

SMELL TRADEMARKS: A CRITIQUE AND ITS STANDING IN INDIAN TRADEMARK LAWS

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INTRODUCTION

With the fast headway of innovation and increment in rivalry among businesses, brands these days tremendously depend on the distinctiveness of their items through the various senses of the shopper like smell taste sound and so forth. Smell, one such senses, has undeniably been one of the most central senses on which individuals have relied on for their ordinary activities. Studies have shown how a particular scent can trigger one's memory, impact one's perspective and clearly impact associations to secure millions.² 'Brand name' as characterized under the Trademark Act, 1999, in India and unfamiliar institutions is wide and broad to an extraordinary degree. These arrangements proceeds to exhibit that to hold a particular level of flexibility to think about progress in the ambit of brand name capacity, the administrators proposed such wide provisions.³ The meaning of brand name being an image, word, or words, which is equipped for recognizing the products and ventures of one maker from those of another and can be graphically spoken to, is similar to the definition given by the TRIPs

BACKGROUND

"Any sign, or any blend of signs, equipped for recognizing the products or administrations of one undertaking from those of different endeavours, will be fit for establishing a trademark".⁴ In spite of the rehashed utilization of these non-ordinary imprints in the worldwide market, it comes up short on an all-inclusive approval attributable to the presence of region savvy enrolment.

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² Abhijeet Kumar, Protecting Smell Marks: Breaking Conventionality, *Journal of Intellectual Property Rights* Vol 21, May 2016, pp 129-139 (2016).

³ Sudipta Bhattacharjee and Ganesh Rao "The Broadening Horizons of Trademark Law Registrability of Smell, Sports Merchandise and Building Designs as Trademarks, *Journal of Intellectual Property Rights* Vol 10, March 2005, pp 119-126 (2004).

⁴ Article 15 (1) TRIPS Agreement.

Yet, one of the most basic changes have been presented by these advanced brand name structures in the present brand name law alongside the steady battle for the administrators to ensure a harmony between advancement protected innovation laws and mechanical enhancements and that they are at standard with one another.⁵

IDEA OF TRADEMARK

As indicated by Section 2(1) (m) of the Trademark Act, 1999-"Imprint" incorporates a gadget, brand, heading, mark, ticket, name, signature, word, letter, numeral, state of products, bundling or blend of hues or any mix thereof".⁶The Act further proceeds to characterize "brand name" in segment 2(1) (b) as – "An imprint equipped for being spoken to graphically and which is fit for recognizing the products or then again administrations of one individual from those of others and may incorporate state of merchandise, their bundling furthermore, blend of colours".⁷

The meaning of brand name gave under the TRIPs Agreement closely resembles the above given definition which states that any sign, or any mix of signs, prepared for perceiving the items or organizations of one endeavour from those of various undertakings, will be good for building up a brand name.

Brand name can be grouped into two classes: regular or customary and non-traditional or on the other hand current brand names. Brand name is, usually, related to words, names, images or a few other signs used for unmistakable evidence of product and administrations given by one producer. Nowadays, with the progression in the area of brand name, a wide array of brand names has been seen these days which has introduced the concept of 'non-conventional brand names', such as smell, sound, and taste thus on.

CENTRALITY OF SMELL

It is a scientific fact that the smell of anything can trigger memories within the human mind itself. However, the smell as a characteristic of a brand name itself didn't get a security, or even affirmation, as a brand's characteristic until recent times. It has been found that the sense of smell isn't just the most vital one out of the five senses, however it incredibly

⁵, Garry Trillet Registrability of smell shading and sounds: how to conquer the difficulties dressed by the necessities of graphical portrayal and peculiarity inside European Union Law.

⁶ Section 2(1)(m), Trademarks Act, 1999

⁷ Section 2 (1)(zb), Trademarks Act, 1999

contributes in the day by day activities. It has been proven by later research that despite the fact that individuals associate with the world through sights and sounds however, equivalent time response is given both at the cognizant and subliminal level to scents also. A person's feeling of smell results from incitement of the olfactory organs, at the head of the sinus cavity, which legitimately trigger the olfactory bulbs in the limbic arrangement of the cerebrum. While scents may bring out a cognizant assessment ninth cerebrum, this isn't required. The olfactory organs straightforwardly trigger both memory and enthusiastic reactions. This is in sharp separation to the following four faculties as they all stimulate locale of the cerebrum, what's more, require a cognizant appraisal to convey a reaction. In this way, the sentiment of smell has a very unique and private authority over what one does and how one lives. However, it is a rather ambiguous way to use smell as a way to make a product distinct since the sense of smell is a very subjective thing. Various people perceive different smells in different ways. Studies have also reflected that men and women both perceive smells and colours differently.

