EU trademark regulation, a mark that is devoid of distinctive character shall not be registered as a trademark.<sup>107</sup> Proving distinctiveness is challenging with respect to non-conventional and sensory marks signs like smells and sounds. The US supreme court has held that scents and colours cannot be distinctive because the distinct smell and colour of the product is viewed by the customers as a characteristic of the goods that they purchase but not as an indicator of origin of those products.<sup>108</sup>

### **4.3 Functionality Doctrine**

The objective of functionality doctrine, under US trademark law, is to prevent a useful product from being trademarked thereby inhibiting the competition.<sup>109</sup> A product feature is functional, if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.<sup>110</sup> Functional features of a product, being the essential constituents, if protected under the trademark law would put the competitors

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<sup>104</sup> Luis H Porangaba, 'Acquired distinctiveness in the European Union: When Nontraditional Marks Meet a (Fragmented) Single Market' (2019) 109 *The Trademark Reporter* 620.

<sup>105</sup> McCarthy (n 3).

<sup>106</sup> Hawes (n 29) 150.

<sup>107</sup> Article 7(1)(b)(c)(d) CTMR and Article 3(1)(b)(c)(d) TMD.

<sup>108</sup> N.V. Organon, 79 U.S.P.Q.2d 1639, 1654, (T.T.A.B. 2006).

<sup>109</sup> 15 U.S.C. § 1052(Lanham Act § 2); US Trademark law states that protection to a mark may be refused if it is functional.

<sup>110</sup> Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938).

at a significant non reputation related disadvantage.<sup>111</sup> Thus, functionality doctrine serves to promote the legitimate competition and restrict the monopoly of traders over useful features of the product. The goal is to maintain a balance between the trademark and patent law, by preventing the grant of perpetual protection to functional features of a product which is the subject matter of patent law.

Functionality requirement has been codified under the EU trademark regulations. Amended EU trademark directive provides that, any sign consisting exclusively of shape or any other characteristic which provides substantial value to the goods cannot be protected.<sup>112</sup> Article 7(1)(e) states that the following signs shall not be registered:

signs which consist exclusively of:

- (i) the shape, or another characteristic, which results from the nature of the goods themselves;
- (ii) the shape, or another characteristic, of goods which is necessary to obtain a technical result;
- (iii) the shape, or another characteristic, which gives substantial value to the goods;

The use of expression '*another characteristic*' is significant for its reference to non-traditional marks like colours, smells and tastes. An application for registering a smell that forms a feature of the product, shall be contravening the provisions of the said article.<sup>113</sup>

Functionality doctrine serves as a bar to the registration of smell marks even if the scent has acquired distinctiveness. This is particularly significant for registering the smell of a perfume. In an application by Chanel No. 5 to secure scent mark protection for its unique floral fragrance of its perfume, the court held that the smell of the perfume is the product itself and is not distinctive or indicative of origin.<sup>114</sup> The proposed scent to be registered is the very essence of the perfume and as such could not be granted trademark protection. However, it is quite interesting to note that smell

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<sup>111</sup> *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844.

<sup>112</sup> Article 7(1)(e) of council regulation 2017.

<sup>113</sup> Adekola (n 16) 67.

<sup>114</sup> Juhana Strandberg, 'Scents as Trademarks Today' (Bachelor's thesis, Tallinn University of Technology 2018).

mark protection has been granted for tyres scented with floral fragrance of roses<sup>115</sup> and flight darts scented with the strong smell of bitter beer.<sup>116</sup> It can be inferred that, the approach is to grant trademark protection to smells applied to products that are normally unscented. To illustrate, scented combs, sandals, ink, blankets might count as potential scent marks.

