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Preface

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GLOBAL INTELLECTUAL PROPERTY EVOLUTION AND RECENT DEVELOPMENTS THROUGH THE LENS OF TRADEMARKS: FRAMEWORK, ISSUES, AND CHALLENGES

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"The real injury in all such cases can only be gauged in the light of what has been said concerning the function of a trademark. It is the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods."[2]

Abstract

Intellectual property law concerns the legal rights associated with creative effort, commercial reputation, and goodwill. The landscape of intellectual property is undergoing a profound paradigm shift, catalysed by rapid technological advancement and global digitalisation, which encourages creativity and the industrial and economic development of a country. With this broader evolution, trademark jurisprudence stands at a critical juncture where traditional principles of territoriality and tangible commerce increasingly clash with a borderless, digitised global economy. This research paper explores the global evolution of intellectual property through the specific lens of trademarks, examining the contemporary regulatory framework, identifying emerging legal issues such as NFTs and AI-generated brands, and analysing procedural and enforcement challenges. This paper proposes a doctrinal and comparative legal research methodology wherein it majorly focuses on the foundational international frameworks, primarily the TRIPS Agreement and the Madrid System, along with the legislative developments of various jurisdictions, including India, the United States, the European Union, etc., and the different hues of the dictum of the judiciary. The primary research problem examines the lacuna in the legal frameworks governing trademark law in modern brand commodification. It addresses the complexity of the registration process for non-conventional trademarks, the intersection of artificial intelligence with brand creation and infringement, and the protection of brands in the metaverse through Non-Fungible Tokens (NFTs). The paper argues that traditional trademark principles, such as 'distinctiveness' and 'use in commerce', are fundamentally eroded by virtual goods and algorithmic branding, resulting in fragmented judicial decisions, heightened challenges in transnational disputes, and increased trademark squatting. Thus, trademark law must reconcile the disparate interests of traders, consumers, the national state, and the international community, and formulate adaptive legal standards that explicitly recognise the evolving, intangible, and transnational nature of modern commercial identity.

Keywords: Trademark jurisprudence, non-conventional trademark, digital globalisation, non-fungible token, transnational disputes.

Introduction

Intellectual property is one of the cornerstones of modern national economic policy and a catalyst for development. It will increasingly become an important tool for the sustainable development of developing countries, especially the least developed countries, in the knowledge-based society of this millennium. It can be regarded as a single generic term that protects ideas, special symbols, design, information and their applications that are of commercial value. Intellectual property rights are gaining importance as compared to the physical assets of any enterprise, such as land, plant, machinery, intellectual property, and workforce, as they are negligible in contrast to intangible assets in various forms of IPRs, such as patents, copyrights, trademarks, designs, geographical indications, trade secrets and layout designs of integrated circuits.[3] As long as a human being is alive, their genius persists; protecting this human creativity from unscrupulous threats is essential to preserving innovation and inspiring confidence in the legal system.[4]

In an era where brand identity and market differentiation are paramount to business success, the legal mechanisms that protect these assets have become increasingly challenging. The law of trademark, the cornerstone of intellectual property rights, plays a vital role in ensuring that businesses can maintain their unique market presence and safeguard their investments in brand development. The effective exploitation and deployment of technological innovations are decisively influenced by the commercial environment in which they arise. An effective trademark can contribute to economic development by enriching the domestic commercial environment and preparing it to receive advanced technology.

The branding landscape has changed significantly due to digital globalisation and the emergence of experiential service economies. The Metaverse and other decentralised Web 3.0 ecosystems have further distanced companies from their physical counterparts. As a result, trademarks are increasingly valuable, commodified properties rather than merely identifiers. This change severely strains international trademark law. The Paris Convention for the Protection of Industrial Property (1883), the TRIPS Agreement (1994), and the Madrid System are foundational international treaties that underpin the legal protection of trademarks across borders. However, these treaties are founded on concepts of territoriality and conventional, human-centred trade, which are increasingly challenged by digital and transnational commerce. Understanding their role and limitations is essential for adapting legal frameworks to modern global branding challenges and ensuring effective enforcement in a borderless economy.