POSITION OF SMELL MARKS: INTERNATIONAL DEVELOPMENT

The Madrid Protocol didn't give much on the topic of enlistment of brand name. The situation in the Paris Convention was similar which concentrated exclusively on the insurance of modern property counting brand names and neglected to give the topic leaving an open door for the inclusion of non-conventional imprints inside the extent of the brand name. Brand name Law Treaty of 1994 has explicitly avoided sound and smell marks from getting enrolled as trademarks. Outings kept up a nonpartisan backup utilizing the word may, demonstrating that sound, smell can be ensured under it contingent on the goal and ability of the contracting parties.

Today it is an irrefutable fact that businesses aim to favour non-conventional marks since it would intently engage their customers and all their senses. By using such methods, a particular smell or sound would engage memories of the product. Market analysts believe that this is an excellent method to improve sales and market standings. So as to comprehend the global improvement in the brand name, the creator has analysed the locus of smell mark as a brand characteristic. The United States of America: US being the greatest industrialist economy, the premise of brand name insurance in the nation is to energize rivalry among companies and the same is encouraged by the Lanham Act.

The Lanham Act utilizes the most stretched out potential terms to portray the arrangement of things that can qualify as trademarks.⁸ Although fragrance marks are not explicitly determined in the Lanham Act, U.S. law recognizes that aroma can work as a source identifier where it has no utilitarian work.

According to segment 45 of The Lanham Act, government rule of the USA, brand name is characterized as: "The term "brand name" incorporates any word, name, image, or gadget, or any blend thereof:

(1) Used by an individual, or

(2) Which an individual has a true-blue aim to use in trade and applies to enlist on the

chief register built up by this Act, to recognize and recognize their products, including a

one of a kind items, from those fabricated or sold by others and to show the wellspring of the merchandise, regardless of whether that source is unknown."⁹

From the aforementioned definition, it is clear that despite the fact that smell mark isn't expressly included in the definition, it has not be banished from getting enlisted by goodness of the expression or any mix thereof. Just because, acknowledgment to the smell marks was given by the US courts wherein the application for enlisting the composed depiction of the smell of 'a high effect, new botanical scent suggestive of Plumeria blooms' for sewing string and weaving yarn was brought before the Trademark Trial Appeal Board (TTAB) and was acknowledged as a graphical portrayal and conceded brand name assurance. In the Qualitex case, the US Court licensed the choice of the Board so as to allow assurance to smell checks in the Clarke case.

In the European Union, Similar to Lanham Act, a wide meaning of brand names has been recognized by the EU order and it can't address fragrance checks plainly. As in, the United States, the European Union's Office for Harmonization for the Internal Market ("OHIM") perceives that olfactory imprints are qualified for brand name enrolment. In 1999, the Community Trade Mark Office ("CTM") mulled over whether the fragrance of new cut grass could be enlisted as a brand name for tennis balls. At first, the application was denied on the

⁸ Julia Anne Matheson, The Sweet Smell of a Successful Registration, Finnegan (2003), Available at <https://www.finnegan.com/en/experiences/the-sweet-smell-of-a-fruitful-registration.html?news=d28c44ca-6b7a440b-a97d-ee09588e9c02> (keep going got to on 26/3/2018)

⁹ Lanham act 15 U.S.C. and 1127 (1194).

ground that the words "the smell of new cut grass" didn't qualify as a satisfactory graphical portrayal of the imprint fit for delineation in a shape or structure as required by Article 4 of the Community Trade Mark Regulation. On request, the Board of Appeal concluded that the aroma of new cut grass is an unmistakable fragrance known to, and conspicuous by, most of the populace as a matter of fact, and accordingly that the imprint's depiction was suitable for registration.

The refusal of the enrolment of a balsamically fruity smell with slight trace of cinnamon by the European brand name vaults brought up two issues to the ECJ:

(1) First of every one of the an imprint which can't be recreated noticeably can in any case be imitated with certain helps (2) And furthermore whether the prerequisite for realistic portrayal in Article 2 is met when a smell is repeated by (a) concoction equation, (b) a portrayal, (c) an example or (d) a blend of these elements.¹⁰

It was held by court that rundown of signs in Article 2 isn't comprehensive and signs which can't be watched outwardly, for example, smell or scents won't be avoided given that it very well may be spoken to graphically. The United Kingdom: In request to execute the Community Trademark Regulation of 1993 a new brand name was instituted in the UK. Chanel No 5 on that day itself sought after to enroll it as brand name however it was ineffective because of absence of sign of its inception. This was followed by the fruitful enlistment of a botanical aroma like roses as applied to tyres by Sumitomo Elastic Co and smell of brew applied to trips for darts by Unicorn Products. Indeed, even on account of the UK the issue was with the graphical portrayal of the imprints comparative to the instance of ECJ. Graphical portrayal isn't just vital for recording and distributing the mark yet in addition to permit the concerned gatherings to decide degree of existing brand name rights by running a pursuit of brand name register. The Principal Hearing Officer for a situation of enlistment of the smell or fragrance of cinnamon in regard of furniture featured the trouble in enlistment of smell marks by expressing that a man's perspective on that smell is most likely going to be influenced by the conditions in which they have been brought up in.

