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TYPES OF NON CONVENTIONAL TRADEMARKS

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ABSTRACT

Trademark is any sign, or mark used to distinguish the goods and services of one person from the other, or to identify the origin of such goods and services. Non-conventional trademarks can therefore be understood in the sense of any mark that doesn't fall within the traditional domain of either being a word, symbol, or logo, and capable of being solely recognized and distinguished by the human eye. There are non-conventional trademarks that are visual such as colour, shape, motion, etc. in addition to non-visual marks such as smell, taste, texture, sounds, etc. **Non-conventional Trademarks** are gaining acceptance in India, but laws and procedures are still being evolved. Intellectual Property Right is the focal point in global trade practice and livelihood across the world. The dissemination of IPR knowledge and its appropriate implementation is utmost requirement for any nation. This article highlights various types Non-conventional Trademarks.

INTRODUCTION.

Trademark law is one of the topics with a contemporary relevance. Trademark is to identify a particular brand, service or goods in the market. It protects the manufacturer or proprietor of the goods from unlawful imitation of the product and also preserves the interest of the consumers by avoiding ambiguities in selection. Generally, trademark protection is given to traditional marks like logos, symbols, images, captions, signs, names, etc. but due to the aggressive and ever-increasing competition between manufactures of physical commodities of late, it has become extremely important for them to stand out in the commercial market. Thus, brands have become more creative and adopted new non-conventional trademarks for identification of their products in the market. As technology developed, products are being distributed, sold and advertised with the assistance of modern technology. In the late 1990s non-conventional. Trademark such as sound, taste, touch, colour and olfactory marks grew in importance. In India the Trademarks Act 1999 replaced the Trade and Merchandise Marks Act 1958 and amended and consolidated the law relating to trade marks in India, however the the same is silent on registering non conventional marks.

Types Of Non-conventional Trademarks

A. Odour as Trademarks.

Smell marks are also known as scent marks/olfactory marks. Smell marks are rare breed. Smell mark is an extremely controversial trademark which has gained popularity and a great deal of consideration in recent times. Smell is one of the most powerful senses of human beings and one of the most potent types of human memory, which has the ability to recollect past experience effortlessly. The ability to perceive smells is one of the most important senses that a human being possess. An individual's sense of smell results from stimulation of the olfactory glands, at the top of the sinus cavity, which directly trigger the olfactory bulbs in the limbic system of the brain. While odours may evoke a conscious evaluation ninth cerebrum, this is not required. The olfactory gland scan and do directly trigger both memory and emotional responses. The feeling of smell has an extremely special and private control over what one does and how one lives. Individuals, places and things may well be dictated by how they smell. The present scenario the business field show increasing interest in pairing pleasant scents with their products. Though many countries have accepted the registration and protection of the smell of products as trademarks, the registration still continues to be a difficult

process due to its inability to be graphically represented and the herculean task required to shows its distinctiveness from the product. Smell trademarks are arguably one of the most difficult types to represent graphically. In many cases, the smell has been illustrated by writing down the chemical formula of the substance. Writing down the chemical formula for a smell is problematic as it is deemed to represent the substance rather the smell of the substance. Any written description of a smell must be so precise that the particular smell would not be confused with any other. However, there are companies that completed all the required tests successfully and registered smell as their trademark. For instance, the first smell mark was registered in the United Kingdom by Sumitomo Rubber for a floral fragrance or smells reminiscent of roses as applied to vehicle tires, smell of beer in the dart flights of a London- based company are famous examples of smell trademarks. The first US smell trade mark to be registered in 1990 after an appeal before the U.S Patent and Trade mark Office (USPTO), Trademark Trial and Appeal Board (TTAB). The mark was for a high impact ,fresh, floral fragrance reminiscent of plumeria blossoms used in connection with sewing thread and embroidery yarn. Since then, there have been very few Smell marks registrations of smell trademarks which include bubble gum scent for sandals, and strawberry, cherry and grape lubricants for combustion engineers. Smell trademarks are arguably one of the most difficult types to represent graphically.