Sound marks too must display distinctiveness and non-functionality, so as to be eligible for trademark protection. An application to register the sound of a 'descending frequency of sound pulse' for an alarm clock, was refused protection since sound is an essential feature for the functioning of alarm clocks.<sup>117</sup>

While the significance of functionality doctrine to trademark law cannot be disputed, it hinders the registration of smell and sound marks thereby restraining a range of potential trademarks from being protected. James Hawes argues that creating unique scents entails huge investments and refusal of trademark protection for perfumes and allowing the competitors to freely copy the successful scent is unfair.<sup>118</sup>

#### **4.4 Depletion Theory**

Depletion theory presents another challenge to the registration of smell marks. It posits that the number of sensory signs that are favourably perceived by the consumers is limited.<sup>119</sup> Granting trademark protection to such signs would deplete the available marks and makes them unavailable to the competitors.<sup>120</sup> Bettina Elias argues that the depletion theory maybe applicable in the context of scents and that only certain scents are suitable for certain products.<sup>121</sup> Depletion of these scents would make it difficult for the traders of similar products to utilize the appropriate scents for their products. For instance, smell of citrus would be suitable for cleaning liquids whereas smell of coffee would be undesirable for the products used for cleaning. It is submitted that the functionality doctrine could be a solution for the possible scent depletion problem. Any scent, the application of which to a product, provides a utilitarian advantage to the competitors, shall not be accorded trademark

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<sup>115</sup> Sumitomo Rubber (n 40).

<sup>116</sup> Unicorn Products' Application No. 2000234 (1994).

<sup>117</sup> *In re Vertex Grp. LLC*, 89 USPQ2d 1694, 1702-03 (TTAB 2009) [32].

<sup>118</sup> Hawes (n 29) 153.

<sup>119</sup> Karapapa (n 30) 1347.

<sup>120</sup> *ibid.*

<sup>121</sup> Elias (n 34) 489.

protection. In such a scenario, the functionality doctrine springs into action and prevents distortion of free and fair competition. James Hawes argues against the scent depletion theory being an obstacle in the registration of smell marks. He states that there are innumerable possible scent combinations and variations that are being created and marketed in the current times and that these scents should not be viewed as functional.<sup>122</sup>

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<sup>122</sup> Hawes (n 29) 153.

## **CHAPTER 5: INDIA'S APPROACH TO PROTECTION OF NON-CONVENTIONAL TRADEMARKS**

### **5.1 Legislative Framework**

The Indian trademark law is modelled in accordance with the provisions of the international treaties and provides an open-ended definition of trademark that neither includes nor excludes non-conventional trademarks.<sup>123</sup> Section 2(1)(m) of the Trademarks Act, 1999 defines a mark as follows:

“A device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof”.

Non-traditional trademarks have steadily found their way into the Indian trademark regime. Introduction of Trademark Rules, 2017 further widened the scope of registration of these marks. The rules provide for the graphical representation of marks in paper-based form or digitized form.<sup>124</sup> The new rules have tremendously facilitated the registration of sound marks through submission of a sound clip in MP3 format not exceeding 30 seconds.<sup>125</sup> Colour marks could be applied for by submitting a combination of the colours. However, the rules have conspicuously omitted any reference to the registration of smell marks. The graphical representation requirement proves to be an impediment for the registration of smell marks in India.

The first non-conventional mark to receive trademark protection is the sound of Yahoo Inc.'s human voice yodelling the word yahoo.<sup>126</sup> ICICI Bank's corporate jingle, Britannia's 4 note bell sound 'Ting, ting di ting', National Stock Exchange's theme song are few of the popular sound marks registered in India.

### **5.2 Prospects of Smell and Sound Marks in the Indian Trademark Regime**

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<sup>123</sup> The Trademarks Act 1999, s 2(1)(m).

<sup>124</sup> Trademark Rules 2017, s 2(k).

<sup>125</sup> Trademark Rules 2017, s 26(5).

<sup>126</sup> P. Manoj, 'Yahoo Awarded India's First Sound Mark; Nokia in Queue'(Live Mint, 22 August 2008) <<https://www.livemint.com/Home-Page/5z2B1NQUy3YyPkpRDp789M/Yahoo-awarded-India8217s-first-sound-mark-Nokia-in-queue.html>> accessed 21 August 2021.

In the era of globalization and ever-growing competitive marketplace, intellectual property protection through trademark is pivotal for boosting the economic growth of the country. Trademarks serve as an important tool with the enterprises for product and service differentiation.<sup>127</sup> With the rise of immersive marketing strategies and increased emphasis of the companies on innovative branding strategies to capture the attention of consumers, sensory marks like smell and sound assume a centre stage in the discourse of innovation and economic growth.

