



CHANGES AND DEVELOPMENTS IN NON-TRADITIONAL TRADEMARKS FROM AN INDIAN VIEWPOINT

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ABSTRACT

There have been various changes in the area of nontraditional trademarks in the competitive domestic market of India. Companies and corporations are spending much more money and utilizing their resources to create a distinct trademark for them to stay in this competitive market. They often tried to spend much more time and effort to create a good distinction between them and their competitors. The smell, shape, sound, texture, etc. of goods and services play an important role in the recognition of the product in present-day society.¹ Intellectual property rights protect creative ideas and different types of innovation to the person organization or business entity that has made it about the physical products.

Trademark is used to represent a particular product and intellectual property rights are there to protect its interest. Copyright and patent are the things that act as a shield for the protection of those particular trademarks. Nowadays there have been a lot of changes and developments in the field of intellectual property rights for the protection of nontraditional trademarks. Some necessary changes have been made in the Indian laws to comply with the provisions of the TRIPS agreement. This agreement has recognized the various kinds of trademarks. Various kinds of unconventional trademarks are beyond the scope of present trademark laws both at the international and local levels. It is to be taken into consideration that the present trademark laws in India have been changing with the needs of society and adapting to various circumstances and situations. The legislature of our country knows it and makes those laws that comply with the globally accepted TRIPS agreement according to changing situations. There are various types of nontraditional trademarks in the field of intellectual property rights.

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¹ Swati Mehra, 'Exploring the Realm of Non- Traditional Trademarks: An Indian Perspective ' (2025) Lawctopus <<https://www.lawctopus.com/academike/exploring-the-realm-of-non-traditional-trademarks-an-indian-perspective/>> accessed 4 March 2025

In recent times there has been an inflow of new technologies in the economy of the country. New types of products and services have been introduced in the market and there is also a change in the way of advertising different products for the customer.²

Keywords: Unregistrable, Uniqueness, Complexities, Registration.

WHAT ARE UNCONVENTIONAL TRADEMARKS?

In the general way of thinking, all the trademarks are created for a specific business model or various other services in the commercial aspect. The intellectual property rights ensure that the various trademarks are protected from any kind of infringement by outsiders. Nowadays various businesses are adopting different branding ways or branding strategies and the use of unconventional trademarks is one of those strategies. These unconventional trademarks are known as nontraditional trademarks and include both visible and nonvisible signs including colour, smell, shape, moving images, sound, position marks, texture, and various other elements within its sphere. These businesses try to represent their products and services uniquely to attract more customers and build up quite good relationships. The NICE classification put forward by the World Intellectual Property Organisation (WIPO) has been followed by our country, that is, India.

The NICE classification contains 86 signatories which ultimately makes it globally recognised and accepted in the field of intellectual property rights and ensures protection for the customers. These are different from traditional trademarks. It tries to create a sensory experience for the customer so that they can easily remember it for a long time or create memorable brand associations with the customers. Trademark occupies a major portion in the arena of intellectual property rights and it has seen many recent developments.³

A nontraditional trademark could be said as a new type of trademark that does not fall into the category of conventional trademarks. Because of its unusual nature, it is problematic to register these types of trademarks as conventional trademarks. These types of nontraditional trademarks are capable of graphical representations. Because of the nonconcrete definition of the trademark, it is possible to create more nontraditional trademarks or unconventional

² Ibid

³ Gautham Balaji, 'Unconventional Trademarks: Can Sounds, Smells and Colours and other Non-Traditional Trademarks Be Protected in India'(2024) De Penning And De Penning
<<https://depenning.com/blog/unconventional-trademarks-evolution/>> accessed 4 March 2025

trademarks. To register a nontraditional trademark, it must be intrinsically distinctive and contain uniqueness in its nature. The Trademarks can be broadly classified into five categories those are generic, Descriptive, Suggestive, Arbitrary, and invented or coined. The sound marks for Yahoo! And Allianz Aktiengesellschaft have been registered by the Trade Mark Registry. A favourable decision was given for the 'Zippo Lighters' against a trademark infringement to protect the shape of their products. It was noticed that the earlier nontraditional trademarks were thought to be unregistrable.⁴

DEVELOPMENTS IN NONTRADITIONAL TRADEMARKS

The trademarks are governed and regulated by the Trademarks Act. The Indian legal framework has been able to prevent various challenges and difficulties faced in the registration of unconventional trademarks. It protects the manufacturer or proprietor of goods from unlawful imitation of the product preserves the interest of the consumers and helps to avoid unnecessary confusion or various other conflicts. The debates and various discussions protection of nontraditional trademarks have been already there for 100 years. Although the protection and registration of nontraditional trademarks have developed very recently, it has been used by various brands for more than a decade.

For example, the unique shape of Coca –Coca-Cola bottle, the unique blue gift box of Tiffany, and the pink colour of Owens Corning Corporation are some examples of registered unconventional trademarks. The standing committee on the law of trademarks which was formed by the World Intellectual Property Organisation (WIPO) was given the task of studying trademarks. As a result of the analysis, it was found that the trademarks could be categorized into two types one is visual and the other one non visual trademarks. Visual trademarks are composed of elements such as colour, shape, and holograms while nonvisual trademarks are composed of elements such as sound, taste, smell, and texture. Later on, it became clear that the previous or earlier definition of trademark needed changes.

