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### The Proustian predicament in trademark law: charting the legal recognition of olfactory marks

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#### \*E.I.P.R. 736 Abstract

*With the rise of multi-sensory branding, trademarks have expanded beyond the graphical and visual requirement to encompass olfaction, pushing the traditional limits of trademark doctrine. The present study assesses the evolving status of olfactory trademarks by focusing on their unique position as sensory-based marks. The study maps the regulatory landscape and evidentiary threshold for olfactory trademarks in the United States, European Union and Australia. These foundations are then juxtaposed to the Indian trademark law to conceptualise a workable framework for accommodating olfactory trademarks within the Trade Marks Act, 1999. The absence of a precedent in the Indian context underscores conservatism surrounding olfactory marks. The authors propose a hybrid framework for incorporating olfactory trademarks into the Trade Marks Act, 1999, combining Australia's statutory model with the evidentiary standards set by the US Courts and the USPTO.*

#### Introduction

"... I carried to my lips a spoonful of the tea in which I had let soften a bit of madeleine. But at the very instant when the mouthful of tea mixed with cake crumbs touched my palate, I quivered, attentive to the extraordinary thing that was happening inside me."<sup>1</sup>

In his seminal work "Remembrance of Things Past", French Author Marcel Proust captures the profound nostalgia and memories sparked by tasting the tea-soaked crumbs of a madeleine.<sup>2</sup> This sensory déjà vu conjures childhood memories, transporting Marcel back to the old country roads of Combray.<sup>3</sup> This powerful phenomenon, later known as the "Proust effect" theorizes that scent-evoked memories are emotional than memories evoked by other stimuli.<sup>4</sup> Distinctive scent are contextual cues.<sup>5</sup> Scent have been claimed to be particularly effective mnemonic cues due to the interconnection between olfaction and emotional processing.<sup>6</sup>

Capitalizing on this deeply emotional memories, brands have harnessed the potential of olfaction by embedding specific scents into their identity.<sup>7</sup> For instance, ITC Sonar, a five start hotel in Kolkata, uses scent branding to persuade and convert potential customers into buyers and enhance brand recall.<sup>8</sup> This deliberate association of scent with consumer experience exemplifies how scent can be utilized as an associative link between the consumer and brand within the commercial realm. This raises an imperative legal question: *can such scents be protected under the trademark law?*

Olfactory trademarks represent a subset of non-conventional trademarks that relate to smells or scents leveraging on the emotional and mnemonic power of olfaction to create lasting brand associations and distinguish goods or services in the marketplace. World Intellectual Property Organization's ("WIPO") Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications identified "olfactory trademarks" as a novel type of mark; identifying their potential for distinguishing goods and services.<sup>9</sup> WIPO Committee noted a core impediment that there is no \*E.I.P.R. 737 accepted international classification of smells to objectively identify an olfactory trademark with a specific name or code.<sup>10</sup> A more fundamental challenge, lies, in the requirement of *graphical representation*, encoded in the national trademark laws.

Jurisdictions such as the United States, the European Union and Australia have reckoned with this question and adapted their trademark regimes to accommodate olfactory trademarks—replacing stringent graphical representation with experiential accommodations through precepts or guidelines.

In *re Clarke*, the United States' Trademark and Trial Appeal Board ("*TTAB*") recognized the fresh floral scent of plumeria blossoms as an olfactory trademark for embroidery yarn.<sup>11</sup> The *Sieckmann* ruling in the European Union had initially imposed strict graphical requirements standards for the registration of olfactory trademarks.<sup>12</sup> These standards were later diluted under the Regulation 2017/1001 (EU) and a shift was made to "*any appropriate technology that is clear, precise and intelligible*".<sup>13</sup> Australian Trademark regime offers a particularly instructive codified and transparent model that explicitly includes "*scents*" as a "*permissible and protectable sign*" under the registration.<sup>14</sup>

Contrastingly, Indian trademark law framework remains conservative. Under s.2(1)(zb) read with s.2(1)(m) of the Indian Trade Marks Act, 1999, due to the requirement of graphical representation the registration of olfactory trademarks is curtailed.<sup>15</sup> The standard of graphical representation in India effectively excludes smells and other non-visible signs from registration. Indian trademark law constrains the registration of olfactory trademarks due to the intangible nature of the scent-excluding emerging innovative goods and services. (Since different jurisdictions utilize the semantics of the words-scents, smells, and odours differently, the terms are used interchangeably in the study).

