

## SMELL TRADEMARK: SIGNIFICANCE AND CHALLENGES

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### INTRODUCTION

In recent times, brands are becoming increasingly innovative in their approaches to make their goods stand out in a crowded market. This has resulted in the evolution of using smell as a trademark to distinct their identity that resonates with consumers on a sensory level. This shift towards olfactory branding is driven by the recognition that smell can evoke powerful emotions and memories which makes it a compelling tool for differentiation and brand loyalty. Smell trademarks are classified as non-conventional trademarks. It refers to the unique scents associated with specific products that can serve as identifiers for brands which can influence consumer behavior and brand loyalty. For instance, products like perfumes, soaps, and food items often rely on distinctive fragrances that differentiate themselves in the market. However, in order to function as a trademark, the scent must be distinctive, non-functional, and capable of being represented graphically. The scent of Play-Doh, registered by Hasbro in the United States, is a famous example of a smell trademark.

### SMELL TRADEMARKS IN INDIA

In India, the trademark laws are governed by the Trademarks Act, 1999 (Act). Trademark under this act has been defined as “*trade mark means 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 colors*”. This suggests that trademarks can be registered for words, letters, numerals, devices, brands, headings, labels, names, signatures, colors, combinations of colors or any combination thereof. It does not suggest if smell trademarks can be included. It neither does explicitly rejects this contention. As of now, India has not registered any smell trademarks largely due to the difficulty in fulfilling the graphical representation requirement and proving distinctiveness.

On 23 March 2023, Sumitomo Rubber Industries, Ltd filed an application for an olfactory trademark described as “*floral fragrance/ smell reminiscent of roses as applied to tyres*”. The company filed for the trademark as work mark since there is no option for application as “olfactory mark”. It mentioned in the written application that it is an “olfactory mark”. However, the Registry rejected it on the ground of not being distinctive (Sec. 9(1)(a), Trademarks Act, 1999).

Section 2(1)(zb) of the Act requires the mark to be graphically represented and capable of being distinguished. Also, Rule 23(1) requires the mark to be a description by words and graphical representation. However, it is highly difficult to distinguish smells based on graphical representation and description by words, as scents are inherently subjective and complex to convey visually or textually. This challenge has made the registration of smell trademarks complicated in requiring a clear and precise

representation. Moreover, the Indian Trademark Registry's approach has been conservative focusing on more conventional forms of trademarks.

## GLOBAL PRACTICES AND COMPARISONS

Globally, the registration of smell trademarks has seen varying degrees of acceptance. *Sieckmann v. German Patent Office (case C-273/00)* was the first case in EU where the European Court of Justice deliberated upon smell as a trademark. The applicant filed for trademark of a scent which the applicant described as "balsamically fruity with a slight hint of cinnamon". The bench rejecting the application stated that description of scent by words is highly subjective and description of the smell in chemical form would not be a factor for distinguished identity of smell as the identity of scent depends on various factors such as temperature, concentration, etc. Till now, there has been no significant development in the European Union regarding the registration of smell as a trademark as the complexities of representing scents in a clear and precise manner continue to pose a challenge under current regulations.

While the EU has been quite reluctant in granting trademark to smell, the USA has appeared to be more proactive in recognizing smell marks by adopting a more flexible approach. In 1990, USA became the first country to grant registration to a smell mark in case of *Celia, dba Clarke's Osewez, 17 USPQ2d 1238 (TTAB) 1990* where the smell was described as "high impact, fresh, floral fragrance reminiscent of *Plumeria blossoms*". The court held that the applicant has succeeded in demonstrating the distinctiveness of the smell being used by the supplicant in relation to their thread and yarn. In the USA, trademarks, including smell trademarks are governed by the Lanham Act. However, the US Patent and Trademark Office (USPTO) has strict procedures for registration of smell trademarks. A smell can be trademarked if it indicated the source of goods or services and isn't purely functional.

In 1996, the United Kingdom granted its first smell trademark to Sumitomo Rubbers for a rose-scented fragrance associated with tires, marking a significant step in the recognition of olfactory marks.

However, there are various countries which are reluctant in granting trademark to scents/smell. Brazil only grants trademarks for visually perceptible signs. As a result, smell is completely excluded from trademark. Similarly, in China, the Chinese laws restrict trademarks to visual marks/symbols only.

There is a clear lack of uniformity across jurisdictions when it comes to granting trademarks for smells. While some countries, like the United States, have adopted more flexible approaches to recognizing olfactory marks, others, such as those in the European Union, remain cautious and restrictive. This disparity highlights the complexities and evolving nature of trademark law as it adapts to accommodate non-traditional marks.

## CONCLUSION

Smell trademarks represent an evolving aspect of intellectual property law which calls for pressing need for specific legislation and criteria governing their registration. India must take proactive steps to develop a legal framework which must address the unique challenges associated with the registration of

smell trademarks, such as the requirement for graphical representation, which currently poses significant hurdles. By learning from the experiences of USA and UK, India can create a conducive environment for the recognition and protection of olfactory trademarks, thus, ensuring that this innovative area of intellectual property law is adequately supported and regulated.

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