



**E- Journal of Academic Innovation and
Research in Intellectual Property
Assets (E-JAIRIPA)**

Vol. V (ISSUE I) JAN -JUNE 2024, pg. 25 - 36



UNCONVENTIONAL TRADEMARKS: THE REQUIREMENT OF GRAPHICAL REPRESENTATION UNDER THE INDIAN LAW

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Abstract

Trademarks are important for any brand's identity or reputation and for consumer protection, but the idea of what constitutes a trademark is developing and expanding. There are conventional and unconventional trademarks. Conventional trademarks like logos or names are widely acknowledgeable, but there is a growing realization of unconventional trademarks, including colors, sounds, and movements. Such unconventional marks, while not represented graphically in the conventional sense, can still serve themselves as determiner of source and quality of products. This research paper by the authors tests the legal status of unconventional trademarks in various jurisdictions around the globe especially on the United States, United Kingdom, European Union, and India. In the United States, unconventional marks can be protected if the marks are distinctive and have developed a secondary meaning. The approach of EU towards it is that unconventional trademarks have a more permissive approach, allowing for registration of marks that can be represented in a clear, precise manner and easily accessible, intelligible, durable, and in objective form. However, Member States have some autonomy in applying these requirements. In India, the legal status of unconventional trademarks is still developing day by day. The Trademarks Act does not specifically prohibit the non-traditional marks, but there is a demand of graphical representation. The Agreement on Trade-Related Aspects of Intellectual Property Rights (herein referred as TRIPs) gives it some flexibility, allowing for protection of unconventional marks without any strict graphical representation. This paper by the authors tests the legal frameworks in these jurisdictions and discusses the challenges and opportunities which will be crucial for protecting unconventional trademarks.

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Keywords: Trademark, Unconventional Trademarks, Graphical representation, Distinctiveness, Trademarks Act

Introduction

A trademark is a distinctive symbol, design, phrase, or word that identifies and distinguishes a particular product or service from those of other producers². Trademarks are protected under law to provide companies with a way to protect their branding and distinguish their products from those of others. Trademarks allow consumers to easily identify a company and its products and associate them with a certain level of quality, reputation, and goodwill.

By having a trademark, a company has the exclusive right to use its trademark on its goods and services and to prevent others from using similar marks that may cause confusion among consumers. This helps to promote fair competition and prevent consumer confusion, deception, and harm. Trademarks also serve as an asset to companies, representing the investment made in branding and the value of the company's reputation and goodwill. Protecting trademarks through the legal system helps to ensure that this asset is not diminished or exploited by others.

Historically, one of the most important requirements/criteria under the Trademark law (along with the most criteria of distinctiveness) has been that of “Graphical Representation”³ that is, that the mark should have the capacity to be denoted in a graphical or similar form, which then in fact allows the consumers to distinguish it from other products.

Typically, these kinds of marks are referred to as Conventional Trademarks, these types of trademarks are considered conventional because they have been used for a long time and are widely recognized by the public as a means of identifying and distinguishing goods and services. By registering and protecting conventional trademarks, businesses can establish a unique brand identity and prevent others from using similar marks that could confuse or deceive consumers.

Conversely, there are some marks which *prima facie* can't be represented graphically and are referred to as Unconventional or Non-Conventional trademarks.⁴ An unconventional trademark is a type of trademark that doesn't fit the traditional mold of a trademark. This can include things like colors, sounds, scents, or even movements.⁵ Unlike conventional trademarks like logos or names, unconventional trademarks can be more difficult to register and enforce, as they often lack the clarity and distinctiveness that is required for trademark protection. However, if an unconventional trademark

² Vatsala Sahay, Conventionalising Trademarks of Sounds and Scents: A Cross-Jurisdictional Study, 6 NALSAR Student Law Review 128, 128-141 (2011).

³ Section 2(1)(zb), Trade Marks Act, 1999.

⁴ Sanya Kapoor & Riya Gupta, The Five Senses and Non-Traditional Trademarks, 8 Supremo Amicus 214, 214-231 (2015).