The present study in Pt II explores the registrability of olfactory trademarks in India by examining the tripartite conventional requirements for registration—*graphical representation*, *distinctiveness* and *functionality doctrine*. In Pt III, the paper looks at how the international legal developments, particularly the United States, European Union and Australia addressed and, in some cases, reformed the treatment of olfactory trademarks under the national trademark laws. Part IV evaluates the requirement of graphical representation, distinctiveness and functionality doctrine for olfactory trademarks within the Indian context. Finally, Pt V proposes statutory and administrative reforms to accommodate olfactory trademarks—suggesting a hybrid model inspired by Australia and the EU. The study advocates for a recalibration of Indian trademark law on olfactory trademarks, aligning with the international trademark jurisprudence and evolving sensory dimensions of modern branding.

## A Fragrant History of Olfactory Marks

A non-conventional trademark refers to a category of marks that fall outside the ambit of traditional or statutorily recognized trademarks, such as letters, numbers, logos or those elements that consists of the combination of such elements.<sup>16</sup>

Owing to their intangible and inherently subjective characteristics, adoption of the olfactory trademarks as a protectable subject matter within the contemporary trademark law discourse across various jurisdictions have been slow.<sup>17</sup> This section of the paper traces the global development of olfactory trademarks, while positing this trajectory within the broader trends in the contemporary trademark jurisprudence. It offers a foundational explanation of the olfactory trademarks and how they challenge the traditional conceptions of trademark law.

### 1.1. Outlining Olfactory Trademarks: A Challenge to the Traditional Trademark Doctrine

Olfactory trademarks represent a form of non-conventional trademarks that utilize the memory associations of "smell" as a source identifier.<sup>18</sup> The tripartite impediments of graphical representation, distinctiveness and functionality doctrine constrain recognition of olfactory trademarks.<sup>19</sup> Although olfactory trademarks bear a high potential of innovative goods and services, the conception of these trademarks is rife with difficulties. Among these, the conflict between the seemingly intangible nature of scent and the traditional legal requirement of graphical representation becomes central to the issue of conceptualizing a framework for the recognition of these trademarks. The traditional conception of a trademark is rooted in the core principle *\*E.I.P.R. 738* of graphical representation. Graphical representation refers to the manner in which a trademark is depicted or displayed, typically in a physical form like a paper or a diagram. The requirement for graphical representation has been justified as "*it represents the only way a trademark can be recorded is by means of a piece of paper that is visible and can be read by the average intelligent person*".<sup>20</sup> Contemporary trademark legislations such as the Trademarks Act, 1999 in India and Lanham Act in the United States impose a stringent standard of graphical representation requirements for registration of trademarks. The dearth of a universally accepted method for graphical representation of olfactory trademarks poses a fundamental obstacle to their legal recognition.

Unlike traditional trademarks that can be disseminated via the digital realm, olfactory trademarks cannot be transmitted or perceived effectively through online channels. Olfactory trademarks are

reliant on the auditor-different trademark auditors have different sensitivity and identifiability to smell, rendering it onerous to quantify the registration standard of such trademarks.<sup>21</sup> The average auditors or lay consumers of these trademarks lack a standardized framework or technical apparatus for the evaluation of a scent, making them susceptible to errors in the evaluation of the uniqueness of these scents.<sup>22</sup> The distinctiveness of these olfactory trademarks is a significant challenge because it must be demonstrated that the scent or aroma did not arise naturally from the products or goods for which it is used. Demonstrating an interconnected brand association that uniquely identifies a product based on its smell is a significant problem.