B. Taste Or. Gustatory Trademark.

The taste mark is considered to be one of the most difficult and challenging when compared to other non-conventional trademarks. Taste mark suffers the same difficulty as that of smell mark. Taste is a human sense which differs from person to person. WIPO standing committee on the law OF Trademarks, Industrial Designs and Geographical Indications (SCT) reports that the graphic representation requirement was satisfied by using a written description of the taste. Taste marks are easier to be presented graphically as the written description of the taste and can be used to indicate the taste of goods. Taste marks can be applied only to goods and not to any services. Some countries have accommodated the registration of flavour as a trademark to identify their products in the commercial market. Generally, the registration of taste mark is made by providing a written explanation of the taste. Just like smell mark, it is mandatory that the taste mark should be distinctive from the inherent function performed by the product. The challenge lies in functionality. The hurdle of distinctiveness is even harder to

overcome as are assertions concerning functionality.

The taste trademark has not been traditionally used as such. Consumers need to be conditioned to perceive the claimed taste as a source-identifying object: taste should be a help to the consumer to distinguish one brand of goods from that of another. The taste should be understood by the consumer as a trademark, but not as a decorative or functional feature of any goods. The important issue of the taste trademark is that it is typically perceived as simply as a functional feature of the goods. Taste is a different sort of a distinctive sign in the sense it is intrinsic to the product in question. Very often, taste will prove to be an essential component of the product it claims to distinguish. Tastes cannot normally be separated from the product they should distinguish and that makes some difficulty for consumers in gaining access to the mark. The taste of a product can only be appreciated once it is consumed but the problem is consumers taste the goods only after they purchase.

Thus, its graphical representation is equally difficult as that of smell mark. But still some jurisdictions have accepted taste marks for registration, by explaining the taste. Which is again subject and not an exact proof of a taste, as the taste what others mind identifies might not be same what my mind has identified. In assessing the registrability of this type of sign, principles similar to those concerning odours may apply and it could be argued that taste marks may only be applied to goods and not to service. One of the obstacles to registering these marks is how to describe a scent or taste. Another difficulty is whether the scent or taste is "functional".

C. Motion Trademarks/Movement Trademarks.

A motion mark is moving animated object or moving logo which is used by a company as a marketing strategy to fascinate customers. A motion mark is made by using computer programs and software along with animation technique. Multimedia production has opened the way for even more non-conventional trademark: holograms, gestures and motion or moving image marks. Their registration usually requires the use of a sequence of pictures or drawings to depict how the trade mark functions. Motion marks are probably the most common of the multimedia marks. Few countries accept the trademark registration of moving pictures, videos, Moving cinematography, logos, video clips of documentaries or films, etc. Famous motion trademarks include the 20th Century Fox Film, corporation logo with floodlights trailing back and forth across the sky, Columbia Pictures, Microsoft Windows logo that appears when we open a windows desktop etc.

The most important aspect while representing motion mark the companies should take extra vital care of the movement occurring in the mark should be represented in the sequence. These are fascinating transformation of the world of trademarks. In India, the registration of motion marks is rising into prominence when compared to other non-convention marks due to many big movie companies prevailing in the country. It's been quite difficult to register motion mark under the Indian trademark due to its incapability of being graphically represented, which must be clear, precise, self-contained, easily accessible, intelligible, durable and objective. It is difficult to represent the motion mark in its pure form rather it will have to be represented as a combination of marks, example sound and movement are to be presented together, like in the case of Sony Ericsson and Nokia. There is no uncertainty that trademark applications for movement marks are expanding everywhere throughout the world and furthermore in Indian trademark law. For a long time, India didn't consider movement mark applications, however, this was changed with the distribution of trademark manual. The advantages of enrolling movement mark in this innovative request are critical. The impediments of a static trademark are

that it just ensures a single picture though movement trademark would protect a few pictures incorporated into the movements. This strategy interminably widens the ambit of assurance and drastically expands the estimation of the brand-related with the trademark.