India ranked 48<sup>th</sup> out of a total of 131 countries in the Global Innovation Index, 2020 released by the WIPO. India is now the third most innovative country of the lower middle-income economies.<sup>128</sup> The marked improvement in the Global Innovation Index rankings is being attributed to the impetus provided by the national policies encouraging innovation and a vibrant start-up ecosystem.<sup>129</sup> In this context, it is indispensable for India to reappraise and liberalize its trademark regime for the registration of sensory marks and to make progress towards the Government's vision of making India an "Innovation Powerhouse".<sup>130</sup>

### **1. Economic Rationale**

India adopted the National Intellectual Property Rights Policy 2016, with the clarion call of "Creative India; Innovative India", to promote innovation, entrepreneurship and socio-economic development.<sup>131</sup> India has realized the prominent role of IPRs and the emerging start-up companies in augmenting the economic growth, capital formation and employment generation and is taking steady strides towards achieving its vision, through several policy interventions.<sup>132</sup> Adequate protection of IPR is the

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<sup>127</sup> Rishi Ram Chapagai, 'Economic Perspectives of Trademarks' (2018) 9 The Saptagandaki Journal 73.

<sup>128</sup> WIPO, 'Brands- Reputation and Image in the Global Market Place' <<https://www.wipo.int/publications/en/details.jsp?id=384>> accessed 21 August 2021.

<sup>129</sup> Shivani Kumar, 'India ranks 48th in global innovation index' (Hindustan Times, 2 September 2020) <<https://www.hindustantimes.com/india-news/india-ranks-48th-in-global-innovation-index/story-Xabmv7sZV88djrVwcCLrJ.html>> accessed 21 August 2021.

<sup>130</sup> ET Now Digital, 'India jumps to 48 rank in Global Innovation Index amid record patent grants, trademark registrations' (TimesNow News, 18 August 2021) <<https://www.timesnownews.com/business-economy/industry/article/india-jumps-to-48-rank-in-global-innovation-index-amid-record-patent-grants-trademark-registrations/800406>> accessed 21 August 2021.

<sup>131</sup> National Intellectual Property Policy of 2016 lays down the objectives: IP Awareness, Stimulation and commercialization of IPRs among few.

<sup>132</sup> Garima Sodhi, Akriti Jain and Rinki Singh, 'Linkages between IP Protection and Start-ups in India' (2019) CUTS Institute for Regulation and Competition <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3589334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589334)> accessed 21 August 2021; Start-Ups



key to innovation by the start-ups. However, it is worrisome to note that the number of trademark applications filed by the Indian start-ups constitutes a mere 0.8% of the total number of trademark applications filed.<sup>133</sup> Expanding the trademark protection to sensory marks could greatly stimulate the start-ups' non-technological innovation especially for firms involved in marketing and advertising, consumer centric services, e-commerce. Start-ups, in their initial phases, suffer from newness and dearth of satisfied customers.<sup>134</sup> Trademarks could offer a way to signal their seriousness and professionalism to the potential investors and customers.<sup>135</sup>

For budding entrepreneurs, filing of trademarks could mean better firm valuation and flow of external investment leading to more business opportunities.<sup>136</sup>

Protecting unique smell and sound marks could also translate into economic incentives for the mark owners as it increases the costs of duplication for the infringers and it curbs free riding of the marks.<sup>137</sup> This encourages firms to create ingenious and imaginative marks for their products.

## **2. New Categories of Consumers**

Recognizing sensory marks has the potential to cater to a segment of differently abled people whose sense of sight or hearing is impaired. The sense of smell is considered to be the most reliable and long-lasting in the human body. Smell marks and sound marks facilitate a visually challenged person to choose products of a brand of his liking without having to worry about the brand authenticity and quality.<sup>138</sup> The potential of smell and sound marks could be explored in protecting at least certain categories of goods that the differently abled person would need and can purchase

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Intellectual Property Protection Scheme and Start-Up India initiatives of Government of India to encourage and facilitate IPR filing by the start-ups.

<sup>133</sup> Indian Patent Office FY19 report.

<sup>134</sup> Carolina Castaldi, Joern Block and Meindert J. Flikkema, 'Editorial: Why and When Do Firms Trademark? Bridging Perspectives from Industrial Organisation, Innovation and Entrepreneurship, Industry and Innovation' (2020) 27 Industry and Innovation 1.