The olfactory trademarks also pose a challenge to the source identifier theory due to the tenuous relationship between the consumer recognition of a scent and its association with a single commercial source. While the lay consumers may perceive a scent as familiar or even distinctive, there lies no cogent evidence that this shall be attributed to a single source identifier by the consumer.<sup>23</sup> For an olfactory trademark to be inherently distinctive, it must serve as a source identifier in the minds of the consumer. Given the variability in consumer perception of scent, pinpointing olfactory trademarks as a source identifier is relatively onerous evidential requirement for determining the possibility of confusion between two comparable scents.<sup>24</sup> Protecting an olfactory mark may be difficult due to the difficulty in proving that a product's scent or smell is not the same as its functional attribute. The scent of a product serves the twin purposes of ornamental value and utility in terms of enhancing consumer appeal or reach. The application of the functionality doctrine postures significant barriers to the protection of the olfactory trademarks. Aside from the practical difficulties of adequately characterizing these marks, there is little legislation or jurisprudence on understanding olfactory trademarks under the traditional trademark doctrine.

## Experiences from the United States, European Union and Australia

In this section the evolution of the recognition of olfactory trademarks in the United States, European Union and Australia is explored. These jurisdictions have been selected due to the distinct nature of their legal developments in this area.

### 3.1. Olfactory Trademarks and the Lanham Act: Developments in the United States

The Lanham Act, 1946 ("Lanham Act") provides for a national trademark registration system in the United States<sup>25</sup> which was enacted to modernise the then trademark laws in order to align them with the business practices.<sup>26</sup> The Lanham Act protects the owner of a federally registered mark against the use of similar marks if such use is likely to result in consumer confusion or if the dilution of a well-known mark is likely to occur.<sup>27</sup>

Section 45 of the Lanham Act defines the term "trademark" as *"any word, name, symbol, or device, or any combination thereof—either used by a person or which a person has a bonafide intention to use in commerce and applies to register on the principal register established by this chapter (i.e. Title X of the Lanham Act)" (emphasis added).*<sup>28</sup> The term "use in commerce" means the bonafide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.<sup>29</sup> A mark shall be deemed to be in "use in commerce on goods" if *"it is annexed to the goods or their containers in the form of tags or labels and the goods are sold or transported in commerce"*.<sup>30</sup> Whereas a mark shall be deemed to be "use in commerce on services" when *"it is used or displayed in the sale or advertising of \*E.I.P.R. 739 services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country"*.<sup>31</sup>

The expansive language of s.45 *prima-facie* enables the extension of trademark laws to register and protect "odours" in the form of olfactory trademarks. In the context of olfactory marks, satisfying "the use in commerce" poses significant interpretative and evidentiary challenges due to the requirement of *"affixation in the form of tags or labels"*. This higher evidentiary requirement upon the applicants to demonstrate *"actual commercial use"* poses a conceptual incongruence as odours are inherently non-visual, non-textual and intangible in nature. Odours cannot be conventionally displayed or affixed in the traditional sense as their presence is transient and varies as per subjective human perception.

While assessing the registrability of a trademark in the US, the Courts apply a *three-fold test* focusing on (1) whether the mark serves a functional purpose,<sup>32</sup> (2) whether the mark actually distinguishes the product's source in the marketplace,<sup>33</sup> and (3) whether there is a likelihood of consumer confusion.<sup>34</sup> Section 1052 of the Lanham Act contains a series of grounds for refusing federal registration of trademarks, thereby precluding the registration of trademarks despite the broad definition under the

Lanham Act.<sup>35</sup> These grounds encompass deceptive character, matter which may falsely suggest a connection with persons, living or dead, institutions, beliefs, national symbols or geographical indications.<sup>36</sup>

When it comes to olfactory trademarks specifically, Section 1202.13 of the Trademark Manual of Examining Procedure (TMEP) provides that a scent may be registrable if it is used in a non-functional manner.<sup>37</sup> s.1202.13 provides that scents that serve a utilitarian purpose, such as the scent of perfume or an air freshener are functional and not registerable.<sup>38</sup> Notably, under s.1202.13 when a scent is not functional, it may be registered on the Principal Register under §2(f), or on the Supplemental Register if appropriate.<sup>39</sup> Section 1203.13 delineates that the amount of evidence required to establish that a scent or fragrance functions as a mark is substantial.<sup>40</sup>

