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Introduction

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Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

Description

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EXPANDING THE BOUNDARIES OF TRADEMARK PROTECTION: A STUDY OF NON-CONVENTIONAL MARKS IN INDIAN LAW

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ABSTRACT

The contemporary marketplace is marked by intense competition, rapid technological change, and evolving consumer behaviour. In this environment, traditional trademarks consisting mainly of words, logos, and symbols, are increasingly insufficient to ensure effective brand differentiation. Non-conventional trademarks, such as sound marks, colour marks, motion marks, shape marks, and other sensory indicators, have emerged as powerful tools for brand identification and consumer recall. Indian trademark law, governed primarily by the Trade Marks Act, 1999, provides a broad definition of a trademark that has allowed limited recognition of such Non-conventional marks. However, their registration and enforcement remain fraught with doctrinal, procedural, and practical challenges. This paper critically examines the legal framework governing Non-conventional trademarks in India, analyses judicial and administrative trends, compares Indian practice with international developments, and evaluates the challenges and opportunities associated with expanding trademark protection beyond conventional boundaries. The study argues that while Indian law has taken important initial steps, meaningful reform and clearer guidelines are required to fully accommodate Non-conventional trademarks in a modern, digital, and experience-driven economy.

Keywords: Non-conventional trademarks, sound marks, colour marks, motion marks, distinctiveness, graphical representation.

INTRODUCTION

Trademarks serve as one of the most visible and commercially significant forms of intellectual property. They function not only as indicators of source but also as repositories of goodwill, reputation, and consumer trust. Traditionally, trademarks were confined to visual identifiers such as words, names, logos, and symbols. However, modern branding strategies increasingly rely on sensory and experiential elements that appeal to sound, colour, motion, and even smell or texture. This shift has given rise to what are commonly described as Non-conventional or non-conventional trademarks.

Globally, jurisdictions such as the United States and the European Union have gradually expanded the scope of trademark protection to accommodate Non-conventional marks. In India, the Trade Marks Act, 1999 introduced a modern statutory framework aligned with international obligations under the TRIPS Agreement. While the Act does not explicitly classify Non-conventional trademarks, its broad definition of a trademark has allowed Indian authorities and courts to recognise certain Non-conventional marks, particularly sound marks and, to a limited extent, colour and shape marks.

Despite this progress, the protection of Non-conventional trademarks in India remains limited and uncertain. Stringent requirements of graphical representation, high thresholds for distinctiveness, and the absence of detailed statutory or administrative guidelines pose significant barriers. This paper explores how Indian trademark law has responded to Non-conventional marks, the extent to which current legal principles are adequate, and whether the boundaries of trademark protection should be further expanded to reflect contemporary branding realities.

CONCEPT AND CLASSIFICATION OF NON-CONVENTIONAL TRADEMARKS

Non-conventional trademarks refer to marks that do not fall within the conventional categories of word marks or device marks. They typically involve elements that appeal to senses other than sight or incorporate dynamic or unconventional visual features. Common categories of Non-conventional trademarks include sound marks, colour marks, motion marks, shape marks,

holograms, scent marks, taste marks, and texture marks.¹

Sound marks consist of distinctive sounds or musical sequences used to identify goods or services. Colour marks involve a single colour or a combination of colours that have acquired source-identifying significance. Motion marks comprise moving images or animations, often used in digital media. Shape marks protect the three-dimensional shape of goods or packaging, provided the shape is not functional. Other categories such as scent, taste, and texture marks remain largely theoretical in India due to significant evidentiary and representational challenges.²

The defining feature of all Non-conventional trademarks is their capacity to distinguish the goods or services of one undertaking from those of others.³ This functional justification aligns with the core rationale of trademark law but raises complex questions when applied to elements that may be inherently functional, aesthetic, or subjective in perception.⁴

LEGAL FRAMEWORK UNDER THE TRADE MARKS ACT, 1999

The Trade Marks Act, 1999 governs trademark protection in India and reflects India's obligations under international intellectual property regimes. Section 2(1)(zb) of the Act defines a trademark as a mark capable of being represented graphically and capable of distinguishing the goods or services of one person from those of others. The term "mark" includes devices, brands, headings, labels, tickets, names, signatures, words, letters, numerals, shapes of goods, packaging, and combinations of colours.⁵

This inclusive definition has been interpreted as permitting the registration of certain Non-conventional trademarks. However, two statutory requirements—graphical representation and

