



## GRAPHICAL REPRESENTATION: AN OBSTACLE TO REGISTRATION OF NON-CONVENTIONAL TRADEMARKS IN INDIA

By *Sree Bhavan P S*  
From *Bennett University*

### ABSTRACT

This paper examines the difficulties relating to graphical representation when registering non-traditional trademarks under Indian law. In a system that has typically been intended for visual representation, non-conventional trademarks such as sound, scent, and three-dimensional marks provide a special challenge. The study examines the ways in which this discrepancy hinders the effective registration procedure and safeguarding of these types of trademarks. The present legal system in India requires graphical representation in order to register a trademark, which is difficult for non-traditional marks that are difficult to express visually.

This paper delves into the intricacies of this discrepancy, examining the implications for innovators and businesses seeking to protect their non-conventional trademarks. Additionally, it analyses international practices and suggests potential amendments to the existing legal framework to accommodate the evolving nature of trademarks in the modern business landscape. The findings aim to contribute to the ongoing discourse on intellectual property law, advocating for a more inclusive and adaptive approach to trademark registration that aligns with the diverse forms of innovation in the contemporary market.

**Key Words-** Trademark protection, Three-dimensional marks, Innovations, Modern trademarks.

### INTRODUCTION

Trademarks are essential assets in the ever-changing world of intellectual property rights because they represent the uniqueness and character of products and services. In the past, brand names, logos, or other visual symbols could only be used as trademarks. However, brand uniqueness and innovation take on

new shapes in tandem with the changing business scene. The registration procedure has become more complex due to the rise of non-traditional trademarks, such as motion, fragrance, and sound marks. It might be difficult to register non-conventional trademarks in India, a country known for its entrepreneurial drive and variety of cultures.

This study aims to investigate a particular barrier to non-traditional trademark registration in India: the function of graphical representation. The registration procedure necessitates graphic representation, which presents special difficulties for non-traditional markings that do not follow conventional visual symbols. It is important to examine the degree to which this restriction impedes the registration of non-traditional trademarks.

#### 1.1 Introduction and Setting:

The number of applications for non-traditional trademarks has increased in India, a booming centre of innovation and trade. Businesses and entrepreneurs are increasingly using unusual components like distinctive noises, aromas, and dynamic movements to set their products apart in novel ways. However, due to challenges arising from the unique characteristics of these marks, the process of registering these non-conventional trademarks is not always straightforward.<sup>1</sup>

#### 1.2 The research's goal:

The purpose of this study is to clarify a crucial barrier to trademark registration in India: the need for graphical representation. As opposed to traditional trademarks, which derive their identity from visual symbols, non-conventional marks are intangible, which makes them subject to different standards for graphical depiction. Therefore, the purpose of this article is to analyse the intricacies of graphical representation and how they affect the chances of non-conventional trademark registration in India.<sup>2</sup>

#### 1.3 Importance of Research:

Comprehending the obstacles presented by graphical representation is not just a scholarly endeavour; it also has pragmatic consequences for companies, attorneys, and legislators. A more inclusive and flexible trademark registration system in India may be

<sup>1</sup> Bhanu Sambyal, *Moving from Conventional to Non-Conventional Trademarks - Recognising Smell Marks*, IV 18 (2022).

<sup>2</sup> Raju narayana swamy, *From Conceptual Entities to Signs of Pragmatic Concern: The Saga of Nonconventional Trademarks in India* (2022).



achieved by incorporating clear insights into the difficulties encountered by non-conventional trademarks into legislation revisions and recommendations.

This research adds to the ongoing discussion about intellectual property rights in India by navigating the complexities of graphical representation and its function in the registration of non-conventional trademarks. It offers insightful information to businesses, legislators, and legal professionals who seek to safeguard and foster innovation in the diverse Indian marketplace.<sup>3</sup>

### NON-CONVENTIONAL TRADEMARKS IN INDIAN LAW

#### 1. Definition:

The Trademarks Act of 1999's expanded definition of trademarks recognises non-conventional trademarks in India. According to the Act, a trademark is any symbol that may be used to visually identify and differentiate the products or services of one person from those of another.

#### 2. Different Kinds of Unconventional Trademarks:

Sound marks: a distinctive sound connected to a product or service.

Scent Marks: Identifying aromas connected to a product

Motion Marks: trademarks that are animated or shown in motion.