However, these principles are increasingly at odds with the realities of an interconnected digital economy. Professor J. Thomas McCarthy emphasises the challenge for lawmakers in acknowledging that the internet transcends geographic borders while still upholding trademark rights and their limits.

The conventional "likelihood of confusion" standard in trademark law is under threat from the quick development of Artificial Intelligence and algorithmic commerce. Purchase decisions are increasingly being handled by voice assistants and autonomous digital agents, highlighting the urgent need for legal adaptation to protect rights in this rapidly evolving environment.

Through the prism of contemporary trademark law, this paper critically examines the development of intellectual property on a global scale. It examines fundamental international legal frameworks, identifies new substantive problems arising from technological advancements, and evaluates the associated challenges in cross-border enforcement. This study demonstrates the growing tension between traditional legal principles and modern brand commodification through a comparative analysis of international treaties and significant court decisions, such as the extraterritorial limitations of the Lanham Act and the recent Meta Birkins NFT litigation. To properly manage virtual assets, non-traditional marks, and AI-driven market landscapes, and to provide long-term protection of corporate goodwill in the twenty-first century, this paper ultimately makes the case for a structural change to the international trademark system.

Historical Trajectory of Intellectual Property Rights- The Realm of Trademark Law

The term Intellectual Property Rights refers to the creative work of the human intellect, thereby promoting the progress of science and technology, the arts, literature, and other creative works, and encouraging the reward of creativity. The contribution of intellectual property is sine qua non for the industrial and economic development of a nation.[5] The term intellectual property has become internationally recognised as encompassing patents, industrial designs, copyright, trademarks, and confidential information. Although the creation of a trademark has very little to do with intellectual creativity, it cannot be doubted that patents, designs and copyright are the products of intellectual effort and creative activity in the field of applied arts or technology and fine arts. There are many similarities in the law relating to different species of intellectual property regarding the nature of the property, the mode of its acquisition, the nature of the rights conferred, the commercial exploitation of those rights, the enforcement of those rights, and the remedies available against infringement of those rights.[6]

The international character of intellectual property is recognised in various international conventions for its protection. The Paris Convention for the Protection of Industrial Property, 1883, was the first Convention to bring about principles for the better protection of industrial property. With the establishment of the World Intellectual Property Organisation (WIPO), the process of streamlining the intellectual property rights regime has received adequate impetus to revamp these rights globally. Among others, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) has given intellectual property rights a new form by dividing industrial property into separate segments and making them independent. The Madrid Protocol allows a single registration due to the territorial nexus between trademark law and the trademark. International concern has reached its peak with the establishment of the World Trade Organisation, which governs trade negotiations among nations worldwide.[7].

From time immemorial, humans have used the marks to designate ownership. Later, the symbols or marks were used to indicate the ownership of the property. The concept of trademark was formalised legally through registration, which gave the trader an exclusive right to deal in goods bearing a symbol or mark to distinguish their goods from imitative goods sold by other traders. The grant of a trademark is an indicator of exclusivity in trade under that mark, and this right cannot be transferred unless under exceptional circumstances, as only a limited right of user can be granted via licence.[8] The law relating to Trademarks recognises and enforces an important intellectual property right.

The Paris Convention[9] may be considered as the mother of all intellectual property harmonisation processes[10]. The Convention specifically addresses the framework for trademark use.[11], concurrent use of the same trade mark by different enterprises[12], the grace period for the payment of renewal fees[13], independence of trademarks[14], well-known trademarks[15], assignment of trademarks[16], protection of trademarks registered in one country of the Union in other countries of the Union[17], service marks[18], nature of the goods to which a trademark is applied[19], collective marks[20] etc. It introduced national treatment, prohibiting member states from discriminating against foreign IP owners, and the right of priority, facilitating cross-border applications. The Madrid Agreement and the Madrid Protocol sought to mitigate the friction caused by territoriality by streamlining the internationalisation of brands. The system allows an applicant to file a single application in one language and pay a single fee in one currency, rather than filing separate applications with the trademark offices of various contracting parties.[21]