The United States experienced a significant evolution in the legal recognition of olfactory trademarks with the landmark decision in *In re Clarke*.<sup>41</sup> In *In re Clarke*, the applicant, Celia Clark on the behalf OSEWEZ, filed for trademark protection for a scent having the following description: "The mark is a high impact, fresh, floral fragrance reminiscent of Plumeria blossoms".<sup>42</sup> The applicant grounded their justification for the registration by asserting that the scent added to her products is not a natural or inherent feature of the goods and does not provide any utilitarian advantage.<sup>43</sup> The applicant utilized modes of declaration and advertisements satisfying the criteria for "use in commerce".<sup>44</sup> In her application Ms. Clarke maintained that "*her fragrance is registrable as a mark because it is inherently distinctive of yarns and threads, no other manufacturer having sold such goods*".<sup>45</sup> Ms. Clarke stressed that the scent as being a brand of the product and consumers associated the scent with her products.<sup>46</sup>

The Examining Attorney had initially refused registration to the applicant on the ground that the "*asserted mark did not function as a trademark because it does not identify or distinguish applicant's goods from those of others*".<sup>47</sup> In refusing, the Examining Attorney observed that the applicant's fragrance mark was analogous to the other forms of "product ornamentation" and that the mark was "de-jure functional" due to the competitive need for free access to pleasant scents or fragrances.<sup>48</sup> Scholars conclude the Examining Attorney's rejection is on account of "competitive need for free access to pleasant scents or fragrances".<sup>49</sup>

On appeal by Ms Clark, The Trademark Trial and Appeal Board ("TTAB") reversed the refusal of registration, noting:

"..... we believe that applicant has demonstrated that its scented fragrance does function as a trademark for her thread and embroidery yarn. **\*E.I.P.R. 740** Under the circumstances of this case, we see no reason why a fragrance is not capable of serving as a trademark to identify and distinguish a certain type of product. It is clear from the record that applicant is the only person who has marketed yarns and threads with a fragrance. That is to say, fragrance is not an inherent attribute or natural characteristic of applicant's goods but is rather a feature supplied by applicant. Moreover, applicant has emphasized this characteristic of her goods in advertising, promoting the scented feature of her goods. Applicant has demonstrated that customers, dealers and distributors of her scented yarns and threads have come to recognize applicant as the source of these goods. In view of the unique nature of applicant's product, we do not believe that the failure of applicant to indicate in her promotional materials the specific scent or fragrance of her yarn (admittedly difficult to describe except in the manner that applicant has done so) is significant. In her advertisements and at craft fairs, applicant has promoted her products as having a scented nature. We believe that applicant has presented a *prima facie* case of distinctiveness of her fragrance mark."<sup>50</sup> (emphasis added)

Faye Hammersley moots that an important factor in the review of olfactory marks is the post-sale confusion doctrine.<sup>51</sup> *Post-sale confusion doctrine* focuses on whether the third parties, encountering a product after its sale, are confused as to the actual source of the product.<sup>52</sup> In Faye's analysis, such confusion may then influence the third party's future buying decisions.<sup>53</sup> Thus, it may be contended *In Re Clarke* succeeded due to the distinctive nature of the applicant's scent. Amanda E. Compton highlights that since the consumers would not typically expect yarn to have a distinctive scent and the yarn would function in the same manner without the scent, it was eligible for registration.<sup>54</sup> Elucidating thereon, Amanda stresses that Ms. Clarke's success stemmed from her use of the trademark in the market.<sup>55</sup> Despite its acceptance of the olfactory trademark, the TTAB distinguished the product in *Clarke* from those "scents or fragrances of products which are noted for those features such as perfumes, colognes or scented household products", upon which it refused to comment.<sup>56</sup> This implies that although the TTAB accepted the olfactory trademarks, it drew a distinction between the case and products such as perfumes, colognes or scented household products and declined to expression the



scents of such products could be protected as trademarks.

While *In re Clarke* enables the registration of non-functional scents as an olfactory trademark under the Lanham Act, Section 1202.13 of the TMEP restricts the scope of such registration by requiring a substantial amount of evidence.