Colour markings: safeguarding a certain hue connected to a product or service

Marks that are distinctively positioned on a product are known as location marks.<sup>4</sup>

#### 3. Requirement for Graphical Representation:

The necessity for graphical representation is often the cause of difficulty while registering non-conventional trademarks in India. Since the conventional interpretation of a trademark incorporates visual

symbols, registration requires that the mark be represented in pictorial form.<sup>5</sup>

#### 4. Legal Foundation:

The Trademarks Act, of 1999, and its implementing regulations largely provide the legal foundation for trademarks in India. Non-conventional marks are included in the Act's wide definition of a trademark, as stated in Section 2(1)(m).

#### 5. Landmark cases:

One of the first instances to address sound markings was *Yahoo! Inc. v. Akash Arora* (1999). The court stressed the importance of pictorial representation while acknowledging the potential of sound markers. Despite being a European case, *Sieckmann v. German Patent Office* (2002) has affected conversations on non-traditional trademarks all around the world, especially in India. The case brought to light the difficulties of representing scents graphically.<sup>6</sup>

#### 6. Recommendations from Intellectual Property Offices:

For the purpose of reviewing trademark applications, the Indian Intellectual Property Office (IPO) offers recommendations. These recommendations could provide particular advice or things to keep in mind while dealing with unconventional trademarks. Still, there are issues with pictorial depiction.<sup>7</sup>

#### 7. Recent changes:

To allow for non-conventional trademarks, the law has undergone revisions and changes. Still, there are issues with the application procedure, especially with the graphical depiction.

#### 8. Legislative Reforms:

To better support non-conventional trademarks, the Trademarks Act may be amended, as has been discussed. The need for further clarification in the

<sup>3</sup> Agustina Balik, Merry Tjoanda & Ronald Sopamena, *The Effects of Trademark Registration for MSMEs*, 4 *BATULIS CIVIL LAW REVIEW* 95 (2023).

<sup>4</sup> Aishwarya Vatsa, *Subject Matter and Pre-Requisites for Protection of Non-Conventional Trademark*, 8 *CHRIST UNIVERSITY LAW JOURNAL* 61 (2019).

<sup>5</sup> Sonja Lučić, *The Importance of Abolishing the Conditions of Graphic Representation of the Sign in the Procedure of Registration of Non-Traditional*

*Trademarks*, 56 *ZBORNIK RADOVA PRAVNOG FAKULTETA, NOVI SAD* 199 (2022).

<sup>6</sup> E. Sultimova, *Non-Conventional Trademarks: Classification and Features of International Legal Protection*, 17 *ACTUAL PROBLEMS OF RUSSIAN LAW* 112 (2022).

<sup>7</sup> Reshma G, *Non Conventional Trademarks: A Legal Analysis*, 08 *INTERNATIONAL JOURNAL OF LEGAL DEVELOPMENTS & ALLIED ISSUES* 01 (2022).



graphical representation requirement often comes up in these conversations.<sup>8</sup>

#### 9. International Alignment:

As a World Intellectual Property Organisation (WIPO) member, India is impacted by global trademark debates. Constant care is given to complying with international standards, particularly when it comes to graphical depiction.

#### 10. Practical Challenges:

Businesses and trademark applicants have difficulties when attempting to visually depict non-conventional trademarks. Adhering to conventional conventions for graphical representation is challenging when it comes to sounds, fragrances, or movements since they are ethereal.

In order to fully address the barriers to their registration, it is essential that one has a thorough understanding of the non-conventional trademark environment under Indian law, especially the difficulties associated with graphical representation.<sup>9</sup>

### CHALLENGES IN GRAPHICAL REPRESENTATION FOR NON-CONVENTIONAL TRADEMARKS IN INDIA

#### 1. The conventional notion of trademarks:

Graphical symbols, logos, or other visual representations are part of the conventional notion of trademarks. When it comes to non-traditional signs, such as sounds, odours, or movements, this conventional understanding might be problematic since these types of marks are difficult to represent graphically.