D. Touch Trademarks/Texture Trademarks.

Touch marks are those which give the feel of the product through touch. Touch mark, also known as texture mark or surface mark, is not as frequently used like other trademarks and is therefore the least common non-conventional Marks. Touch is one among the different senses stamps and has its quality and claim in the business domain, yet it shows up as a trademark. It gives the sense to the client with reference to its substance and products or administrations it is for. The Touch mark ought to be unmistakable to the client because it gives light to the touch feeling of individuals and are also not being guaranteed as habitually when contrasted with another non-conventional trademark. Just like smell marks, these are difficult to be registered as there can be no representation of the texture such as fabrics, bottles, etc. In the present scenario the touch marks are less celebrated and less asserted stamps in the part of non-conventional marks. For registration of a touch mark, it is extremely important that it should carry a meaning and should not be a mere ornamental packaging of products or services. It is very important that texture should not be attributing to the functional purpose of the product. **Ecuadorian Institute of Intellectual property (IEPI)** founded in 1998 issued what is apparently, the world's first registration certificate for a texture trademark. IEPI found that the **"OLD PARR" SURFACE TEXTURE** proposed mark complied with all legal requirements of the Ecuadorian Intellectual property law and the Andean Community of Nations, by way of Decision 486. The velvet touch trademark of Khvanchkara wine bottles and leather-like material on the packaging of brandy or grappa are examples of touch as trademark.

E. Hologram Trademarks.

Holograms have been used for decades as security device against counterfeiting. In recent times holograms are being increasingly used as trademarks. Hologram by their very nature possess combination of multiple images and colours that are visible only when viewed from a particular direction and therefore it is extremely difficult to show the trademark on paper since it will not be able to capture all the motion of the mark in paper form, because the paper print will not be able to show the movement of the images. The image may work electronically, but on paper, the published mark will only be a substitute of the mark itself; a figurative mark which needs graphical representation and adequate written description if it is to succeed. The major difficulty with regard to hologram marks is its difficulty to prove as the source identifier of the product. A represents a picture sequences used to perform the trademark function of identifying the commercial source of goods and services. These types of marks are mainly used by companies to avoid unwanted false imitation of goods and services. Holographic trademarks have been registered by a few European countries and also in the united states. The basic requirement for a hologram mark registration is also same as that of other non-conventional trademark registration i.e., the mark should be distinctive enough to be used by a business to uniquely identify itself and its products and services to consumers. The trademark on the toothpaste of Glaxo Groups is one of the most famous examples of the hologram mark. American Express owns a trademark registration in USA for a hologram that is applied on the surface of its credit card.

F. Colour Trademarks.

Colours can be utilized as trademarks in two structures as a single colour, or as a combination of colours. single colour and combination of colours are the two forms of colour

trademarks. Combination of colours or even a single colour in combination with a word or device is statutory registrable. The definition of mark and trademark under the Trademark Act 1999 refer only to a combination of colours and therefore the combination of colours may prima facie be registrable. For obtaining combination of trademark registration, it is necessary to prove that the colours are probably going to strike the consumer as a sign of trade source. The Trademark Rule 2017, Rule 26(2) has broadened the scope for the registration of the colour mark by providing the process of its registration under Rule 26[8]. Therefore, the registration of single colour is questionable. In India the single colour trademark registration is very uncommon. In the various judgments given by the Indian courts, it is viewed that though the act has mentioned only the combination of colours but the courts interpreting the act say that the single colour can also be registered under the act. Single colour is seldom used as the principal means of distinguishing the trade source of the goods and services. A single colour will only in exceptional circumstances be capable of denoting the origin of the product or service.