In the case of *In re Pohl-Boskamp GmbH & Co*, the applicant had attempted to register the mark of "peppermint scent" along with the flavour in connection with "medicines, namely, pharmaceutical formulations of nitroglycerin".<sup>57</sup> While examining the case on merits, the TTAB referenced the precedent of *In re Clarke* noting that the TTAB had addressed the use of scent on products that are not ordinarily known to be scented, and not products such as perfumes or scented household products, which are noted for the feature of their fragrance.<sup>58</sup> Addressing the Examining Attorney's refusal to register the scent of peppermint, the TTAB observed that both flavour and scent could never be inherently distinctive.<sup>59</sup> For TTAB the evidentiary standard for registering a scent requires "a substantial showing of acquired distinctiveness" to demonstrate both a flavour or scent as a trademark' and that 'evidence required is in proportion to the degree of "non-distinctiveness of the mark at the issue".<sup>60</sup> The TTAB noted that there was a third-party product still available in the mark with a peppermint scent that competed directly with the applicant's goods.<sup>61</sup> In the context of examining consumer perceptions, the TTAB says "we give advertising of this sort little weight for purposes of demonstrating customer perceptions of the proposed marks".<sup>62</sup>

The TTAB concluded by stating:

*"The record lacks evidence of any efforts of applicant specifically directed toward promoting its product's flavor and scent as trademarks. The evidence of sales and promotional expenditures is equivocal in nature. The customer testimonials are not alone sufficient to establish the trademark function of these features of applicant's products. \*E.I.P.R. 741 By contrast, evidence showing that peppermint flavor and scent are used by others in the relevant marketplace tends to show that such flavors and scents are more likely to be perceived merely as attributes of ingestible products than as indicators of source. Accordingly, we find that applicant's flavor and scent marks fail to function as trademarks for applicant's goods."*<sup>63</sup>

Unlike the decision of *In re Clarke*, in *In re Pohl-Boskamp*, the applicant failed to provide sufficient evidence of intentional branding or consumer association between the odour and the source of the goods. These contrasting outcomes underscore a rather crucial dichotomy: while *In re Clarke* reaffirmed the registration of olfactory trademarks due to the innovative use and distinctive marketing, *In re Pohl-Boskamp*, the odour was perceived as a functional or generic attribute, particularly due to the wide-spread use of peppermint scent in pharmaceutical industry.

Despite the legal recognition of olfactory trademarks under the Lanham Act, the number of successfully registered olfactory trademarks in the United States remains remarkably low. This is primarily due to the substantial evidentiary threshold imposed by the USPTO, particularly in proving acquired distinctiveness and non-functionality under s.1202.13 of the TMEP. In July 2024, Crayola, a brand that ranks number one in the United States of America for sales in the coloring crayon category, was granted trademark for the smell of its crayons by the USPTO.<sup>64</sup> The CEO of Crayola-Pete Ruggiero has underscored that the smell of Crayola crayons holds a powerful connection to childhood evoking strong memories and has hinted future plans on utilizing the scent of the crayons in stores to enhance the unique consumer experience.<sup>65</sup> Crayola's ardently contested six-year long journey for securing trademark protection commenced in 2018 when the company first filed with the USPTO to register the scent of its crayons.<sup>66</sup> When applied in 2018, the USPTO rejected it outright, deeming the smell insufficiently distinctive as the smell was held to be "familiar, common and not exceptional to stand alone".<sup>67</sup> Crayola persisted and secured the trademark protected on an appeal after successfully proving the "distinctiveness of the scent".<sup>68</sup> In the request of reconsideration of trademark, Crayola highlighted that the Examining Attorney had demonstrated a misplaced reliance on the "wiki entry" from the website of CAMEO (Conservation and Arts Material Encyclopedia Online) pertaining to "wax crayons".<sup>69</sup> Crayola distinguished the unique nature of its scented crayons and highlighted various exhibits annexed with their first response to office action for demonstration non-functional nature of the scent.<sup>70</sup>

The disparity between legal permissibility and practical registrability becomes palpable when the actual registrations are examined. Annex 1 illustrates the live and registered olfactory trademarks in the United States. For collating these trademarks, a trademark search was carried out on the website of USPTO using the keywords "scent", "fragrance" and "odour" as the mark description. The compiled

data on the registered and attempted olfactory trademarks in the United States reflects the evolving landscape of trademark jurisprudence. Despite the judicial and administrative openness to the registrability of olfactory trademarks since the *In Re Clarke* case, the illustrates successful registration of the olfactory trademark remains exceptionally rare and largely contingent upon the applicant's ability to demonstrate non-functionality and acquired distinctiveness of the scent. Further, the presence of cancellations and abandoned filings as seen in Annex 1 underscore the onerous nature in maintaining and registering olfactory trademarks.