<sup>135</sup> *ibid.*

<sup>136</sup> Serhiy Lyalkov, Monica Carmona, Emilio Congregado, Ana Millan and Jose Maria Millan, 'Trademarks and Their Association with Kirznerian Entrepreneurs' (2020) 27 Industry and Innovation 153, 159.

<sup>137</sup> Ashitha Bhagwan, Namita Kulkarni and Ramanujam Padmanabha, 'Economic Rationale for Extending Protection to Smell Marks 2007 <

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1027281](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027281)> accessed 21 August 2021.

<sup>138</sup> Raja Selvam, 'What is Smell Trademark or Scent Trademark? – With Examples' (Selvams 11 March 2013) <<https://selvams.com/blog/smell-trademark/>> accessed 21 August 2021.

confidently. Smell and sound marks present an optimistic picture of the prospects of sensory marks in performing a non-commercial function of trademarks.

### **3.Certainty in the Registration Process**

Graphical representation poses a major hurdle to the registration of sensory marks in India, especially smell marks and taste marks. Seemingly, graphical representation requirement of the mark, so as to be in a visually perceptible manner, has been stretched to unreasonable limits with the effect of barring the chances of registration for few sensory marks. It is argued that the problem stems from attempting to represent the mark visually on a paper when such a mark would be easily perceived through another sense.<sup>139</sup> The reality is that sensory marks are here to stay and are slowly but steadily gaining ground in this digital era of fierce marketplace competition. India must absorb the global experience of protecting the sensory marks and bring in suitable changes in the legislative framework.

Apparently, the reception for the non-conventional marks is skewed with sound marks being most popular in India. Till date, there are not been any case of registration of smell marks. There is a lack of judicial precedents with respect to smell marks that can steer the way for sensory marks.

In this backdrop, the following recommendations are made to facilitate the registration of smell marks:

- The registration of non-conventional marks should proceed on the criteria laid down by TRIPS agreement. The agreement does not specify graphical representation as a prerequisite for non-conventional marks. Rather, to protect a mark, it suffices if the mark has acquired sufficient distinctiveness capable of distinguishing goods and services one undertaking from the other.<sup>140</sup> As long as the mark performs the function of identifying the origin of the goods/services and does not consist of a functional aspect of such product, there should not be any reason to refuse trademark protection.
- As regards to smells, the standard should be to evaluate the uniqueness and unusualness of the scent with respect to the goods that it represents. If a scent

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<sup>139</sup> Christopher Eames, 'Non -Traditional Trade Marks: Past Practice and a Look to the Future' (2017) 44 Exeter Law Review 37, 53.

<sup>140</sup> The Agreement on Trade Related Aspects of intellectual Property Rights, Article 15.

is applied to products that are not normally scented or even if scented, the smell proposed to be registered is uncommon in the context of the specific product, then it should suffice for the purpose of registration of smell mark.

- The trademark registry must keep up with the pace of technological advancements and must provide appropriate means for making applications, examination, submission of samples and maintenance of the sensory marks.

### **5.3 India's Way Forward**

The Trademark Law of India and the regulations made under it, are designed on the lines of EU Trademark law. Graphical representation of the mark is an essential requirement for registering a non-conventional mark in India. In the light of impressive advantages of recognizing sensory marks, India should pioneer the liberal facilitation of smell and sound mark registration. In the light of impressive advantages offered by the sensory marks, it is submitted that India should not simply toe the EU approach towards registration of smell and sound marks. India must take the lead to enable an efficient sensory mark registration through the means of cutting-edge technologies in line with the prevailing environment of innovative sensory brand marketing.

## CHAPTER 6: CONVERGENCE OF TECHNOLOGY AND INTELLECTUAL PROPERTY PROTECTION

### 6.1 Tapping the Technology to Protect Sensory Marks

The requirement of graphical representation and the Sieckmann criteria has made it nearly impossible for smells to be registered as trademarks. On one hand the European Court of Justice posited that non-conventional marks could be registered upon complying with the Sieckmann criteria, on the other hand the court has not provided any guidance as to the form of representation that sufficiently satisfies the laid down criteria. This ambiguous stand of the court makes registration of smell marks possible only in theory but not in practice.<sup>141</sup> The registrability of sounds has been greatly facilitated with the acceptance of digital sound files. There is a real need for technological approaches to objectively represent the scents.