⁵ David Vaver, Unconventional and Well-Known Trademarks, Singapore Journal of Legal Studies 1, 1-19 (2005).

is distinctive and has acquired secondary meaning, it can still be protected under trademark law.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), an international agreement under the World Trade Organization (WTO) that sets minimum standards for the protection and enforcement of intellectual property rights, including unconventional trademarks. Under the TRIPs agreement, unconventional trademarks, such as sounds, scents, colors, shapes, and motions, are eligible for protection as trademarks, provided that they meet the criteria of distinctiveness since visual representation is not made mandatory and hence even without a mark being graphically represented it can be protected within the flexibilities of the TRIPs agreement. The TRIPs agreement requires member countries to provide the right to prevent the use of a trademark that is identical or similar to a registered trademark for similar goods or services, if it is likely to cause confusion or deceive the public. This applies to unconventional trademarks as well, meaning that a company can prevent others from using a similar unconventional trademark to identify their goods or services if it is likely to cause confusion or deceive the public.

It is the latter category of marks that'll be discussed in this paper at length and through references to legal position in the subject matter in foreign jurisdictions, specifically United States (US), United Kingdom (UK) and European Union (EU), along with interpretations of provisions under Indian law dealing with graphical representation, the status of unconventional trademarks in India would be inferred and accordingly, necessary conclusions and recommendations will be made.

Unconventional Trademarks: What are they?

As mentioned earlier, Unconventional trademarks are non-traditional forms of intellectual property that are used to identify and distinguish a particular product or service from those of others. Unlike conventional trademarks, which typically consist of logos, slogans, and names, unconventional trademarks can include other distinctive elements such as colors, sounds, shapes, or scents and are harder to perceive⁶.

Unconventional trademarks may be classified in one of the following categories⁷-

1. Shape trademarks: A shape trademark is a type of unconventional trademark that uses a specific shape or configuration to identify and distinguish a particular product or service from those of others. Shape trademarks can include three-dimensional shapes, two-dimensional designs, or a

⁶ Lindstorm Martin, Brand Sense, Build Powerful Brands Through Touch, Taste, Smell, Sight and Sound, Kogan Page Publisher, (2005).

⁷Smell, Sound and Taste-Getting a Sense of Non-Traditional Marks, WIPO, http://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html.

combination of both. Shape trademarks can be difficult to protect because they often serve a functional purpose, such as providing stability or protection to the product. In order to be qualified for protection under the trademarks Act, a shape trademark must qualify certain parameters, which are distinctiveness and non-functionality of the mark. Shape trademarks registration basically requires a complete detailed description of the shape and representation of the same, and in some jurisdictions around the globe, proof that the shape has acquired distinctiveness and uniqueness through its use. Some examples of it would include- Coca-Cola's bottle as well as the cylindrical shape of the Pringles potato chips box.

2. Sound trademarks: A sound trademark is another special type of unconventional trademark that uses a specific kind of sound or melody or even tunes to identify and distinguish a specific product or service from those of others. Sound trademarks can include sound logos, or even other distinctive audio signatures or jingles. In order to be eligible for protection of trademark, a sound trademark must qualify certain given criteria, like distinctiveness and non-functionality of it. The registration process for sound trademarks requires a recording of the particular sound, along with a detailed description of its use in association with the product or service, and in some jurisdictions, a demonstration that the sound has acquired uniqueness through the use of it. MGM lion roar or the NBC chimes are some examples of it.
3. Color trademarks: Another type of Unconventional trademarks is color trademarks. Color trademark is a type of unconventional trademark that uses a specific color or basically a combination of colors to identify and distinguish a specific kind of product or service from those of others. In order to be qualifying for the protection of color trademark, a color trademark actually meet certain parameters like distinctiveness and non-functionality of it. The registration process for color trademarks requires a detailed description of the color and its use in collaboration with the product and in some jurisdictions around the globe, a demonstration that the color has acquired distinctiveness through its use. It is very essential here to note that while color trademarks can be very effective in making any brand recognition and differentiation, they are also one of the most difficult types of trademarks to protect because as colors are often used by multiple brands for similar products or services. Tiffany & Co.'s robin egg blue color is a best example of it.
4. Motion trademarks: Trademarks that protect a specific motion or animation, such as the Pixar lamp or the scrolling Apple logo.
5. Holographic trademarks: Trademarks that protect the use of holographic images, such as the holographic NBA logo.
6. Scent trademarks: A scent trademark, commonly referred as smell mark, is a kind of unconventional