¹ Arka Majumdar, Subhojit Sadha & Sunandan Mujumdar, The Requirement of Graphical Representation for NonConventional Trademarks, 11 Journal of Intellectual Property Rights (2006)

² Sudipta Bhattacharjee & Ganesh Rao, The Broadening Horizons of Trademark Law - Registrability of Smell, Sports Merchandise and Building Designs as Trademarks, 10 Journal of Intellectual Property Rights 119, 119- 126 (2005)

³ Kuruvila M Jacob & Nidhi Kulkarni, Non-Conventional Trademark: Has India Secured an Equal Footing, Indian Journal of Intellectual Property of Law 47, 47-72 (2018)

⁴ Smell, Sound and Taste-Getting a Sense of Non-Traditional Marks, WIPO (Dec 27, 2025, 8:12 PM), http://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html

⁵ Lisa P. Lukose, Non-Traditional Trademarks: A Critique, 57 Journal of the Indian Law Institute 197, 197-215 (2015).

distinctiveness—have proven particularly restrictive in practice. The Act does not provide specific provisions or separate standards for evaluating Non-conventional marks, leaving their treatment largely to administrative discretion and judicial interpretation.⁶

The Trade Marks Registry, functioning under the Office of the Controller General of Patents, Designs and Trade Marks, examines applications for Non-conventional marks using general trademark principles. In the absence of detailed statutory guidance, examiners often apply conservative standards, resulting in a low rate of successful registrations for such marks.

JUDICIAL AND ADMINISTRATIVE RECOGNITION OF NON-CONVENTIONAL MARKS IN INDIA

1. Sound Marks

Sound marks represent the most successful category of Non-conventional trademarks in India. The registration of sound marks such as the Yahoo yodel and the ICICI Bank jingle marked an important shift in Indian trademark practice. The Trade Marks Registry has issued guidelines requiring applicants to submit sound recordings along with graphical representations, typically in the form of musical notations or spectrograms.

Indian authorities generally require a high degree of distinctiveness for sound marks, ensuring that the sound functions as a source identifier rather than as mere background music or functional noise. This cautious approach reflects concerns about overbroad monopolisation of commonly used sounds. Sound Trademark Yahoo Inc.'s three-note yodel⁷ and ICICI Bank's corporate jingle⁸, granted trademark status in 2008 and 2011 respectively, are two of the best examples of sound marks in the country; the former being the first sound trademark to be granted in India and the latter being the first sound trademark to be granted to an Indian entity. Britannia Industries' four-note bell sound, Nokia mobile phone's default ring tone, MGM film's lion's roar, Raymond: The Complete Man's musical sequence, Edgar Rice Burroughs' Tarzan yell, National Stock Exchange's theme

⁶ Harshada Wadkar, Non-Conventional Marks, Lexology (Dec 27, 2025, 8:50 PM), <https://www.lexology.com/library/detail.aspx?g=4339efff-eba0-4339-a5f9-47f2d72ae7d1>

⁷ P. Manoj, Yahoo Awarded India's First Sound Mark; Nokia in Queue, Live Mint, Aug. 22, 2008.

⁸ ICICI Secures Rights for Corporate Jingle, The Indian Express, Mar. 12, 2011.

song, etc. are some of the other examples of sound marks in the country.⁹ For a sound to be registered as a trademark in India; an MP3 recording of the said jingle, chime or musical composition, which is not more than 30 seconds in length, has to be submitted to the Office of Registrar of Trade Marks as per Section 26(5) of the Trade Marks Rules, 2017.

2. Colour Marks

The protection of colour marks in India has been far more contentious. While the Act recognises combinations of colours as marks, the registration of a single colour is viewed with scepticism. Indian courts have emphasised that colours are often functional or decorative and should remain available for public use unless strong evidence of acquired distinctiveness is established.

Judicial decisions involving colour marks demonstrate a reluctance to grant exclusive rights unless the applicant can prove long, extensive, and exclusive use leading to strong consumer association. This high evidentiary threshold has significantly limited the success of colour mark registrations in India. It can also be observed that the courts themselves have often delivered contradictory or conflicting judgements over the years. The exact position of colour trademarks in India is thus unknown. In the case of *Colgate Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd.*¹⁰ in 2003, the Delhi High Court restrained the defendant from using the red and white colour combination of the plaintiff in the packaging of their products and also opined that copying the colour of another product was tantamount to passing off. However, 4 years later, in the case of *Cipla Ltd. v. MKI Pharmaceuticals*¹¹, wherein the plaintiff had sought an interim injunction restraining the defendant from using orange colour, similar to that of the plaintiff, in the production of their products; the court opined that there could not be monopoly over colours and thereafter held that copying the colour of another product did not amount to passing off. Later on, the High Court of Delhi reiterated the *Colgate Palmolive Co.* judgement in the cases of *Dabur India Ltd. v. Shree Baidyanath Ayurved Bhawan Pvt. Ltd.*¹² and *Seven*

⁹ Labna Kably, Jingles and Chimes can make Trademark Noise, *The Times of India*, Mar. 27, 2017.