Distinctiveness and graphical representation are the two main essentials for the registration of a colour mark. This colour should be distinctive from that of other product. If the applicant decides to claim trademark protection for a particular colour, he will be required to submit evidence to show that the said colour combination or colour that has been claimed is solely associated with the Applicant or exclusively designates their goods. So, it will be helpful if the applicant could show that the particular colour is associated with the Applicant and his goods or services. In a case where the colour mark is not inherently distinctive, the brand owner can still apply for its registration, contending that the colour mark has acquired distinctiveness due to its use for a long time, and has created a picture in the mind of customers that the colour belongs to his brand. For example, when we talk about the colour pink the first thing which comes to our mind is the pink colour vanish bottle. This pink colour has adopted in the mind of customers that it belongs to vanish and here is capable of being registered. India with respect to geographical representation may consider internationally recognized code such as pantone in order to prevent colour depletion and anti-competition. The pantone is a business framework that assigns explicit shades numerically and classifications more than thousands of shades by extraordinary unique codes. Hence to unravel the issue of graphical representation, India may use the Pantone or any internationally recognized colour identification code. Royal purple colour of Cadbury, a protected shade of pink of the Barbie company, Canary yellow of 3M company are some of the well-known colour trademarks in the world today.

G. Shape Marks.

The Indian Trade Marks Act, 1999, and the UK Trade Marks Act, 1994 specifically included the shape of good within the definition of goods. Shapes with significant functional features are unregistrable. Shape of the product can be a trade mark if it has acquired inherent distinctiveness. However, the scope of protection of shape marks is unclear, as statutory protection for shapes of goods was introduced in 2003. For the shape of a product to be considered a trademark, it must have acquired secondary meaning both conceptually and functionally. A shape mark is a trademark that safeguards the shape of the product. It might be the shape of a product, a good, brand, logo, label, tag, etc that are designed by an individual. The shape must be able to stand alone as trade mark. The shape marks have three-dimensional marks or shapes which are capable of identifying goods and services of one trader from another, can be registered as trademarks. Shapes form part of the visual characteristics that help to identify a product. For the shape of a product to be registered as a trademark, the shape should be distinctive and should not act as a functional

element of the product. For instance, the Coca-Cola bottle acquired a trademark for its shape, to protect its distinctiveness and identity.

A shape mark is also known as shape trademarks. Shape must have the capability to find goods sold under the trademark. This is a very beneficial process for blind people because some marks can be printed in Braille (A system of reading and writing for blind persons, through touch). These kinds of trademarks are high in demand in the present technological world. According to trademark rules, 2002, a shape mark must have a three-dimensional mark, the mark must consist of graphical representation or photographic reproduction as follows:

- 1, The product furnished must consist of three-dimensional views of the trademark.
- 2, If the registrar is not up to the satisfactory level, the applicant will be asked to furnish five different views of the mark and describe by words of the mark.
- 3, Additionally, if the registrar is not satisfied, he/she may call upon the applicant to furnish a specimen of the trademark.

According to the Indian Trademarks Act, a trademark may involve the shape or appearance of goods or their packaging, so long as it is possible to graphically represent the same. Shape distinguishes the goods sold under such a trademark from those of another manufacturer. The shape mark has also to satisfy certain criteria to be eligible to use as a trademark. They are: Nature of goods, Technical result and value of goods. The Trademarks Act prohibits registration of a shape which: results from the nature of the product itself; is necessary to obtain a technical result or its functionality or gives substantial value to the goods. For the shape of a product to be considered a trademark, it must have acquired secondary meaning both conceptually and functionally. However, just like other non-traditional trademarks, registration of shape marks faces a lot of challenges due to its inability to be graphically represented as well as difficulty in showing distinctiveness.