trademark which is used to distinguish a particular product or service by the using of a specific scent. Scent trademarks can include fragrances, aromas, or even odors that are linked with a particular brand or even a product. Scent trademarks can be difficult to get protection because they are intangible in nature and couldn't be represented graphically. But in some jurisdictions around the globe, scented trademarks can be registered and protected under trademark law if they qualify certain kinds of parameters, such as distinctiveness and non-functionality⁸. The registration steps given for scent trademarks can be complex in nature and can requires a detailed description of the scent and its use in association linked with the product or service. The Bubble gum scent for Sandals, the scent of roses used by the brand Air Wick are kind of examples of it.

7. Taste trademarks: Trademarks that protect a specific taste, such as the taste of Coca-Cola's secret formula. Such trademarks are Taste Trademarks.
8. Position trademarks: Trademarks that protect a specific location or placement, such as the location of a logo or tagline on a product. Such trademarks are Taste Trademarks.
9. Trade dress trademarks: Trademarks that protect the overall look and feel of a product or its packaging, such as the design of the Apple iPhone or Louis Vuitton's Damier pattern.

Such types of unconventional trademarks could be difficult to protect and actually needs a high level of distinctiveness in order to be even considered eligible for protection. However, when successfully registered, unconventional trademarks can provide a company with a unique and effective means of protecting their brand and intellectual property (IP).

Unconventional Trademarks in Other Jurisdictions

European Union

The European Union (EU) recognizes a wide range of unconventional trademarks, including shapes, sounds, colors, and scents, provided that they meet the criteria of distinctiveness and non-functionality. The EU Intellectual Property Office (EUIPO) has established guidelines and procedures for registering unconventional trademarks, which are governed by the EU Trademark Regulation.

In order to be eligible for protection under EU trademark law, an unconventional trademark must be distinctive, meaning that it must be capable of identifying the goods or services of one particular entity as opposed to those of others⁹. This can be achieved through acquired distinctiveness, meaning that the

⁸ Tanisha Agarwal & Vanshaj Mehta, Hear Me, Touch Me, Taste Me, Smell Me: Conventionalizing Non Conventional Trademark in India, 3 Journal of Contemporary Issues of Law 1, 1-22 (2017).

⁹ *Ibid.*

trademark has become distinctive through use over a sufficient period of time, or through inherent distinctiveness, meaning that the trademark has a unique and unusual character that makes it inherently capable of identifying the goods or services. In terms of the requirements for registering unconventional trademarks, the EUIPO requires a clear and concise representation of the trademark, which may be achieved through a sound recording, a description of the scent or taste, or a depiction of the shape or color.

Overall, the EU recognizes and provides protection for unconventional trademarks as a means of creating unique and recognizable brand identities, provided that they meet the criteria of distinctiveness and non-functionality.

Graphical representation used to be an important criterion, per EU Directive 89/104/EEC, that governed the subject matter of trademark, specifically Article 2 of the said directive mandates graphical representation.

In the case of *Raf Sieckmann v. Deutsches Patent und Markenamt*,¹⁰ a landmark decision by European Court of Justice on the matters of unconventional trademarks, the applicant tried to get registration for the scent defined as “*as balsamically fruity with a slight hint of cinnamon*”, accompanied by chemical formula, composition and sample attached with the application.

Even though description through words indeed rendered to be graphical representation, it was held that it was not possible to properly understand the scent with description alone, and so the registration was denied. The court further noted that the representation made should be “*clear, precise, self-contained, easily accessible, intelligible, durable and objective.*”

In a later case of *Shield Mark BV v. Kist*,¹¹ concerning with sound marks and graphical representation requirement for the same, ECJ opined that representation by the methods of musical notes or other kind of musical notations would be a valid representation under the law.

Importantly, the requirement of graphical representation has since been removed by EU Trademark Directive 2015/2436 and EU Trademark Regulation 2015/2424,¹² and registration of unconventional trademarks is easier given they qualify as distinctive and have secondary meaning.

