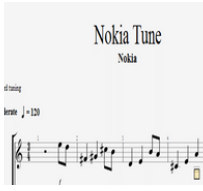


## THE RISE OF NON-TRADITIONAL TRADEMARKS: ARE WE READY FOR A SHIFT?



### Introduction- : A New Era of Brand Identity

**Section 2(1)(m)** of the Trade Marks Act, 1999 defines a “mark” which includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination while **Section 2(1)(zb)** defines “trade mark” as “a mark capable of being 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 colours”.

However, as branding evolves, so does the concept of what constitutes a trademark and as a result the 1999 Amendment of the Act saw addition of three new terms – “colour combination”, “shape” and “packaging”. The Act gives provisions only on combination of colours, motion, shape of goods and sound marks, however, unconventional concepts of smell, texture and taste are considered in some foreign countries.

Modern intellectual property frameworks, including the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, have paved the way for recognizing trademarks that go beyond conventional boundaries. As a signatory to TRIPS, India has incorporated significant adjustments to its legal provisions from recognizing trademarks in traditional forms and non-traditional formats. This shift raises a pertinent question: Are we ready to embrace a world where sounds, smells, tastes, and even textures serve as trademarks?

### Smell/ Olfactory Marks: Can Fragrance Speak for a Brand?

Smell is a powerful sense that evokes memories and emotions, making it a valuable tool for branding. Some companies have leveraged this by creating unique scents for their products, such as the scent of freshly mown grass registered by a Dutch company for tennis balls.

In India, the Trade Marks Act does not explicitly address smell or olfactory trademarks. While the definition does not exclude such marks, representing them graphically poses significant challenges. In 2009, the Trade Marks Registry released a Draft Manual on Trade Marks serving as a guide to the registration practices in India which clarified that trademarks for “fragranced goods” can only be registered if they are capable of graphical representation and can be distinctly differentiated from other products.

One illustrative case in which the registration of smell mark was rejected on the basis of non- fulfillment of the graphical representability criterion, among other factors, is that of Ralf **Sieckmann v German Patent Office**, where European Court of Justice (ECJ) decided that graphical representation per se is not enough for registration and it must meet the following criteria:

- It must be complete, clear and precise, so that object of the right of exclusivity is immediately clear.

- It must be intelligible to those persons having an interest in inspecting the register, i.e. other manufacturers and consumers.

However, in the U.S, the Trademark Manual of Examining Procedure allows registration of non-visual marks, such as scents or sounds, without requiring graphical representation. The first scent mark registration, granted in *In Re Celia Clarke* upon appeal, demonstrated that a scent functioning as an origin indicator could help consumers distinguish between competing goods.

### Taste Marks: Can Flavour Define a Brand?

The concept of taste marks pushes the boundaries of trademark law even further. While certain jurisdictions have begun accepting applications for taste marks, the graphical representation requirement creates a major hurdle. How does one “describe” taste in words or symbols?

India does not have any provisions for registering taste or flavor as a trade mark. While a taste can be described in words, the lack of a graphical representation makes registration unfeasible.

Also additionally, the functionality doctrine that prevents the use of functional product features as trademarks, often disqualifies taste marks for consumable products. For example, the mango flavour in mango juice cannot be trademarked because it is intrinsic to the product's functionality.



### Touch/Tactile Marks: When Texture Speaks

Touch marks, also known as tactile/texture marks, introduce the sense of touch into the branding conversation. A product's texture—whether it's the soft grip of a pen or the smooth finish of a luxury item—can distinguish it in the market.

A tactile mark must meet the same distinctiveness criteria as other trademarks to be eligible for trademark protection. However, graphically representing texture remains a significant obstacle. Tactile marks were first acknowledged in 2006 when International Trade Mark Association (INTA) passed a resolution in favour of them. The same year, the World Intellectual Property Association (WIPO) issued a report on the new types of marks, listing 'texture or feel marks' as non-visible marks. The report highlighted that the surface of a product could lead to recognition due to a specific and recognizable structure or texture. Due to various challenges associated with the registration of touch-marks, it has become one of the least explored categories of non-traditional trademarks in India.

### Sound Marks: Audible Branding in Action

Sound marks are perhaps the most recognized form of non-traditional trademarks. Whether it's the Nokia ringtone or ICICI Bank's “Dhin Chik Dhin Chik” jingle, sound can serve as a powerful branding tool.

Indian trademark law recognizes sound marks under **Rule 26(5)** of the Trade Mark Rules, which mandates submission in MP3 format (not exceeding 30 seconds) and a graphical representation of musical notations. This dual requirement ensures that sound marks are both distinctive and easily reproducible. Despite the challenges, sound marks have found a growing acceptance in India's trademark landscape.

### Conclusion :The Future of Trademarks

The protection of non-conventional trademarks reflects the law's acknowledgment of the psychological impact of symbols. New types of these marks, which hold greater influence over consumers and therefore higher commercial value, deserve the same level of protection as traditional trademarks. The challenges in registering these marks on paper should not discourage their use. Instead, innovative methods for identifying and categorizing such marks should be developed to safeguard both existing non-conventional trademarks and those that may emerge in the future.