Today, the level of technology has reached to such a threshold that it has become possible to store scents digitally and transmit odours via the internet.<sup>142</sup> Adopting the latest technological measures could potentially ease the problems pertaining to registration of smell marks.

#### **Digital Scent Technology**

It is a virtual reality-based technology that allows one to sense, transmit and store fragrances digitally and transmit them via internet.<sup>143</sup> DigiScents Inc has developed the iSmell digital scent synthesizer that can transform the smell into digital codes and store in a computer.<sup>144</sup> Digital olfaction technologies include sensor and an associated software that processes the information received from the sensor.

#### **Fragrance Wheel**

A fragrance wheel groups scents on the basis of their similarity and depicts the relationship between them. It is similar to the Pantone classification of colours that is used for representing the colour at the trademark registry. The fragrance wheel consists of families and sub-families of scents where each family is a prominent smell

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<sup>141</sup> Eames (n 136) 54.

<sup>142</sup> Friedmann (n 96).

<sup>143</sup> Viswanathan (n 95) 219.

<sup>144</sup> *ibid.*

and the sub-families represent a blended version of the prominent scents.<sup>145</sup> This can objectively represent the scents to meet the Sieckmann criteria.

### **Electronic Nose**

An electronic nose is a device that allows classification of scents through the means of an array of sensors analogous to human olfactory receptors and a computer simulating the response of human brain.<sup>146</sup> The odour interacts with the sensors and undergoes a change in the chemical properties. This change is captured as an electronic signal and is sent to the data processing unit. The electronic nose has to be trained with scent samples to create a database for reference.

An electronic nose with biodegradable polymers has been developed indigenously by the researchers of Centre for Nano and Soft Matter Sciences (CeNS), an autonomous institute of Department of Science and Technology, Government of India.<sup>147</sup> The device is exceptionally sensitive due to the impersonation of the human Olfactory Receptor Neuron (ORN) which is responsible for the identification of air borne molecules. Replication of human olfaction could find its application for detecting the smells and has the potential of satisfying the Sieckmann criteria.

### **Scent Dome**

A scent dome is an external device attachable to the computer that generates smells.<sup>148</sup> The device consists of a cartridge filled with aromatic oils. Each aroma is encoded into a series of binary codes that produces thousands of different smells with different concentrations.<sup>149</sup> These scents can then be stored as digital files and transmitted

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<sup>145</sup> Leanna Serras, 'Your guide to the fragrance wheel and scent families' (FragranceX, 26 June 2019), <<https://www.fragrancex.com/blog/fragrance-wheel/>> accessed 21 August 2021.

<sup>146</sup> Cecilia Conti, Marcella Guarino and Jacopo Bacenetti, 'Measurements Techniques and Models to Assess Odor Annoyance: A Review' (2020) 134 Environmental International.

<sup>147</sup> Department of Science and Technology, 'New electronic nose with biodegradable polymer and monomer can detect hydrogen sulphide from sewers' <<https://dst.gov.in/new-electronic-nose-biodegradable-polymer-and-monomer-can-detect-hydrogen-sulphide-sewers>> accessed 29 August 2021.

<sup>148</sup> Karapapa (n 30) 1358.

<sup>149</sup> *ibid.*

according to the instructions of a computer program.<sup>150</sup> Scents emitted by the scent dome are stable and durable.<sup>151</sup>

### **Gas Chromatography**

Gas chromatography is the chemical analysis of scents to identify the individual odour compounds present in an olfactory mixture.<sup>152</sup> After the separation process, a chromatogram is produced which graphically represents the quantity of each odour component and the time taken for their separation from the mixture. Gas chromatography combined with mass spectroscopy is very effective in identifying the compounds with low concentrations. This technique can also be used to reconstitute a scent.<sup>153</sup>

### **Olfactory Start-ups**

Aryballe, a digital olfaction start-up, has developed an electronic nose capable of detecting odours and characterizing them in a way so that they can be mapped and compared.<sup>154</sup>

A scentography camera known as the Madeleine Scentography Camera was designed to turn photography into scentography by capturing the molecular information of a smell by placing the smell under a glass dome.<sup>155</sup> A graph like formula of the captured scent is produced which can be utilized for artificially reproducing the scent in the laboratories.