¹⁰ Raf Sieckmann v. Deutsches Patent und Markenamt, Case C-273/00, European Court of Justice

¹¹ Shield Mark BV v. Kist, Case C-283/01, European Court of Justice.

¹² Tanisha Ranjan, India: Protection of Non-Conventional Trademarks, Fast forward Justice's Law Journal, <https://fastforwardjustice.com/india-protection-of-non-conventional-trademarks/>

United Kingdom

Before exiting from the EU, the UK used to follow the same directive 89/104/EC, having implemented it in its domestic law via Trademark Act of 1994.

The UK Intellectual Property Office (UK IPO) recognizes unconventional trademarks, such as sounds, scents, and shapes, under the Trademarks Act 1994. Here are some aspects related to unconventional trademarks under UK law:

Sound marks: A sound mark can be recorded and submitted in MP3 or WAV format as part of the trademark application. The sound mark should be distinctive and capable of being represented graphically.

Smell marks: A description of the scent mark can be submitted along with a sample of the scent for examination by the UK IPO. The scent should be distinctive and capable of being represented graphically.

Shape marks: A shape mark can be submitted as part of the trademark application, along with a description of the shape and its intended use. The shape should be distinctive and non-functional.

Historically, the applications made by Sumitomo Rubber Company's scent of roses from their tyres¹³ and the darts made by Unicorn Products having smell of Beers,¹⁴ the distinctive waving movement of the hands of London's "Little Chef" restaurant chain as a motion mark are examples of successful registration of unconventional marks in UK.

United States

The Lanham Act¹⁵ is a federal trademark law in the United States that governs the registration and protection of trademarks. The Lanham Act provides for the registration of both conventional and unconventional trademarks, including marks such as shapes, sounds, scents, and colors. Under the Lanham Act, a trademark must be distinctive and capable of identifying the goods or services of a particular source. This means that the trademark must be sufficiently unique and different from other marks used in the market and must not cause confusion among consumers.

As per the Act, *"protection can be granted to any words, symbols, name or any combination if they are used to identify and distinguish goods or services of one undertaking from those of other undertaking,"* so the requirement of graphical representation is not available¹⁶ even though, it might be asked for

¹³ Sumitomo Rubber Co's Application No. 2001416, 31 October 1994.

¹⁴ Unicorn Products' Application No. 2000234, 31 October 1994.

¹⁵ 15 U.S.C. § 1051 et seq.

¹⁶ Linda B. Samuels & Jeffrey M. Samuels, Colour Trademarks: Protection under U.S. Law, 15 Journal of Public Policy & Marketing 303, 303-307 (1996).

registration of it but actually just to make aware about what has been trademarked.

The Lanham Act recognizes unconventional trademarks as a way to distinguish goods and services and protecting the source of those goods and services. It basically means that unconventional trademarks qualify for registration and protection under the Lanham Act, given that they should meet the requirements of distinctiveness and are capable of identifying the source of the goods or services. In recent years, there have been plenty of legal cases in the United States (US) where the disputes are regarding unconventional trademarks, including the registration of scent marks, sound marks, and color marks. These cases have helped to clear the legal standards regarding unconventional trademarks and establish parameters for their protection under the Lanham Act. This liberty under the Act has also been transversed into the case laws in US.

In *Qualitex Co. v. Jacobson Products and Co.*,¹⁷ the US supreme court held that the primary function of the trademark was that of distinctiveness and not of graphical representation.

The US also has a functionality doctrine in place that states that trademark should not have any relation to the function of the product.

*“In re Celia, d/b/a Clarke's Osewez”*¹⁸ a case decided by the United States Patent and Trademark Office (USPTO) that dealt with the issue of registering an unconventional trademark, specifically a scent trademark, it was held that function should not have relation to the smell of the product which is attempted to be trademarked.