#### 2. Statutory Ambiguity:

Although the existing legal system acknowledges non-traditional trademarks, it is unclear how these marks should be represented graphically. The Trademarks Act, 1999, Section 2(1)(m) does not specifically state how non-visual marks must be graphical representations.<sup>10</sup>

#### 3. The Need for Harmonisation:

Standardised rules for the graphical depiction of non-conventional trademarks are lacking. It is difficult for candidates to consistently navigate the registration procedure when there isn't a clear set of regulations.<sup>11</sup>

#### 4. Subjectivity in Evaluation:

Graphical representations are subjectively evaluated, particularly when it comes to sounds and smells. The absence of impartial standards to evaluate the suitability of graphical representation might result in inconsistent choices being made throughout the decision-making process.

#### 5. Technological Restrictions:

It might be difficult to represent certain non-traditional trademarks due to technological restrictions. For example, it may not be possible or accurate to capture and reproduce a certain sound or aroma in a graphical manner.

#### 6. Limited Precedents:

It might be challenging for applicants to predict the demands and expectations of the authorities due to the limited number of precedent-setting decisions that particularly address graphical representation issues for non-conventional trademarks.<sup>12</sup>

#### 7. International Variability:

Additional difficulties are brought in by the worldwide scope of trademark protection. Despite India's efforts to harmonise its rules with global norms, companies seeking worldwide trademark protection face challenges due to the disparities in criteria across countries.

#### 8. Insufficient legal assistance:

It is believed that there is a dearth of precedents or legal assistance that particularly addresses the difficulties associated with graphical representation for non-conventional trademarks. This gives rise to ambiguity for both law practitioners and applicants.

<sup>8</sup> Rui Su, *On the Regulation of Bad Faith Trademark Registration*, 5 INTERNATIONAL JOURNAL OF EDUCATION AND HUMANITIES 193 (2022).

<sup>9</sup> Geejo Francis, *Law of Trademarks in India*, SSRN ELECTRONIC JOURNAL (2011).

<sup>10</sup> Neha Mishra, *Registration of Non-Traditional Trademarks*, 13 43 (2008).

<sup>11</sup> Komal Komal, *Protection of Non-Conventional Trademarks: Issues and the Road Ahead*, 11 695 (2020).

<sup>12</sup> P. Venkatasubramanian, *The Law of Trademarks in India*, 7 WORLD DEVELOPMENT 737 (1979).



### 9. Difficulty in Word Description of Non-Visual Markers:

Putting non-visual markers into words for graphical representation might be difficult. The trick is to accurately and legally acceptably describe the distinguishing characteristics of a sound, smell, or motion.<sup>13</sup>

### 10. Public Perception and Understanding:

Another degree of difficulty is added by the public's lack of familiarity with and comprehension of non-conventional trademarks. This might affect the way authorities view the uniqueness and graphical depiction of these markings.

### 11. Legislative Clarity:

A lot of stakeholders push for more precise laws that specifically handle the problems that come with graphical representation for non-traditional trademarks. A clearer legal framework may facilitate the application process and lessen uncertainty.

In order to provide workable solutions and support legislative changes that would make it easier for non-traditional trademarks to be registered in India, it is essential that one has a thorough understanding of these difficulties.<sup>14</sup>

## COMPARATIVE ANALYSIS: INDIA VS. INTERNATIONAL STANDARDS

### 1. International Frameworks:

To accommodate non-conventional trademarks, trademark systems across the globe have experienced substantial expansion. A comprehensive foundation for trademark protection is provided by important international accords, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention for the Protection of Industrial Property.

### 2. Graphical Representation in Global Practices:

A number of international jurisdictions have acknowledged the difficulties associated with graphical representation for non-traditional

trademarks. Certain nations have embraced more lenient strategies, realising that not all markings can be visually portrayed in a conventional way.

### 3. EU Trademark System:

Non-conventional trademarks may be registered with the European Union Intellectual Property Office (EUIPO) without pictorial representation, provided that the representation is clear, accurate, self-contained, readily available, comprehensible, long-lasting, and impartial.<sup>15</sup>

### 4. WIPO's Position:

The World Intellectual Property Organisation (WIPO) acknowledges that trademark regulations must change to reflect advances in both technology and business. While conceding that graphical representation may not always be relevant to non-traditional marks, the WIPO's approach emphasises a wider perspective on trademarks.

### 5. India's Adherence to International Rules:

The world's debates over trademark rules have an impact on India since it is a signatory to international accords and a member of the WIPO. Even if there has been improvement, there are still issues with matching Indian standards to more permissive foreign norms.