Japanese start-up Aromajoin has developed an innovative digital scent device, AromaShooter which utilizes solid state materials to generate discrete and blended

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<sup>150</sup> *ibid.*

<sup>151</sup> Will Knight, 'Smell device would liven up web browsing' (New Scientist, 20 February 2004) <<https://www.newscientist.com/article/dn4705-smelly-device-would-liven-up-web-browsing/>> accessed 21 August 2021.

<sup>152</sup> Lyalkov and others (n 133) 156.

<sup>153</sup> Karapapa (n 30) 1354.

<sup>154</sup> Tracey Workman, 'Aryballe Announces New High-Volume, Low-Cost Universal Odor Sensor for Consumer Applications' (Business Wire.com, 7 January 2020) <<https://www.businesswire.com/news/home/20200107005524/en/Aryballe-Announces-New-High-Volume-Low-Cost-Universal-Odor-Sensor-for-Consumer-Applications>> accessed 21 August 2021.

<sup>155</sup> Dave Parrack, 'Madeleine "smell camera" records odors for the future' (New Atlas.com, 2 July 2013) <<https://newatlas.com/smell-camera-madeleine/28126/>> accessed 21 August 2021.

scents.<sup>156</sup> The scents can be digitally recorded and transmitted via a smartphone app and reproduced through a scent emitting device.<sup>157</sup>

OVR Technologies has developed an Architecture of Scents (AoS) that combines hardware and software technologies to capture the aromas using virtual reality. Its scentware component uses analytical chemistry to capture, catalog and re-create scents.<sup>158</sup>

### **Artificial Intelligence**

Researchers of University of California have utilized artificial intelligence and machine learning techniques to evaluate the chemical features of a smell and understand what makes a chemical compound smell in a particular way.<sup>159</sup> A specially designed algorithm is used to evaluate the odour receptor activity of the machines and then predict the composition of diverse qualities of the odours.<sup>160</sup> The technology helps in digitizing the smells and prioritizing them and immensely benefits the food, fragrance industry. The trademark registries could reap the benefits of this technological leap to capture the chemical composition of a smell. This is particularly interesting in the context of Sieckmann ruling wherein a chemical formula was held not to be sufficient to represent the smell.

Technology giant Google is attempting to capture and predict the odour from an input molecule using Deep Learning algorithms and Graphical Neural Networks (GNNs).<sup>161</sup> Each molecule of the smell is represented using a graph which is then provided as input a connected network capable of carrying out molecular featurization.<sup>162</sup> For every molecule of the scent, a learned representation with odour descriptors is generated. This is known as odour embedding and has potential applications in classifying and generating new odours.

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<sup>156</sup> AromaJoin, 'AromaShooter' <<https://aromajoin.com/products/aroma-shooter>> accessed 21 August 2021.

<sup>157</sup> Mark Purdy, Max Klymenko and Mia Purdy, 'Business Scents: The Rise of Digital Olfaction' (Sloan Review, 3 May 2021) <<https://sloanreview.mit.edu/article/business-scents-the-rise-of-digital-olfaction/>> accessed 21 August 2021.

<sup>158</sup> OVR Technology, 'OVR Technology Delivers First-of-Its-Kind Scent Experience for VR' (OVR Technology, 18 May 2018) <<https://ovrtechnology.com/pr04182020/>> accessed 21 August 2021.

<sup>159</sup> Science Daily, 'Using Artificial Intelligence to Smell the roses' (Science daily, 28 July 2020) <<https://www.sciencedaily.com/releases/2020/07/200728182544.htm>> accessed 29 August 2021.

<sup>160</sup> *ibid.*

<sup>161</sup> Google AI Blog, 'Learning to Smell: Using Deep Learning to Predict the Olfactory Properties of Molecules' (AI Google Blog, 24 October 2019) <<https://ai.googleblog.com/2019/10/learning-to-smell-using-deep-learning.html>> accessed 29 August 2021.

<sup>162</sup> *ibid.*

The sense of smell is an incredible yet the most elusive of the senses. It has the ability to trigger vivid memories and help us analyse and respond to the world around us. The steady and progressive drift of technology facilitating sensory engagement and digitization should be leveraged to the best to benefit the sensory trademarks.