For the first time in intellectual property law, the TRIPS Agreement's section on trademarks defines what constitutes a trademark and the rules for its protection. [22] A trademark means any sign or any combination of signs capable of distinguishing the goods and services of one undertaking from those of other undertakings, thus mandating that distinctiveness be the universal metric for registrability.[23] The TRIPS Agreement envisages a uniform regime for intellectual property rights across all countries, without accounting for differences in levels of development, and this approach seems harsh towards developing and underdeveloped countries.[24] Crucially, TRIPS allowed member states the discretion to require that signs be visually perceptible.[25] This seemingly minor caveat inadvertently laid the legislative groundwork for the contemporary jurisdictional fragmentation regarding non-traditional sensory marks.[26]

Jurisprudential Metamorphosis: Navigating The Modern Trademark Landscape

The fundamental macroeconomic purpose of a trademark is to reduce consumer search costs and incentivise consistent quality.[27] However, the true value of a modern trademark lies not merely in indicating a physical origin, but in its psychological hold upon the public mind. The particular transition from source-identifier to an independent, commodified psychological asset forms the crux of modern trademark dilution theory.[28]. In the contemporary era, the proliferation of digital globalisation, the transition toward experiential service economies, and the dawn of decentralised digital ecosystems have fundamentally decoupled brands from physical products. This decoupling imposes immense systemic stress on the foundational frameworks of global intellectual property governance. The bedrock of international trademark law, anchored by the Paris Convention and the TRIPS Agreement, is built on the doctrines of territoriality and tangible commerce.[29]

I. Expanding the Trademark Lexicon: Non-Traditional Trademark and the Paradox of Registration

The domain of trademark law and the scope of trademark protection have been expanded significantly during the past decades. The flexible application of registration prerequisites has paved the way for the recognition of a wide variety of signs as subject matter eligible for trademark protection, including single colours, shapes, sounds, smells, holograms, video clips, and even gestures.[30]. With the elastic conceptual contours drawn in the trademark section of the TRIPS Agreement[31], this remarkable growth of the trademark universe has led to the inclusion of so-called 'non-conventional' or 'non-traditional' types of marks becoming a worldwide phenomenon. While not establishing an obligation to accept non-traditional trademarks at the national level, the Singapore Treaty on the Law of Trademarks reflects policymakers' willingness across all continents to facilitate the registration of both traditional and non-traditional marks.[32]

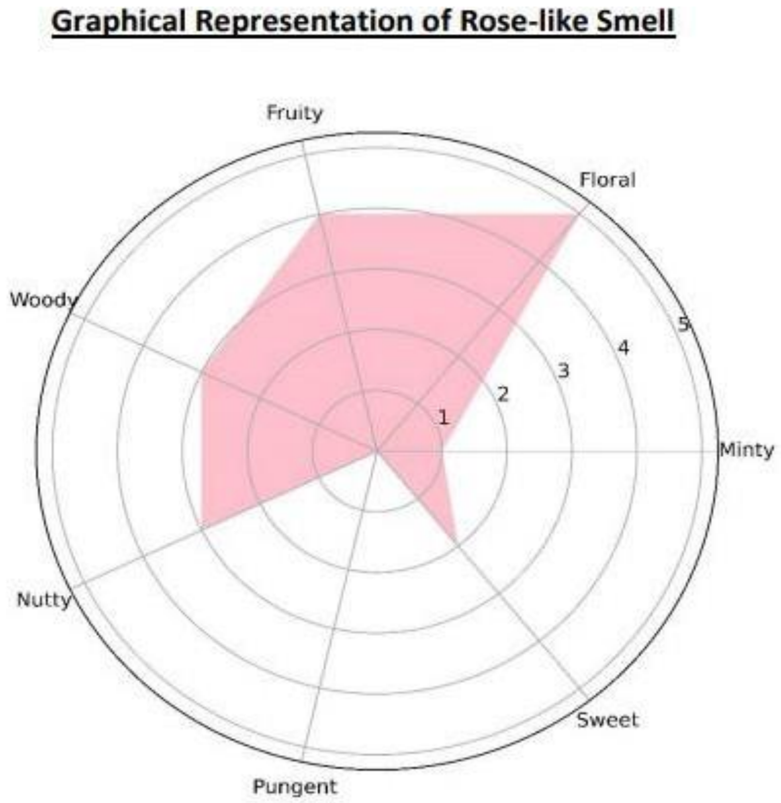
The Registration of Non- Traditional Trademarks: The Graphical Representation Hurdle– National and International Perspective