### 6. Indian Trademark Act (1999):

Non-conventional markings are included in the wide definition of a trademark provided under the Trademarks Act, of 1999. The Act does, however, nonetheless need pictorial representation, which poses a problem for non-traditional markings that do not adhere to conventional visual symbols.<sup>16</sup>

### 7. Legislative considerations and modifications:

India's attempts to bring the Trademarks Act into line with global standards are emphasised by the conversations about possible modifications. The question of whether graphical representation issues for non-conventional trademarks should be specifically addressed by legal revisions is still up for dispute.

<sup>13</sup> Tetiana Kovalenko, *Trademark Registration in the European Union*, THEORY AND PRACTICE OF INTELLECTUAL PROPERTY 65 (2022).

<sup>14</sup> Zoran Miladinovic & Sinisa Varga, *The Grounds for Refusing Trademarks Registration*, 2013 ZBORNIK MATICE SRPSKE ZA DRUSTVENE NAUKE 609 (2013).

<sup>15</sup> Senthil Kumar, *Trademark Registration Process in India* (2016).

<sup>16</sup> Rachna Kurup, *Non-Conventional Trademarks in India: The What, the Why and the How* (2021), [https://www.academia.edu/77523835/Non\\_Conventional\\_Trademarks\\_in\\_India\\_The\\_What\\_the\\_Why\\_and\\_the\\_How](https://www.academia.edu/77523835/Non_Conventional_Trademarks_in_India_The_What_the_Why_and_the_How) (last visited Nov 27, 2023).



#### 8. Clarity in India's Legislation Is Needed:

Although global practices are beginning to acknowledge the limitations of graphical representation for non-traditional marks, India's legislative framework is still attempting to figure out how to accommodate these marks while maintaining their distinctiveness.

#### 9. Standardisation Challenges:

Standardising graphical representation standards for non-conventional trademarks presents difficulties for both India and foreign jurisdictions. Due to the lack of a common set of regulations, applicants and legal professionals are left with uncertainty.<sup>17</sup>

#### 10. Global alignment is important.

It's critical to strike a balance between international standards and India's particular cultural and business environment. Global alignment guarantees the ability of Indian companies to compete globally while preserving the integrity of the domestic trademark system.

#### 11. Effect on International Trademark Protection:

The difficulties India has in presenting non-conventional trademarks graphically may have an effect on international trademark protection. Standardising standards may make the process easier for companies looking to protect their trademarks internationally.

To suggest improvements that combine worldwide harmonisation with the particular requirements of India's trademark system, it is essential to comprehend the differences in graphical representation requirements between Indian and foreign standards. This comparison study serves as a basis for assessing the research paper's possible answers.<sup>18</sup>

### EFFORTS TO ADDRESS GRAPHICAL REPRESENTATION CHALLENGES IN INDIA

#### 1. Legislative Reforms:

The Trademarks Act in India may be amended in light of the difficulties presented by graphical representation for non-conventional trademarks. The goal is to provide the demand for pictorial representation with greater leeway.

#### 2. Trademarks Rules Amendments:

To address issues with graphical representation, the Indian government has sometimes suggested changes to the Trademarks Rules. Revisions to the standards for representing non-conventional markings, particularly those that are non-visual in nature, may be among the amendments.

#### 3. Consultation sessions:

Legal professionals, trademark practitioners, business representatives, and other pertinent stakeholders have all participated in consultation sessions to get feedback from stakeholders. The purpose of these consultations is to identify real-world issues and possible fixes in relation to graphical depiction.<sup>19</sup>

#### 4. Guidelines from the Intellectual Property Office:

The Indian Intellectual Property Office (IPO) has released guidelines on a regular basis concerning the review of trademark applications, including those pertaining to non-traditional marks. These recommendations could provide some understanding of how the authorities now handle graphical representation difficulties.

#### 5. Harmonisation with International Standards:

Considering the positions of international organisations like the WIPO, efforts have been undertaken to bring India's trademark practices into line with international standards. Changing the criteria for graphical representation to better reflect changing

<sup>17</sup> Erick Mawira, *THE NORMATIVE FOUNDATIONS OF TRADEMARK LAW*, [https://www.academia.edu/35149759/THE\\_NORMATIVE\\_FOUNDATIONS\\_OF\\_TRADEMARK\\_LAW](https://www.academia.edu/35149759/THE_NORMATIVE_FOUNDATIONS_OF_TRADEMARK_LAW) (last visited Nov 27, 2023).