¹⁰ Hikada S & Tatchell Nicola et al., *Assign of the occasions? An audit of Key Trade Mark Decisions of the European Official courtroom and Their Impact Upon National Trademark Jurisprudence in the EU*, Trademark Reporter, 94(2004)1105 at 1115.

Aside from graphical portrayal, it is significant that the mark isn't missing of one of a kind characters as was expressed by the OHIM Third Board of Appeal in another such case. Since an olfactory mark is unequipped for being seen outwardly, it raised a question regarding whether an olfactory mark can't be a distinct mark of a brand name in any way.

The response to this inquiry was managed for the main the first run through on account of Sieckmann v Deutsches Patent-und Markenamt under the watchful eye of the European Court Of Justice. The ECJ underscored on the graphical portrayal of the imprint as opposed to on visual discernment. And yet the ECJ concluded that graphical portrayal essentially isn't sufficient for enrollment, and it must satisfy the accompanying standards: It must be finished, clear and exact, with the goal that object of the privilege of selectiveness is quickly clear. It must be coherent to those people having an enthusiasm for examining the register, for example different makers and consumers.¹¹ In this manner in spite of the fact that in UK the enrollments of olfactory imprints is particularly permitted and open for interpretation.

STANDING OF SMELL TRADEMARKS IN INDIAN LAWS

Definition of Trademark under the Indian law isn't exactly the same as the past global case judgements. It neither incorporates nor explicitly prohibits the registrability of nonconventional brand names. Despite the fact that it is not entirely clear, the meaning of trademark doesn't include any non-customary brand name however the Draft Manual given by the Trademark Office accommodates uncommon thought for certain non-conventional brand names. Like several nations, India is additionally not liberated from the issue of graphical portrayal of the smell marks and to determine this issue the Draft Manual arrangements have been presented which if not actualized could stunt the development of registrability of smell marks in India.

RAMIFICATIONS FACED IN REGISTRATION OF SMELL MARKS

Notwithstanding the acknowledgment picked up by smell marks from different nations, despite everything needs sponsorship of solid lawful arrangements and improvement is required in this part of trademark laws. With more nations building up arrangements for the registrability of smell, denotes an unmistakable logical inconsistency which can be seen between the guidelines set down for the same by the nations. Where on one hand nations like

¹¹ Nikhil Kashyap & Priyanka Ghai, Non Traditional Trademarks: An Unprotected Arena, Law Mantra Think Beyond others.

Australia and Europe rely upon the Sieckman test, the United States brand name law is guided by the Qualitex administering of the Supreme Court. The most essential test looked by a smell mark is the customer's availability to the smell previously buying the item. Thus, On the off chance than not, at that point the fundamental reason for the smell to go about as a brand name is vanquished since the buyer needs to hold back to smell its fragrance till the item is put to use at home or during his/her upbringing.

COMMERCIAL SCOPE OF SMELL MARKS

'Smell' as brand trademark has been an extensively discussed theme. Albeit different nations have set down explicit arrangements as to the security of smell marks, by and by the norms set in different nations are contradictory with one another. A few contentions for ensuring smell marks feature the way that the job of fragrance in the present item isn't confined to just sell the item but it additionally reaches out to recognize the item and make it distinct from the rest of the items of the same category. Additionally, it plays a functioning job in building up a long span scent memory. As the researcher would see it, enlistment of smell marks has more drawbacks than the boons since the explanation is similar in a few cases, purchasers associate a specific smell with a particular producer, considering the emotional idea of human affectability and irregular nature of smell, it ought to be an issue of worry for several companies that to consider utilizing aroma as brand trademarks as a fragrance on an item may dissatisfy the purchaser if the fragrance is unappealing to them.

CONCLUDING REMARKS

Smell or olfactory marks can be a creative, novel and engaging way of advertising and selling products for vendors yet it has a questionable and dubious position when it comes to registrability as brand trademarks under the brand trademark laws inferable from the accompanying difficulties Smell trademarks are something that is difficult to register because of its unavailability of a graphical representation, which is an important factor when it comes to registering smell trademarks under global trademark laws. Moreover, smell is something that is extremely subjective in nature and it is perceived differently by different individuals. It is also a risk that businesses take since certain smells may seem unfavourable to certain customers, thus causing a drop in sales rates. In India, although there has been no registration of smell trademarks, the standing of smell trademarks in Indian trademark laws is rather ambiguous.