The registration procedure for these marks is the same, though for certain marks, the requirement of graphical representation is difficult to fulfil. The graphical representation of these marks is more of a practical problem than a legal problem. In several jurisdictions, including India, non-conventional trademarks are not governed by an explicit, dedicated statutory framework; accordingly, their protection is often shaped through implementing rules and the incremental development of judicial doctrine. In India, the Trade Marks Act, 1999 adopts a broad definitional approach to "trade mark" (including, inter alia, the shape of goods, packaging, and combinations of colours) without exhaustively cataloguing all non-traditional mark categories, thereby leaving significant room for doctrinal evolution through administrative practice and case law.

At the international level, Article 15(1) of the TRIPS Agreement[33] articulates a function-based standard-any sign (or combination of signs) capable of distinguishing goods or services may constitute a trademark-while permitting Members to predicate registrability on acquired distinctiveness and, if they so choose, on visual perceptibility. The prerequisites are acquired or inherent distinctiveness, graphical representation or visual perception.[34] It must consist of a distinctive sign that is capable of serving as a source identifier. Additionally, use can be requisite. However, its compliance is not made mandatory, as the word "may" is used[35]. Also, it mentions that the nature of goods should not be an obstacle to their protection. The implementation of these minimum standards varies from country to country. As TRIPS ensures independence of IP rights, registration in one nation does not guarantee the same in other nations. For example, a colour registered as a trademark may not be registered in another country where that colour has religious significance.[36]

The foundational jurisprudence on the registration of the smell/olfactory mark was established by the European Court of Justice in *Sieckmann v. Deutsches Patent- und Markenamt*.[37], which attempted to register an olfactory mark by providing a chemical formula, a written description, and a physical odour sample. The ECJ rejected the application, formulated the now infamous Sieckmann criteria, and held that, while a trademark need not be inherently visual, its graphical representation must be clear, precise, self-contained, easily accessible, intelligible, durable, and objective.[38]. Recognising that the Sieckmann criteria were technologically obsolete and commercially restrictive, the European Union implemented a radical legislative solution by abolishing the strict requirement of graphical representation.[39]Under the current EU regime, a sign can be represented in any appropriate form using generally available technology, provided it meets the criteria of clarity and precision. This structural evolution allows sound marks to be submitted as MP3 files and motion marks as MP4 video files, effectively resolving the paradox of registration for auditory and kinetic marks within the EU.

While the Trademark Rules[40] provide a specific provision for the registration of sound marks, olfactory and gustatory marks remain administratively orphaned. Recently, in November 2025, India took a remarkable step with the acceptance of the application for registration of its first-ever smell mark for a rubber tyre, the rose-like scent, and held that it meets the statutory requirements under the Trademark Act, 1999[41]. The Registry further observed that a rose fragrance is arbitrary in relation to tyres; unlike the ordinary smell of rubber, the floral scent was positioned as a distinctive, source-identifying sign capable of indicating trade origin.[42]



Description: A complex mixture of volatile organic compounds released by the petals interact with our olfactory receptors, creating a rose-like smell. Using the technology developed at IIIT Allahabad, this rose-like smell is graphically presented above as a vector in the 7-dimensional space wherein each dimension is defined as one of the 7 fundamental smells, namely floral, fruity, woody, nutty, pungent, sweet, and minty.

The Methodology: Over and above our primary research (available in the public domain) based upon supervised machine learning, we have done additional processing and analysis for identifying the top 5 contributing compounds, and an algebraic average of vectors is done to arrive at the above graphical representation.