¹⁰ *Colgate Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd.*, (2003) DLT 51

¹¹ *Cipla Ltd. v. MKI Pharmaceuticals*, (2007) (36) PTC 166 Del

¹² *Dabur India Ltd. v. Shree Baidyanath Ayurved Bhawan Pvt. Ltd.*, (2012) (51) PTC 441 (Del).

Towns Ltd. and Ors. v Kiddiland and Ors.¹³. A similar judgment was also passed in the case of Deere and Co. and Ors. v. S. Harcharan Singh and Ors¹⁴. However, in the case of Britannia Industries Ltd. v. ITC Ltd.¹⁵, wherein it had been alleged that the yellow and blue colour combination of ITC's Sunfeast Farmlite Digestive All Good Biscuit had been copied by Britannia's Nutri Choice Digestive Zero Biscuit, the Delhi High Court opined that ITC was not entitled to an interim injunction in this regard as it had failed to prove that this colour combination had become a "badge of its goodwill". Furthermore, in the case of Christian Louboutin Sas v. Abu Baker and Ors.¹⁶, the court placing reliance on Sections 2(1)(m) and 2(1)(zb) of the Trade Marks Act, opined that it was not possible to trademark single colours. The court hence held that the plaintiff's trademark, i.e., red colour on the soles of ladies' footwear had not been infringed by the defendant and thereafter dismissed the suit.

3. Shape and Motion Marks

Shape marks are expressly included within the statutory definition of a trademark but are subject to exclusions where the shape results from the nature of the goods, is necessary to achieve a technical result, or adds substantial value to the goods. Indian courts have applied these exclusions strictly to prevent trademark law from encroaching upon patent or design protection.

Motion marks, though not explicitly mentioned in the Act, are theoretically registrable if they can be graphically represented through a sequence of images and demonstrate distinctiveness. With the growth of digital platforms, motion marks are likely to become more prominent, but their registration in India remains rare. Indian courts have also been more or less consistent in their judgements with regard to shape as a trademark. In the case of Lilly ICOS LLC and Anr.

Maiden Pharmaceuticals Ltd.¹⁷, wherein it had been alleged that the almond shape of the plaintiff's product had been copied by the defendant, the Delhi High Court passed

¹³ Seven Towns Ltd. and Ors. v Kiddiland and Ors., (2016) (68) PTC 308 (Del)

¹⁴ Deere and Co. and Ors. v. S. Harcharan Singh and Ors., (2015) (63) PTC 433 (Del).

¹⁵ Britannia Industries Ltd. v. ITC Ltd., 2017 (70) PTC 66 (Del)

¹⁶ Christian Louboutin Sas v. Abu Baker and Ors., (2018) 250 DLT 475

¹⁷ Lilly ICOS LLC and Anr. v. Maiden Pharmaceuticals Ltd., 2009 (39) PTC 666 (Del).

judgement in favour of the plaintiff and thereafter issued an injunction against the defendants in this regard as it was of the opinion that the defendant had adopted such shape with deceptive intent. Furthermore, in the case of *Gorbatschow Wodka KG v. John Distilleries Ltd.*¹⁸, the Bombay High Court held the shape of the plaintiff's vodka bottles to be a trademark and thereafter granted them an injunction against the defendants as it agreed with their claim that the shape of their bottle was distinctive in nature and also contributed to the goodwill of their product. It is also important to note that even prior to the enactment of the present Act, shape had been recognised by the Indian Judiciary as trademark. In the case of *MRF Ltd. v. Metro Tyres Ltd.*¹⁹ in 1990, wherein the plaintiff had sought a permanent injunction restraining the defendant from manufacturing and selling tyres with tread patterns similar to their own, the Delhi High Court favoured the plaintiffs as it was of the opinion that similar patterns as in the present case would result in confusion amongst consumers with regard to the origin of the product. A similar judgement was also passed later on in the case of *Zippo Manufacturing Company v. Anil Moolchandani and Ors.*²⁰ in 2011.