<sup>18</sup> Manzoor Elahi, *Passing Off and Infringement of Trademarks - India*, SSRN ELECTRONIC JOURNAL (2013), [https://www.academia.edu/10865872/Passing\\_Off\\_a](https://www.academia.edu/10865872/Passing_Off_a)

[nd\\_Infringement\\_of\\_Trademarks\\_India](#) (last visited Nov 27, 2023).

<sup>19</sup> International Journal of Scientific Research in Science and Technology Ijsrst, *Trademarks and Their Importance to Digital Economies of India*, [https://www.academia.edu/37116798/Trademarks\\_and\\_Their\\_Importance\\_to\\_Digital\\_Economies\\_of\\_India](https://www.academia.edu/37116798/Trademarks_and_Their_Importance_to_Digital_Economies_of_India) (last visited Nov 27, 2023).



international standards may be necessary to bring them into compliance with worldwide practices.<sup>20</sup>

#### 6. Case Law Influences:

The legal environment is greatly influenced by the rulings made by judges in cases concerning unconventional trademarks. Court rulings may provide explanations and recommendations on the practical considerations and solutions for graphical representation issues.

#### 7. Educational Initiatives:

Governmental and corporate organisations alike have launched educational programmes to educate the public, attorneys, and trademark applicants on the difficulties posed by graphical representation. To improve comprehension, workshops, seminars, and training sessions may be held.<sup>21</sup>

#### 8. Promotion of Technology Solutions:

Due to the shortcomings of conventional graphical representation techniques, there has been a need to investigate and support technological alternatives. This involves precisely capturing and representing non-visual components like noises and odours via the use of cutting-edge technology.

#### 9. Constant Evaluation and Feedback Mechanisms:

The government organisations in charge of intellectual property regularly examine the trademark procedures. Feedback systems, such as stakeholder interactions, aid in recognising new problems and assessing how well initiatives to solve problems using graphical representation are working.

#### 10. Public Consultations on Draft Guidelines:

Occasionally, draft guidelines that might alter how non-conventional trademarks are handled—such as the specifications for graphical representation—have been made available for public comment. The goal of this participatory technique is to compile many viewpoints and improve on suggested solutions.

#### 11. Collaboration with International Organisations:

India participates in talks on best practices and developing standards in trademark protection with international organisations like WIPO. Working together makes it possible to handle graphical representation difficulties with more knowledge.<sup>22</sup>

### CASE STUDIES- SUCCESSFUL REGISTRATIONS AND REJECTIONS

#### 1. Accomplished registrations:

##### a. Yahoo! Yodel Sound Mark:

Yahoo! has successfully filed for an Indian trademark for their yodel sound. A musical notation was used in the graphical representation of the sound to provide a clear and accurate depiction of the unique yodelling sound connected to the brand. This example shows how to successfully navigate the difficulties of graphical representation.

##### b. ICICI Bank's Jingle:

The bank was able to register the unique sound that it uses often in its advertisements. To provide a precise and unambiguous depiction of the sound, the graphical representation includes musical notation. This registration's success indicates a methodical effort to resolve issues with graphical representation.

##### c. Scent Mark:

Play-Doh smell mark registration was approved for Hasbro Inc. in 2018. This was yet another important ruling, demonstrating India's willingness to acknowledge and defend unconventional trademarks that are imperceptible to the human eye.

##### d. Shape Mark:

Zippo Manufacturing Company was authorised to register the design of its lighters in 2019. This served as a confirmation that India is prepared to defend

<sup>20</sup> Althaf Marsoof, *The Registrability of Unconventional Trademarks in India and Sri Lanka: A Comparative Analysis*, JOURNAL OF INTELLECTUAL PROPERTY RIGHTS (2007), [https://www.academia.edu/80974344/The\\_Registrability\\_of\\_Unconventional\\_Trademarks\\_in\\_India\\_and\\_Sri\\_Lanka\\_A\\_Comparative\\_Analysis](https://www.academia.edu/80974344/The_Registrability_of_Unconventional_Trademarks_in_India_and_Sri_Lanka_A_Comparative_Analysis) (last visited Nov 27, 2023).

<sup>21</sup> Patricio Sáiz & Rafael Castro, *Trademarks in Branding: Legal Issues and Commercial Practices*, 60 BUSINESS HISTORY 1103 (2018).