Handing Over: After receiving the consultancy fee into IIITA's bank account, the graphical representation is handed over to Shri Praveen Anand on Sept 13th 2024.

Fig 1.1[43]

While the Indian statute is rigid, the judiciary has often exercised progressive pragmatism, particularly in cases involving single-colour marks. The registrability of a single colour presents a unique facet of the paradox: while a colour is inherently visual, granting a monopoly over a primary colour risks severe anti-competitive "colour depletion" in the market.[44] The Indian judiciary addressed this issue in the landmark case *Christian Louboutin SAS v. Pawan Kumar*. The Delhi High Court examined whether Louboutin's signature 'Red Sole' (Pantone 18-1663 TPX) on high-heeled shoes could serve as a valid trademark. Moving beyond the usual hesitations about monopolising a single colour, the Court recognised the Red Sole as a 'well-known trademark'. It reasoned that when a specific, aesthetic colour is applied to a distinctive, non-functional part of a product, it goes beyond mere decoration and acquires a secondary meaning indicating the product's source. This ruling demonstrates how Indian courts are expanding the scope of trademarks within existing laws, distinguishing between functional utility (which cannot be registered) and aesthetic indicators of origin. The global evolution of the trademark lexicon exposes a fundamental doctrinal dissonance; commercial realities have outpaced administrative capabilities.

II. Beyond the Tangible Matrix: Navigating Trademark Rights in the Metaverse.

The architectural foundations of intellectual property law are rooted in the regulation of tangible commerce and geographically bounded markets. Traditionally, trademark law evolved to prevent consumer deception about the physical source of manufactured goods and to reduce search costs in localised economies.[45] However, the trajectory of digital globalisation has fundamentally altered the mechanics of commercial interaction. While Web 2.0 digitised marketing and facilitated global e-commerce, it remained anchored in the exchange of physical goods or centralised digital services.

The emergence of Web 3.0, characterised by blockchain technology, decentralised finance, and persistent virtual environments collectively termed the "metaverse", marks a profound jurisprudential paradigm shift.[46] In this new digital epoch, the asset itself is virtual. Brands are no longer merely utilising the internet to sell physical commodities; they are monetising digital scarcity through Non-Fungible Tokens (NFTs) and virtual real estate. This transition has given rise to a new commercial ontology in which virtual sneakers, digital apparel, and metaverse avatars possess immense economic value in their own right.[47] This decoupling of the trademark from physical reality presents a formidable challenge to international intellectual property regimes. The legacy doctrines of territoriality, "use in commerce," and the traditional categorisation of goods are increasingly incongruous with a borderless, decentralised digital matrix.

III. The Ontological Shift and the Classification Crisis

The foundational premise of a trademark registry is the precise categorisation of goods and services, harmonised internationally under the WIPO Nice Classification system.[48]This categorisation dictates the scope of a brand's statutory monopoly. The advent of virtual goods has precipitated an acute administrative and doctrinal crisis within this system. Historically, a physical apparel brand would secure protection for its headwear, footwear, and headgear.[49]. However, a virtual shoe minted as an NFT does not clothe a human body; it is fundamentally a string of alphanumeric code stored on a blockchain that renders a visual representation in a digital environment. Ontologically, it is software. Consequently, traditional brands attempting to enforce Class 25 registrations against virtual infringers faced severe standing issues, as courts grappled with whether a virtual shoe is legally "similar" to a physical shoe for the purposes of establishing a likelihood of confusion.[50] This ambiguity triggered a defensive deluge of trademark applications under Class 9 (Downloadable computer software) and Class 41 (Entertainment services) by global conglomerates seeking to pre-emptively stake claims in the metaverse.[51]

In a belated attempt to impose administrative order, the World Intellectual Property Organisation (WIPO) explicitly recognised "downloadable virtual goods" under Class 9, provided the exact nature of the virtual goods is specified.[52] While this administrative update provides a clear runway for future applications, it leaves legacy brands vulnerable. If a globally recognised brand relies solely on its historical Class 25 registrations, bad-faith actors can exploit the classification gap by minting unauthorised virtual goods, arguing that the legacy brand lacks the requisite statutory rights in the digital software class. This necessitates a judicial expansion of the "zone of natural expansion" doctrine, allowing courts to recognise that a famous physical brand's transition into the metaverse is a natural commercial progression warranting protection against digital squatters.[53]