### 3.2 Olfactory Trademarks in the European Union

The European Union ("EU"), particularly the member-states of France and Italy, has been the global epicenter of perfumery and olfactory innovation. According to Mordor Intelligence, the scent and flavor market in Europe is expected to register a Compound Annual Growth Rate of 4.67% during the forecast period between 2019 to 2030.<sup>71</sup> From the cobbled streets of Grasse, France to the laboratories of luxury fashion houses such as Gucci and Yves Saint Laurent, scents are not merely commercial products: they are an integral part of European cultural heritage, identity and industry.

Trademark law in the European Union operates on two distinct levels-national trademark systems in each member state and a separate EU-wide system that *\*E.I.P.R. 742* provides protection across all member-states with a single registration.<sup>72</sup> The national system of trademarks has been harmonized by the Directive 2015/2436 enacted to approximate the laws of the member-states relating to trademarks.<sup>73</sup> On the other hand, the EU-wide system is presently governed by the 2017-amended EU Trade Mark Regulation ("EUTMR").<sup>74</sup> The harmonization objective of the Directive 2015/2436 implies that the nature of the signs of which a trademark may consist cannot essentially differ across the member-states.<sup>75</sup> Cumulatively, the Trade Mark Directive and EUTMR impose the same criteria for the protection of trademark due to the harmonization of laws across the member-states.

Article 4 of the EUTMR provides that

*"an EU trademark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colors, the shape of goods, or the packaging of goods, or sounds, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings and being represented on the Register of European Union trademarks, in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor."*<sup>76</sup>

Article 3 of European Union Trade Mark Implementing Regulation ("*Implementing Regulation*") provides the rules pertaining to the representation of trademarks.<sup>77</sup> Article 4 of the EUTMR and art.3(3) of the Implementing Regulation, read in conjunction, provide a non-exhaustive list of signs that may constitute an EU trademark.<sup>78</sup> Article 3(4) of Implementing Regulation states that "*where the trade mark is not covered by any of the types listed in para.3, its representation shall comply with the standards set out in para.1 and may be accompanied by a description*".<sup>79</sup> Notably, as per the guidelines of EUIPO, it is currently not possible to represent smells in compliance with art.4 of the EUTMR, as the subject matter of protection cannot be determined with clarity and precision with the generally available technology.<sup>80</sup> Article 3(9) of the Implementing Regulation specifically excludes the filling of samples of the compound.<sup>81</sup> The EUIPO has omitted olfactory trademarks from its policy documents on "new types of marks".<sup>82</sup>

This creates a paradoxical situation wherein olfactory trademarks are not per se prohibited by the EU Law, but they cannot meet the legal standards of registration due to the representational and technological barriers. While art.4 of the EUTMR and art.3(4) of the Implementing Regulation permit the registration of olfactory trademarks, they are operationally constrained by the requirement laid down in art.3(1) of the Implementing Regulation that any trademark must be represented in a "*clear, precise, durable, intelligible and objective manner*". This strict standard of graphical representation was laid down in the case of [Ralf Sieckmann v Deutsches Patent-und Markenamt \("Sieckmann Case"\)](#).<sup>83</sup> A closer examination of the Sieckmann case reveals how the European Court of Justice confronted, for the first time, the question of how and whether a scent could satisfy the legal requirements for trademark representation.

Mr Sieckmann had raised two questions on the interpretation of erstwhile art.2 of the First Council Directive 89/104.EEC. These questions were in connection with an attempt to register a olfactory mark in respect of various services in classes 35, 41 and 42 of the Nice Agreement on the International Classification of Goods and Services, 1957.<sup>84</sup> The national legislation in question here

was the German "Markengesetz" (Trademark Act) that had transposed the First Council Directive.<sup>85</sup> Mr Sieckmann referred to a description attached as an annex to his registration application that read as follows:

*"Trade mark protection is sought for the olfactory mark deposited with the Deutsches Patent- und Markenamt of the pure chemical substance methyl cinnamate (= cinnamic acid methyl ester), whose structural formula is set out below. Samples of this olfactory mark can also be obtained via local \*E.I.P.R. 743 laboratories listed in the Gelbe Seiten (Yellow Pages) of Deutsche Telekom AG or, for example, via the firm E. Merck in Darmstadt.*