CHALLENGES IN PROTECTING NON-CONVENTIONAL TRADEMARKS IN INDIA

1. Graphical Representation Requirement

The requirement of graphical representation poses a fundamental challenge for Non-conventional trademarks, particularly sensory marks such as scent or taste. While sound marks can be represented through notations and recordings, there is no universally accepted method for graphically representing smells or textures. This limitation effectively excludes several categories of Non-conventional marks from protection under current Indian law.

2. Distinctiveness and Functionality

Proving distinctiveness is particularly difficult for Non-conventional marks, as many such

¹⁸ *Gorbatschow Wodka KG v. John Distilleries Ltd.*, 2011 (47) PTC 100 (Bom).

¹⁹ *MRF Ltd. v. Metro Tyres Ltd.*, 1990 PTC 101.

²⁰ *Zippo Manufacturing Company v. Anil Moolchandani and Ors.*, 2011 (48) PTC 390 (Del).

elements are not inherently distinctive. Applicants must demonstrate acquired distinctiveness through extensive use, advertising, and consumer recognition. Additionally, courts are vigilant in excluding marks that are functional or aesthetically necessary, especially in the case of colours and shapes.

3. Enforcement Difficulties

Enforcing Non-conventional trademarks presents practical challenges. Establishing infringement or likelihood of confusion involving sounds, colours, or motions can be evidentially complex and subjective. The absence of established enforcement standards further complicates litigation involving such marks.

4. Lack of Clear Guidelines

The absence of detailed statutory provisions or administrative guidelines creates uncertainty for applicants and examiners alike. Inconsistent examination practices and unpredictable outcomes discourage businesses from investing in Non-conventional trademark protection.

COMPARATIVE PERSPECTIVES: LESSONS FROM INTERNATIONAL JURISDICTIONS

International experience offers valuable insights into the potential evolution of Indian trademark law. The European Union has relaxed the requirement of graphical representation, allowing marks to be represented in any form that is clear, precise, and objective. This shift has facilitated the registration of sound, motion, and multimedia marks.

The United States adopts a flexible approach under the Lanham Act, focusing primarily on distinctiveness and non-functionality rather than formal representation. US courts have recognised sound and scent marks where they serve a source-identifying function.

India can draw from these models by adopting more flexible representational standards and issuing comprehensive guidelines tailored to different categories of Non-conventional marks, while

maintaining safeguards against overbroad monopolies.

OPPORTUNITIES AND POLICY CONSIDERATIONS

Non-conventional trademarks offer significant opportunities for businesses in an increasingly experience-driven economy. Sensory branding can enhance consumer engagement, strengthen brand recall, and create emotional connections. For Indian businesses, particularly in sectors such as technology, entertainment, and consumer goods, Non-conventional marks can serve as powerful competitive tools.

From a policy perspective, expanding trademark protection must be balanced against public interest concerns. Over-protection of basic sensory elements could stifle competition and creativity. Therefore, reforms should focus on clarity, predictability, and proportionality rather than unrestricted expansion.

THE FUTURE OF NON-CONVENTIONAL TRADEMARKS IN INDIA

The future of Non-conventional trademarks in India will likely be shaped by technological developments, judicial interpretation, and regulatory reform. Digitalisation, artificial intelligence, virtual reality, and immersive branding will generate new forms of brand identifiers that challenge traditional legal categories.

Indian courts will play a crucial role in defining the contours of protection through purposive interpretation of existing provisions. At the same time, legislative or administrative intervention in the form of detailed guidelines or amendments could significantly enhance certainty and encourage innovation.

CONCLUSION

Non-conventional trademarks represent an important evolution in trademark law, reflecting changes in marketing practices and consumer perception. Indian trademark law, while conceptually capable of accommodating such marks, has thus far adopted a cautious and fragmented approach. The challenges of graphical representation, distinctiveness, and

enforcement have limited the practical utility of Non-conventional trademarks.

Nevertheless, the growing recognition of sound marks and the increasing relevance of digital branding suggest a gradual expansion of trademark boundaries. By adopting clearer guidelines, flexible representation standards, and balanced judicial reasoning, India can create a more inclusive and forward-looking trademark regime. Such an approach would not only align Indian law with global best practices but also foster innovation, competition, and consumer welfare in a rapidly evolving marketplace.