The case *“Christian Louboutin vs. Yves Saint Laurent”*¹⁹ was also a trademark infringement case that was decided by the US District Court for the Southern District of New York and later on upheld by Court of Second circuit there. The case centered around the use of red soles on high-heeled shoes. The plaintiff Christian Louboutin claimed that the red soles of its brand's shoes were a distinctive and protectable trademark, while on the other hand defendant Yves Saint Laurent argued that the red soles were functional and not actually eligible for trademark protection. The district court somehow went with the arguments of Christian Louboutin and ruled that the red soles of its shoes were indeed a distinctive trademark that had acquired secondary meaning as a source indicator. The court of law also found that Yves Saint Laurent had infringed upon Christian Louboutin's trademark by using red soles on its own high-heeled shoes. So, this case is very significant as it demonstrates the protection that unconventional trademarks, such as color, can get under the trademark law. It also reflects on the importance of acquiring secondary meaning for unconventional trademarks to be eligible for protection.

¹⁷ *Qualitex Co. v. Jacobson Products Co.*, 514 US 159 (1995).

¹⁸ *Re Celia*, 217 U.S.P.Q.2d.1238 (1990).

¹⁹ *Louboutin v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2012)

In the year 2000, “Yahoo” filed for registration of the Yahoo Yodel as a sound trademark with the United States Patent and Trademark Office (USPTO). The application faced opposition from the authority USPTO, where USPTO claimed that sound marks were difficult to represent graphically and that the Yahoo Yodel lack distinctiveness in it. However, Yahoo contented that the sound had acquired secondary meaning as a source indicator and was widely recognized by consumers as being associated with Yahoo. The USPTO ultimately granted registration of the Yahoo Yodel as a sound trademark. This liberal behavior towards Unconventional marks has resulted into many such unconventional marks being registered in US, with some of the earliest examples being NBC jingles as sensory marks in 1970, and later MGM and their lion roar to name a few.

Unconventional Marks in India Vis-À-Vis Graphical Representation

Section 2(1)(zb) of the Trade Marks Act, 1999 defines a trademark as *“A mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours”*.

Section 2(1)(m) defines a mark as *“A device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof”*.

Additionally, Section 26(5) of trademark rules, 2017, reads as-

“Where an application for the registration of a trademark consists of a sound as a trademark, the reproduction of the same shall be submitted in the MP3 format not exceeding thirty seconds' length recorded on a medium which allows for easy and clearly audible replaying accompanied with a graphical representation of its notations.”

Under Indian trademark law, a trademark must be capable of being represented graphically in order to be registered. This means that the trademark must be capable of being depicted or represented in a manner that clearly and precisely shows its features. Unconventional trademarks, such as shapes, sounds, colors, and motions, can still be protected as trademarks in India, even though they may not meet the requirement of graphical representation in the traditional sense. For example, sounds can be represented through musical notation, while shapes can be depicted through drawings or photographs. In order to meet the requirement of graphical representation, unconventional trademarks must be represented in a manner that allows the Trademark Office and the public to clearly understand the nature of the trademark and its features. The representation must also be capable of being reproduced for the purposes of registration, enforcement, and dispute resolution.

So under the Indian law, as could be seen Graphical representation is a mandate under Section 2(1)(zb), however, it is possible for some of the unconventional marks such as colour marks and sound marks to

be registered. It is important to note that per Section 2(1)(m) only the combination of colours is protectable and not single colour trademarks.

In the case of *Colgate Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd.*,²⁰ by Delhi HC, the defendant was banned from using the colour combination (red and blue) of product manufactured by Plaintiff and it was held that any such copying may in fact be passing off of the trademark.

In the case of *Christian Louboutin Sas v. Abu Baker and Ors.*,²¹ it was reiterated by the court that it is not possible under Indian law to grant trademark on single colour.

For Sound marks, as Section 26(5) denotes, it is possible to give a graphical representation and get them registered but it is important that the sound has become one and same with the product in the minds of the consumers. Yahoo's three note yodel and ICICI Bank's jingle are some instances of successful sound mark registrations in India. Britannia's bell, NSE's theme song, lion roar of MGM studios, Nokia ring tone are some other instances of successful sound mark registration in the country.

With reference to the shapes, the Section 9(3) of trademark act, 1999 reads as-

"A mark shall not be registered as a trademark if it consists exclusively of— (a) the shape of goods which results from the nature of the goods themselves; or (b) the shape of goods which is necessary to obtain a technical result; or (c) the shape which gives substantial value to the goods."