*C<sub>6</sub>H<sub>5</sub>-CH = CHCOOCH<sub>3</sub>"*<sup>86</sup>

In the event that the description in the previous application was not sufficient to satisfy the application requirement of the Markengesetz, Mr Sieckmann in the main proceedings made the following addendum to that description:

*"The trade mark applicant hereby declares his consent to an inspection of the files relating to the deposited olfactory mark "methyl cinnamate" pursuant to Paragraph 62(1) of the Markengesetz and Paragraph 48(2) of the Markenverordnung (Trade Mark Regulation)."*<sup>87</sup>

Mr Sieckmann had also submitted his registration application with an odour sample of the sign in a container and stated that the scent was usually described as "balsamically fruity with a slight hint of cinnamon"<sup>88</sup> The application for registration was refused due to doubts on the registrability of scents and whether a sign's lack of any distinctive character precluded its registration.<sup>89</sup> In the appeal against the refusal, the Bundespatentgericht (*The Federal Patent Court of Germany*) held that in theory odours may be capable of being accepted in trade as an independent means of identifying an undertaking, in accordance with para.3(1) of the Markengesetz.<sup>90</sup> Mr Sieckmann claimed that art.2 of the Directive does not preclude an olfactory mark from being capable, in principle, of being registered.<sup>91</sup> He submitted that such a mark is covered by art.2. Mr Sieckmann additionally submitted that "represented graphically" should be understood as "represented, or electronically represented or deposited in another way".<sup>92</sup> Perhaps this was a rather intriguing line of reasoning as Mr Sieckmann in his submission highlighted that structural chemical formula should always be deposited with the Deutsches Patent und Markenamt (The German Patent and Trademark Office) with a description or a deposit of the sign.<sup>93</sup> Mr Sieckmann contended that "by knowing the chemical name, which must be published, third parties could buy the same chemical and, even without access to the scent sample or detailed description, form a clear and objective understanding of the mark and compare it with other scents if needed".<sup>94</sup>

The German Court in its findings highlighted that the "function of protection afforded by a trade mark is in particular to guarantee the mark as an indication of origin".<sup>95</sup> The court highlighted:

*"However, as is clear from the language of both Article 2 of the Directive and the seventh recital in the preamble thereto, which refers to a 'list [of] examples' of signs which may constitute a trade mark, that list is not exhaustive. Consequently, that provision, although it does not mention signs which are not in themselves capable of being perceived visually, such as odours, does not, however, expressly exclude them. In those circumstances, Article 2 of the Directive must be interpreted as meaning that a trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically. That graphic representation must enable the sign to be represented visually, particularly by means of images, lines or characters, so that it can be precisely identified..."*

*Article 2 of the Directive must be interpreted as meaning that a trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective."*<sup>96</sup>

With regards to the registrability of olfactory trademarks, the Court noted:

*"...a chemical formula does not represent the odour of a substance, but the substance as such, and nor is it sufficiently clear and precise. It is therefore not a representation for the purposes of Article 2 of the Directive. In respect of the description of an odour, although it is graphic, it is not sufficiently clear, precise and objective. As to the deposit of an odour sample, it does not constitute a graphic \*E.I.P.R. 744 representation for the purposes of Article 2 of the Directive. Moreover, an odour sample is not sufficiently stable or durable.*

...

*in respect of an olfactory sign, the requirements of graphic representability are not satisfied by a chemical formula, by a description in written words, by the deposit of an odour sample or by a combination of those elements.*"<sup>97</sup>

The European Court of Justice ultimately held an olfactory mark must be represented in a clear, precise, self-contained, easily accessible, intelligible, durable and objective manner (*these factors later came to be known as Sieckmann factors or Sieckmann Test*). As a result, the application for the olfactory mark was rejected in the Sieckmann case, setting a high threshold for the graphical representation of olfactory marks. In the case of [Eden SARL v Office for Harmonisation in the Internal Market](#), registration was sought for an olfactory sign accompanied with the description "smell of ripe strawberries" and consisting of the image of a strawberry.<sup>98</sup> The applicant referred to Sieckmann:

*"Referring to Sieckmann, the applicant asserts that it is sufficient that the graphic representation be 'unequivocal' and that there is no need to inquire whether that representation will be perceived more or less subjectively by the consumer. To that effect, the applicant submits that no other type of sign is subject to an objectivity criterion and that therefore olfactory signs should not be subject to that criterion either."*<sup>99</sup>

The Court of First Instance in Eden SARL held that the application to register the olfactory mark as a community trademark failed to meet the graphical representation criteria.<sup>100</sup> The Court in Eden SARL quoted [Sieckmann](#) to affirm that a combination of individually inadequate representations cannot together satisfy the requirements of graphical representation under art.4.<sup>101</sup> Sieckmann decision has been crystallized as the benchmark authority to define the strict threshold for graphical representation of olfactory trademarks in the Europe.