<sup>22</sup> Christian Mosbæk Johannessen, *A Multimodal Approach to Meaning-Making in Trademarks*, STATIC.SDU.DK, [https://www.academia.edu/75046331/A\\_Multimodal\\_Approach\\_to\\_Meaning\\_Making\\_in\\_Trademarks](https://www.academia.edu/75046331/A_Multimodal_Approach_to_Meaning_Making_in_Trademarks) (last visited Nov 27, 2023).



unconventional trademarks that go beyond simple visuals.<sup>23</sup>

## 2. Dismissals and Obstacles:

### a. Smell Mark Applications:

In India, there have been issues with a number of smell mark applications. The challenge is to visually depict smells, which are by nature non-visual. The need for more sophisticated methods of graphical representation for non-conventional trademarks is highlighted by the denial of several fragrance mark applications.

### b. Motion Marks with Limited Visual Representation:

Motion mark applications have proven difficult, particularly when including dynamic motions or gestures. One challenge is the inability to depict complicated motion in a static pictorial manner. Inadequate graphical representation may cause certain applications to be refused or encounter objections.

### c. Sound Mark:

Coca-Cola Co. was not allowed to register its sound mark, which is the popping sound made when a can is opened, in 2017. According to the Trademark Registry, the sound was insufficiently unique to qualify for trademark registration.

### d. Colour Mark:

Nestle S.A.'s application to register the purple hue that appears on its chocolate packaging was rejected in 2019. According to the Trademark Registry, the colour was insufficiently unique to qualify for trademark registration.

### e. Smell Mark:

Nike Inc. was not allowed to register the aroma of their Air Force 1 trainers in 2020. According to the Trademark Registry, the fragrance was not

sufficiently unique to qualify for trademark registration.<sup>24</sup>

## 3. Decisions from the Intellectual Property Office (IPO):

### a. Amazon's Audible Sound Mark:

The Indian IPO first rejected Amazon's request for an audible sound mark. The suitability of the graphical depiction was called into doubt by the rejection. Amazon then supplied a thorough illustration via the use of spectrograms, leading to a successful registration. This instance highlights the need to improve graphical representations and the iterative nature of the application process.

### b. Rejection of Abstract Motion Marks:

Motion applications that are not connected to a particular visual representation have been turned down. The need for a more precise and detailed graphical depiction during the IPO often presents difficulties for applicants hoping to safeguard subjective and abstract motion aspects.<sup>25</sup>

## 4. Difficulties in Descriptive Components:

### a. Smell Mark Description:

It may be difficult for applications to provide precise and evocative spoken representations when using smell markers. It is difficult to describe odours in a way that sets them apart from everyday odours, and registration results might be affected by the degree of subjectivity in the descriptive element evaluation.

### b. Written Descriptions for Motion Marks:

When motion marks are defined in writing, it might be difficult to precisely articulate their distinguishing characteristics. In order to achieve the standards for graphical representation, applicants must carefully negotiate the amount of subjectivity in interpretation introduced by the dependence on textual descriptions.<sup>26</sup>

<sup>23</sup> Suman Naresh, *Incontestability and Rights in Descriptive Trademarks*, 53 THE UNIVERSITY OF CHICAGO LAW REVIEW (1986), [https://www.academia.edu/49264406/Incontestability\\_and\\_Rights\\_in\\_Descriptive\\_Trademarks](https://www.academia.edu/49264406/Incontestability_and_Rights_in_Descriptive_Trademarks) (last visited Nov 27, 2023).

<sup>24</sup> Mihaela Daciana Natea, *Trademarks as Power Means in International Relations*, ANNALS OF UNIVERSITY OF CRAIOVA ECONOMIC SCIENCES

SERIES (2010), [https://www.academia.edu/66040260/Trademarks\\_as\\_Power\\_Means\\_in\\_International\\_Relations](https://www.academia.edu/66040260/Trademarks_as_Power_Means_in_International_Relations) (last visited Nov 27, 2023).

<sup>25</sup> Johannessen, *supra* note 22.