The Trademarks Registry Revised Draft Manual outlines the evidence required and other information that may facilitate the application, including the applicant's market share under the subject mark; the intensity and geographical extent of use of the mark; the investment in promoting the mark; evidence of consumer recognition of the sign as a mark; and evidence from the trade that the sign is considered to function as a mark. Under Rule 26(4) of the Trademark Rule 2017, the person claiming for the registration of the shape mark have to submit the pictorial representation of the 5 different views of claimed shape mark and its description in writings to the registrar. If the registrar is not satisfied, he can further call the application to produce the sample of the claimed mark before him. There are a lot of companies that were able to protect the shape of the product such as the shape of a chocolate called Toblerone, shape of zippo lighters, shape of Coco-Cola bottles, etc.

H. Sound Trademarks.

A sound mark is a non-conventional trademark which performs the function of helping consumers uniquely identifying the commercial origin of products or services or a particular product in the commercial market without causing much confusion. Sound mark or auditory marks can be anything which is auditory in nature. Sound marks are sounds that are unique to a distinct domain and possess features that make them recognizable to a community or a specific demographic. Sound marks are greatly denotative as they evoke instantaneous recognition from their audience. Consequently, sound marks are culturally and historically significant, and therefore warrant safeguarding and preservation. When compared to other non-conventional

trademarks, sound mark is the most registered and protected one and it is gaining wide popularity in many countries especially in US. Unlike other non-conventional trademarks, sound mark has the capability to be graphically represented using a series of musical notes with or without the usage of words. Some of the oldest and famous registered trademarks in this regard are the sound of Harley Davidson, Nokia tune, Tarzan Yell, etc.

The new Trademark mark rule 2017 has eased the process of registration of a sound mark in India by digitizing the process of its representation. After the introduction of the new Trade Mark Rules, 2017 the process of trade mark registration has been streamlined, with more emphasis on digitization. The rule 26(5) of the Trademark rule requires the sound to be submitted in an MP3 format not exceeding 30-second length and graphical representation of the sound notations with TM-A form. 'Factual Distinctiveness' of the sound is the pre requisite which needs to be proved to register a sound mark. Here 'Factual Distinctiveness' means the immediate recall value of sound with the product or service i.e., the consumers should be able to distinguish the sound mark of a particular brand from that of other as soon as he hears the sound mark. Factual distinctiveness is said to be the other essential factor for the registration of a sound mark. Yahoo was awarded as the first sound mark in India in 2008, to Yahoo Inc. It had a human voice yodeling Yahoo. ICICI Bank was the first Indian entity to obtain sound mark registration.

Sound Marks Benefit Companies in 4 ways.

1) Sound marks are a Component of Branding

Sound marks are auditory in nature and therefore they are uniquely distinctive audio clips that activate listeners' auditory senses, which will facilitate the identification of your particular brand. Just as how a brands' visual logo operates as a visual aid to further identify your brand, sound marks would have the same effect on its consumer-base.

2) They Stimulate Familiarity and Emotional Association

As mentioned, sound marks have rooted familiarity with them. Experts say there is tremendous power in using the strength of a popular song and affixing it to your particular product. This allows the song's sentiment to be transferred to your particular brand.

3) They're designed to be Infuriatingly Memorable

Company logos will have the ability to be identified while we scroll by them, eyes glued to our phones. Only sound marks, though, possess the power to seek indefinite refuge in our head. For days. And sometimes at 4 am, while you battle insomnia.

4) Sound marks are Persuasive

Music has the unique ability to embed messages in consumers' psyche. When words are put in musical form, their denotation is intensified, making them more potent and effective.

Some of the registered sound marks in India are:

- National Stock Exchange – (Theme song)
- ICICI Bank – (Corporate jingle – Dhin Chik Dhin Chik)
- Britannia Industries (Four note bell sound)
- Cisco – (Tune heard on logging in to the conferencing service Web Ex)
- Edgar Rice Burroughs – (Tarzan Yell by its toy action figure)
- Nokia – (Guitar notes on switching on the device)
- Yahoo - (Human voice yodelling Yahoo)

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