Navigating the Intersections of IP and Digital Art: The Meta Birkins Precedent

The primary legal battleground in Web 3.0 revolves around trademark enforcement, digital commodification, and free speech rights. This conflict was clearly addressed in the United States District Court for the Southern District of New York in *Hermès International v. Rothschild*.[54] This significant judgment established that traditional trademark protections apply within the metaverse. When a digital artist produced and sold "MetaBirkins" NFTs, he claimed the works were protected artistic commentary under the First Amendment in his defence against trademark infringement. Nevertheless, a federal jury found him liable for infringement and dilution, ruling that the NFTs intentionally misled consumers. This key decision indicates that using new forms like NFTs does not exempt creators from liability if they commercially misuse a well-known brand's reputation and deceive the public.[55]

Decentralisation and the decline of traditional enforcement methods

As substantive law gradually adjusts to Web 3.0, procedural enforcement mechanisms for trademark rights are increasingly threatened by blockchain technology. Under Web 2.0, intellectual property enforcement depends heavily on centralised intermediaries: if a website infringes a trademark, a brand owner can serve a takedown notice to a hosting provider like Amazon Web Services or request domain cancellation through ICANN.[56] In contrast, Web 3.0 operates on decentralised blockchain networks, where data stored is immutable- it cannot be altered, deleted, or removed by any central authority. Therefore, if an infringing NFT is created and hosted on a decentralised system such as Interplanetary File System, there is no central server administrator to subpoena or enforce removal.[57]

The Indian Jurisprudential Context: Bridging the Digital Divide

The Trade Marks Act, 1999, is visibly strained by Web 3.0[58]. However, the Indian judiciary has historically shown remarkable agility in applying traditional doctrines to novel technological paradigms, suggesting a viable path for metaverse jurisprudence. Unlike infringement, which requires a registered mark, the common law tort of passing off protects a business's unregistered goodwill.[59] The Supreme Court of India has robustly protected "trans-border reputation," ruling that a brand need not have a physical commercial presence in India to suffer actionable damage, provided its reputation has spilt over via digital channels.[60] In the context of the metaverse, Indian courts are highly likely to leverage the tort of passing off to protect legacy brands against virtual squatters, circumventing the Class 9 v. Class 25 registration dilemmas. If a virtual asset misappropriates the established goodwill of a physical brand, causing digital confusion or dilution, the equitable remedy of passing off remains a potent judicial tool.

The metaverse challenge is not merely a transient technological trend; it represents a fundamental ontological shift like commerce, property, and commercial identity. The reliance on legacy doctrines-rooted in territoriality, physical goods classifications, and centralised enforcement-renders the current global IP architecture dangerously vulnerable to digital exploitation. Until intellectual property law seamlessly integrates with the cryptographic realities of Web 3.0, the global trademark registry will remain ill-equipped to protect the intangible brand equity that drives the modern digital economy.

Conclusion

The jurisprudential metamorphosis of global trademark law underscores a critical inflexion point in intellectual property governance. The foundational international architectures, anchored in the doctrine of territoriality, strict graphical representation, and tangible commerce, are increasingly irreconcilable with the borderless, algorithmic and decentralised realities of the modern economy. The proliferation of non-traditional sensory marks, the ontological shift of virtual assets within the Web 3.0 ecosystem, and the advent of Artificial Intelligence-mediated consumption have exposed profound doctrinal and administrative lacunae across global registries. It is imperative that the international community, in tandem with domestic legislatures, undertakes a structural recalibration of trademark frameworks. By adopting technologically neutral registration standards, expanding the parameters of use in commerce to encompass virtual ecosystems, and pioneering decentralised dispute resolution mechanisms, intellectual law can successfully bridge the chasm between archaic orthodoxies and the intangible commercial realities of the twenty-first century, thereby ensuring the enduring protection of global brand equity.

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