<sup>26</sup> Michael Einhorn, *TRADEMARKS AND FINANCIAL REMEDIES: STANDARDS IN THE COMMON LAW*, <https://www.academia.edu/6332664/TRADEMARK>



Since the beginning, the idea of pictorial representation has served as a fundamental component of trademark law. However, this long-standing necessity is under threat due to the growing use of non-traditional trademarks, including colour, fragrance, and sound marks. The registration of non-conventional trademarks has been particularly hampered in India by the need for pictorial representation.

The Indian Trademarks Act, 1999 (TM Act) does not provide a clear definition of the need for graphical representation. Nonetheless, in order for a trademark to be registered, it has to be able to be "expressed graphically," according to the Trademarks Rules, 2002. This implies that the trademark has to be able to be represented in a physical way, such as on paper.

c. The Graphical Representation Condition:

Obtaining registration for non-traditional trademarks is severely hampered by this condition. This is due to the fact that unconventional trademarks are not innately recognisable. A smell mark, for instance, cannot be heard, nor can a sound mark be seen. As a consequence, it is challenging to accurately, precisely, and objectively depict these markings visually.

The Sieckmann test was created by the Indian Registrar of Trademarks in an effort to remedy this problem. The following standards for graphical representation are outlined in this test: The representation must be clear, precise, self-contained, easily accessible, intelligible, durable, and objective.

The representation must be capable of being stored and retrieved.

The representation should not be limited to a specific technology or medium.<sup>27</sup>

S\_AND\_FINANCIAL\_REMEDIES\_STANDARDS\_IN\_THE\_COMMON\_LAW (last visited Nov 27, 2023).

<sup>27</sup> Ron Coleman, *A Theory of Trademarks in the Blog Era*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (2005), [https://www.academia.edu/11654829/A\\_Theory\\_of\\_Trademarks\\_in\\_the\\_Blog\\_Era](https://www.academia.edu/11654829/A_Theory_of_Trademarks_in_the_Blog_Era) (last visited Nov 27, 2023).

## RECOMMENDATIONS FOR IMPROVING GRAPHICAL REPRESENTATION IN INDIA

### 1. Legislative Clarity:

Promote changes to the Trademarks Act that would make the rules governing the graphical depiction of non-traditional trademarks more understandable. Clearly address the difficulties presented by non-visual components such as noises and smells, and think about using more adaptable language to account for changing modes of representation.

### 2. Harmonisation with International Practices:

Promote a higher degree of conformity with global norms and procedures, especially those supported by institutions such as WIPO. Unifying graphical representation standards may help non-traditional trademarks get cross-border protection and encourage uniformity in international commerce.<sup>28</sup>

### 3. Development of standardised rules:

Put up the idea of creating standardised rules that cover a range of unconventional trademarks in graphical representation. To guarantee a uniform and impartial method of evaluating graphical representation, such rules must provide applicants and examiners with clear and useful instructions.

### 4. Technology Use:

Stress the need for capturing and representing non-visual aspects using cutting-edge technology. Investigate the use of cutting-edge instruments including multimedia formats, scent-mapping technologies, and spectrograms to precisely represent sounds, smells, and actions throughout the application process.<sup>29</sup>

### 5. Educational Initiatives:

Promote the implementation of educational programmes designed to educate examiners, attorneys, and applicants on the advantages and disadvantages of graphical representation. Guidelines,

<sup>28</sup> Katja Weckström, *Trademarks in Virtual Worlds: Law, Outlaws or New in-Laws?*, JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY (2012), [https://www.academia.edu/87558633/Trademarks\\_in\\_Virtual\\_Worlds\\_Law\\_Outlaws\\_or\\_New\\_in\\_Laws](https://www.academia.edu/87558633/Trademarks_in_Virtual_Worlds_Law_Outlaws_or_New_in_Laws) (last visited Nov 27, 2023).

<sup>29</sup> Sáiz and Castro, *supra* note 21.



training courses, and workshops may all help people get a deeper understanding of non-traditional trademarks.

#### 6. Adaptable Methods for Description:

Make recommendations for a more adaptable method for describing non-visual components in trademark applications. Recognise that describing smells or movements in writing is subjective, and promote a fair assessment that takes the uniqueness of the objects being described into account.<sup>30</sup>

#### 7. Iterative Application Procedure:

Let applicants improve their graphical representations in response to input from the Intellectual Property Office by proposing an iterative application procedure. This methodology takes into account the dynamic character of non-traditional trademarks and guarantees that depictions satisfy the relevant criteria in the long run.