So, for a shape to be registered, it must not have any functionality for the product itself. Even before the 1999 act, it was possible for a shape to be registered in India, as evidenced in the case of *MRF Ltd. v. Metro Tyres Ltd.*,²² wherein the plaintiff was granted injunction as against the defendant from using similar patterns in their tyres, as it was likely to cause confusion amongst the consumers regarding origin of the product.

In the case of *Gorbatschow Wodka KG v. John Distilleries Ltd.*,²³ the unique shape of the bottle of vodka made by plaintiff was held to be a trademark as the court noted that it was distinctive in nature and contributed to the goodwill of the plaintiff.

The Coca-Cola bottle and Zippo lighters also enjoy similar types of trademark protection in India.

Even though sound, shape, colours and related terms do find some sort of mention under the Indian statutes on trademark, other kinds of unconventional marks such as scent, taste, touch, movement marks etc. do not, and hence with the mandate of graphical representation requirement in place via Section 2(1)(zb) of trademark act, 1999 read with Section 26(1) of trademark rules, 2017, it is very difficult for registration of trademarks in these categories. So even if a mark in these categories is distinct enough in

²⁰ *Colgate Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd.*, (2003) DLT 51.

²¹ *Christian Louboutin Sas v. Abu Baker and Ors.*, (2018) 250 DLT 475

²² *MRF Ltd. v. Metro Tyres Ltd.*, 1990 PTC 101.

²³ *Gorbatschow Wodka KG v. John Distilleries Ltd.*, 2011 (47) PTC 100 (Bom).

the minds of consumers and may have attained a secondary meaning, it would be unlikely for it to be registered under Indian laws, and it is here a lacuna exists because of the fact that technological advancements and marketing strategies of brands have resulted into creation of many categories that may help in distinguishing one brand or product from other, and those include sound, smell, taste, touch, movement marks which the Indian law has failed to reflect.

It is not that there have been no registrations in these categories as well, as Nokia's connecting hand motion is a valid trademark registered in India in 2003. Similar motion mark resides with the Brand Toshiba as well. Hotel Taj Mahal was granted trademark protection for its unique and distinct design.²⁴ But the fact remains that these examples are only exceptional cases of registration and hence do not reflect the actual backward position of Indian law on the subject matter.

Conclusion and Recommendations

Firstly, as mentioned earlier, TRIPs don't mandate a graphical representation requirement onto the member states, so there's a variety of application (*US not mandating v. India mandating*). It's also been discussed that nowadays features such as scent, taste, shape are capable factors of distinguishing one brand/product from another, and even though some of these new categories have been accommodated via Trademark rules, 2017 and Draft manual of Trademark Practice and Procedure, Indian law still falls behind in its application.

As a result, there have been very limited cases of successful registrations in India related to unconventional marks.

To address these developments, there have been calls to amend the Trademarks Act, 1999 to better incorporate unconventional trademarks. These calls for amendment have been based on the need for a more comprehensive and modern legal framework that would provide greater protection for unconventional trademarks and better align with international trademark laws and practices. Such amendments could include clarifying the criteria for distinctiveness of unconventional trademarks, providing clearer guidelines for the graphical representation of unconventional trademarks, and ensuring that the legal framework provides adequate protection against infringement and other unauthorized uses of unconventional trademarks. In summary, while the Trademarks Act, 1999 provides a framework for registering unconventional trademarks in India, there is a need to update and amend the law to reflect the latest developments in technology and the increasing use of unconventional trademarks.

Accordingly, the following recommendations are presented-

²⁴ Kenneth L Port, On Non-Traditional Trademarks, William Mitchell College of Law Legal Studies Research Paper Series, <https://ssrn.com/abstract=1564230>.

- The requirement of graphical representation at least in cases related to sensory marks should not be a mandate for registration given the criteria of distinctiveness is satisfied though it could be used as an indicative feature similar to US.
- These different domestic positions of law are also an impediment to registration of international brands and products and hence a uniform policy that eases registration in multiple jurisdictions is necessary.