This thing was taken into consideration during the meeting held in Vienna and thereafter at Brussels. A major development in trademarks happened in 1994 with the introduction of the TRIPS agreement (Trade-related aspects of intellectual property rights). This thing provided a more proper definition of trademark and took into consideration the types of marks eligible for

⁴ Prमित Bhattacharya and Himanshu Mahamuni, 'Unconventional Trademarks' (2016) iPleaders Blog <<https://blog.ipleaders.in/unconventional-trademarks/>> accessed 4 March 2025

protection. This agreement has taken into consideration the importance of safeguarding and protecting the unconventional trademarks that are used to make distinct and unique products and incorporate unique characteristics. During the 19th century, many discussions and debates took place within Europe regarding the protection of nontraditional trademarks. Similarly, during the 20th century in Bolivia, some discussions took place to recognize and protect non-traditional trademarks. Many challenges are faced by the business sector in safeguarding or protecting unique nontraditional trademarks. Despite the various discussions and efforts to mitigate these issues protecting unconventional trademarks remains a very difficult area with complexities in it. There has been issued an interim stay order on the registration of the word 'N95' due to its generic nature by the intellectual property appellate board (IPAB).⁵

TYPES OF NON-TRADITIONAL TRADEMARKS

1. Sound Trademarks: These are those trademarks that are made through sound elements or various other kinds of distinct auditory elements. There has been an increasing tendency or growth in the use of sound marks in the world. These things give more uniqueness to the products in a competitive market. This is to be experienced through the ear of a person as this one is auditory sense.

2. Colour Trademarks: These are those trademarks that are made up of various kinds of colours that are available in the world. By mixing two different colours unique types of colours can be obtained. By using these unique colours, the business entity makes a distinction in its products and services. This is to be experienced through the eyes as this one is visual.

3. Taste Trademarks: When a specific type of flavor is applied to the product it is known as a taste trademark. This thing is not visible through the eyes but could be experienced through the tongue which is situated in the mouth of a person. This could be unique to a particular product.

4. Shape Trademarks: This is to be experienced through the touch sense of a person. The product must contain a specific type of structure and texture to be unique. Different types of patterns and shapes are used to make it. Fingertips are used to touch the surface of the object to know its specific structure. This has been made for the experience of the visually impaired

⁵ Gautham Balaji, 'Unconventional Trademarks: Can Sounds, Smells, Colours and Other Non-Traditional Trademarks Be Protected in India?' (2024) De Penning and De Penning <<https://depenning.com/blog/unconventional-trademarks-evolution/>> accessed 4 March 2025

persons also so that they could easily identify the products and be the customers of that company.⁶

CHALLENGES FACED BY NON-TRADITIONAL TRADEMARKS

Different types of difficulties are faced by non-traditional trademarks. There is a primary requirement that the mark should be capable of being represented graphically and it should be either in paper form or digital form to qualify for registration. This makes it difficult for the smell marks and taste marks that are nonvisual and provide for ineffective graphical representation. In the case of motion and multimedia marks also there is inadequate or a lack of proper guidelines about it leading to uncertainty among the business persons. There must be uniqueness and distinctive elements for the non-traditional trademarks to be registered. It becomes difficult to show the demonstration of consumer recognition and association when compared to unconventional trademarks.⁷

Moreover, conducting searches for non-traditional trademarks becomes difficult as there is no proper search code available in the search database. There are no proper guidelines to search for such types of marks which forms a hurdle for non-traditional trademarks. There is a lack of proper definitions for non-traditional trademarks and a lack of established precedents for non-traditional trademarks. Some jurisdictions have adopted a liberal approach towards Unconventional trademarks whereas India's legal framework remains rigid and takes a relatively conservative approach towards such types of trademarks. These have come to evolve as a difficulty or hurdle for such types of non-traditional trademarks. In these types of trademarks proving distinctiveness is a difficult task because these types of trademarks often deviate from the conventional ways or manners.⁸

The colour trademarks are not difficult to register if they can show that the combination of colours contains distinctiveness. The person who applies for the registration of non-traditional trademarks has to face certain types of difficulties. There has been an evolution of the registration of the non-traditional trademarks which has taken place gradually. Another difficulty for the registration of smell and taste marks is whether it is associated with the

⁶ Prmit Bhattacharya and Himanshu Mahamuni, 'Unconventional Trademarks' (2016) iPleaders Blog <<https://blog.ipleaders.in/unconventional-trademarks/>> accessed 4 March 2025

⁷ Ibid

⁸ Ibid

‘functional element’ as in the case of conventional trademarks about intellectual property rights.⁹

CONCLUSION

It has been observed that non-traditional trademarks have a major portion in the field of intellectual property rights. There is no particular distinction between conventional trademarks and non-traditional trademarks in the theory but the area of conventional trademarks must be liberalised so that the area of non-traditional trademarks can be expanded. In many situations and circumstances, these non-traditional trademarks face certain difficulties in their application. There have been many changes in the realm of non-traditional trademarks which could mean a lot in the field of intellectual property rights in the Indian Perspective. Nowadays many startups are emerging in this field and creating various non-traditional trademarks whose protection is very much needed and for that the Indian laws are also changing according to that.¹⁰

⁹ Pulkit Rathi, ‘Unconventional Trademarks: Overview and Analysis’ (2020) iPleaders Blog
<<https://blog.ipleaders.in/unconventional-trademarks-overview-and-analysis/>> accessed 5 March 2025

¹⁰ Ibid