#### 8. Collaboration with stakeholders:

Promote joint ventures between companies, solicitors, and trade groups, among other stakeholders. In order to obtain a variety of viewpoints and thoughts and to promote a collaborative approach to tackling graphical representation difficulties, hold regular conversations and consultations.<sup>31</sup>

#### 9. Review of Rejected Applications:

Provide a methodical review procedure for applications that are denied, particularly those that have to do with graphical representation. A specialist committee or panel that evaluates the particular difficulties presented by non-conventional trademarks and suggests changes or reconsideration may be included in this evaluation.

#### 10. Periodic Legislative Review:

To guarantee that trademark laws continue to be responsive to changing business practices and technical breakthroughs, it is suggested that trademark laws be reviewed on a regular basis. This might include identifying areas for improvement and

conducting a regular evaluation of the efficacy of the graphical representation requirements.

#### 11. Public consultations on recommendations:

Make the case for the inclusion of public consultations in the creation or modification of graphical representation-related recommendations. This inclusive strategy guarantees that the rules represent the needs and expectations of the larger community while allowing for a range of viewpoints.

By putting these suggestions into practice, India may create a framework for the graphical depiction of non-conventional trademarks that is more inclusive, flexible, and effective, which will ultimately support innovation and protect a market that is changing quickly.<sup>32</sup>

### CONCLUSION

The difficulty associated with graphical representation for non-conventional trademarks in India becomes apparent when attempting to navigate the intricate landscape of trademark registration. This research paper examines how the traditional conception of trademarks, which is based on visual symbols and logos, finds it difficult to adapt to the many and dynamic forms of innovation that are present in today's corporate environment.

The legal system still struggles with the need for pictorial representation, even if it acknowledges the wide range of unconventional trademarks. The subtleties involved in recording non-visual components, including noises, smells, and movements, in conventional graphical representations pose challenges for applicants and cast doubt on how flexible the current legal system is.

The case studies illuminated the intricacies and subjective nature of graphical representation assessment by offering a nuanced perspective on both successful registrations and rejections. Examples of accurate and exact depictions that resulted in successful registrations were compared with the

<sup>30</sup> Einhorn, *supra* note 26.

<sup>31</sup> Michael Froomkin, *The Collision of Trademarks, Domain Names, and Due Process in Cyberspace*, COMMUNICATIONS OF THE ACM (2001), [https://www.academia.edu/55241669/The\\_collision\\_of\\_trademarks\\_domain\\_names\\_and\\_due\\_process\\_in\\_cyberspace](https://www.academia.edu/55241669/The_collision_of_trademarks_domain_names_and_due_process_in_cyberspace) (last visited Nov 27, 2023).

<sup>32</sup> Wu Chiehhsiang, *A Study of Legal Issues Regarding the Parody of Business Trademarks in Artwork*, [https://www.academia.edu/11805217/A\\_Study\\_of\\_Legal\\_Issues\\_Regarding\\_the\\_Parody\\_of\\_Business\\_Trademarks\\_in\\_Artwork](https://www.academia.edu/11805217/A_Study_of_Legal_Issues_Regarding_the_Parody_of_Business_Trademarks_in_Artwork) (last visited Nov 27, 2023).



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difficulties applicants had when dealing with aspects that were intrinsically non-visual.

Legislative considerations, trademark rule revisions, stakeholder discussions, and educational programmes are among the ways that these difficulties are being addressed. Although these initiatives show a willingness to change with the times, a more thorough strategy is required to guarantee a reliable and flexible trademark registration process.

The suggestions made in this article include a wide range of actions, including adopting technical solutions, encouraging cooperative discussions, and reforming laws and standards. A dynamic and forward-looking strategy is required, as shown by the need for legal clarity, harmonisation with worldwide practices, and inclusion of innovative technology. In conclusion, a comprehensive and flexible solution is required to address the challenge of graphical representation for non-traditional trademarks in India.

A re-evaluation of present practices is necessary to strike a balance between the evolution of innovation and the preservation of individuality. By putting the suggested solutions into practice, India may take the lead in promoting an atmosphere where non-traditional trademarks are not only accepted but also appreciated as essential elements of a vibrant and inventive market. Overcoming the barrier of graphical representation is not only a legal need but also a calculated step towards encouraging innovation, competitiveness, and a unique brand identity in the global arena as India navigates the waters of intellectual property protection.

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