## **CHAPTER 7: CONCLUSION**

Multi-sensorial marketing, that engages the five human senses, is on the rise with its potential to leave a significant impression on the minds of the consumers.<sup>163</sup> Sensory marks, in spite of the challenges posed, provide enormous opportunities to the enterprises to strengthen their intellectual property base and develop efficient branding strategies.<sup>164</sup> Trademark protection for the sensory marks promotes competition and innovation in the market place, as it prevents the competitors from adopting similar marks thereby confusing the consumers and the free-riding on the goodwill developed by the enterprises.<sup>165</sup> Strong brand names and reputation are the investments made, nurtured and cultivated by the firms over a period of time to win the customers' loyalty and goodwill. There is no reason to deny trademark protection to these ingenious categories of marks which greatly benefit the firms to retain the customer base in a largely competitive market place.

International conventions and regulations regulating the non-conventional trademarks are not fully evolved to protect such marks. They leave it to the domestic legislations of the member states to regulate the requirements pertaining to the representability of such marks. As such the national practices of recognizing sensory marks varies widely across the jurisdictions.

The amendment to European Trademark Regulation removing the graphical representation requirement is quite significant in widening the possibilities of registration of sensory marks.<sup>166</sup> However, the implications of the amendment are not uniform for all the sensory marks. Considering the case of sound marks, they have benefitted enormously with the simplified registration requirement of submitting a digital sound file. On the other hand, registration of olfactory marks is more complex in comparison with other non-conventional marks. Smell marks could be registered only if they satisfy the criteria of being distinctive and non-functional. The Sieckmann criteria has almost foreclosed the possibility of registration of smells. Even after the

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<sup>163</sup> Trillet (n 4) 18.

<sup>164</sup> Jerome Gilson and Anne Gilson LaLonde, 'Cinnamon Buns, Marching Ducks and Cherry-Scented Racecar Exhaust: Protecting Nontraditional Trademarks' (2005) 95 *The Trademark Reporter* 773, 820.

<sup>165</sup> World Intellectual Property Organization, *Brands - Reputation and Image in the Global Marketplace* (WIPO Economics & Statistics Series Report, 2013).

<sup>166</sup> EU Regulation no. 2015/2424 and the EUTMD 2015/2436.

removal of graphical representation requirement, there has been no considerable change in the state of affairs of registering a scent mark.<sup>167</sup>

The starting point of enquiry for determining whether a scent qualifies for trademark protection should be to assess whether the particular scent is unique and atypical of the products that it represents. The registration requirements of sensory marks like smells should be differentiated from that of other marks. The trademark registry's paradigm of paper-based representation of smell marks should evolve to incorporate a flexible mode of representation of the mark using a combination of written description and chemical formulation. Considering the uniqueness of the sense of smell in creating long lasting olfactory memory and consequent association with a product, the requirements for representation should also be fine-tuned to suit this exceptionality.

A pragmatic approach is to best utilize the emerging technological progress to represent the smell marks in a way that eliminates subjectivity and brings in predictability. Digital olfactory technologies are evolving to enable digital capture and reproduction of aromas with capabilities to analyse the aromas. Electronic sensing devices and scent domes could be utilized to satisfy the easy accessibility criteria of Sieckmann. Digitization of the trademark registries equipping them with path-breaking technologies should be the first step towards electronically representing, storing and transmitting scents.

The challenges in representing these sensory marks should not be allowed to undermine the gains that they provide in enhancing the market competitiveness and reducing the consumer search costs. It must be realized that innovation is the lifeblood of competitive advantage. Competitive advantage lets firms stand apart from the crowd and profit from the customer satisfaction and retention. A thriving and vibrant innovation ecosystem is the need of the hour and the spirit of innovation should not be whittled down to conform to rigidly prescribed boundaries. On the contrary, regulatory regimes should expand their capabilities of accommodating the budding innovation.

Law must match pace with the growing technology to establish a robust and effectual intellectual property regime. India should rise up to the occasion and utilize the opportunity of becoming a global leader in the domain of intellectual property

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<sup>167</sup> Strandberg (n 111).

innovation. The time is ripe for liberalising the legal framework to suitably accommodate the innovative marks.

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