A significant change in the EU trademark system occurred with the passing of Directive (EU) 2015/2436 and Regulation (EU) 2017/1001, which eliminated the previous requirement that trademarks must be able to be graphically represented.<sup>102</sup> This reform seemed to directly address the issues pointed out in the Sieckmann judgment. There is however the lack of a flexible standard for representation effectively prevented the registration of non-visual marks, including scents. Recital 9 of the 2017 Regulation conveys this reformist intent, stating that "*a sign should be permitted to be represented in any appropriate form using generally available technology,*" as long as the representation remains clear, precise, self-contained, easily accessible, understandable, durable, and objective.<sup>103</sup> Recital 13 of the Directive supports this point, emphasizing that "*representational flexibility must still meet the goals of legal certainty and administrative clarity*".<sup>104</sup>

However, despite this formal update to the law, olfactory trademarks are almost impossible to register in practice. The problem is not due to any legal exclusions, but rather the absence of an established, standardized technology that can capture and electronically reproduce scent data in a way that meets the criteria set out in art.3(1) of the EUTMIR, based on the Sieckmann case. Essentially, the legal changes have separated form from function, providing a theoretical opening without addressing the underlying technological and evidentiary challenges that continue to keep scents from gaining proper trademark protection.

### **3.3. Australian Experience in Olfactory Trademarks**

While the European Union presents a unified approach, common law jurisdictions such as Australia provide a rather interesting contrast. Australia's case is particularly instructive due to the explicit statutory inclusion of scent marks, coupled with pragmatic and exhaustive registration guidelines.

Scents are explicitly registrable under ss 7 and 17 of the Australian Trademark Act, 1995.<sup>105</sup> Section 6 defines a "*sign*" as including scent.<sup>106</sup> Section 17 defines a "*trade mark*" as "*a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person*".<sup>107</sup> The Trade Marks Office Manual of Practice and Procedure in Australia provides detailed information on how to register trademarks, including olfactory trademarks.<sup>108</sup> In the case of the registration of an olfactory trademark in *\*E.I.P.R. 745* the condition of graphical representation is not a fundamental difficulty, as a textual description of the smell is acceptable.<sup>109</sup>

Since s.40 of the Australian Trade Mark statute specifies that an application for trade mark registration in Australia must be rejected if the mark cannot be represented graphically and providing a sample of the scent mark with the trade mark application will not satisfy Australian registration



requirements.<sup>110</sup> The wording of ss 27(3)(a) and 40 of the Trade Mark Act of 1995 indicate that the written requirement could not be satisfied by providing the scent's chemical structure.<sup>111</sup> According to s.43 of Australia's Trade Marks Act 1995, it may be misleading to represent a scent mark by the fragrance's chemical formula, because the scent's chemical formula depicts the compound itself rather than the odor of the compound used in the scent mark.<sup>112</sup> A customer of the products or services linked to the fragrance would not perceive the mark in the same way as a chemical formula. The official website of the Trade Marks Manual of Practice and Procedure enlists the following requirements for the presentations and descriptions of scent trademarks:<sup>113</sup>

*The application must include a graphical representation of the scent mark, for instance, the verbal description of the scent such as "the scent of pine". Trademarks consisting of or containing a scent will be indexed as the kind of sign "scent" and therefore, all scent trademarks will come up on a search of the "scent" kinds of sign.*<sup>114</sup>

*The graphical representation needs to be presented in a way that makes the trademark identifiable to the average person. Highly technical data will not be acceptable as a graphical representation. For instance, the outcomes of analytical methods such nuclear magnetic resonance, vacuum fractionation, "electronic nose" analysis, chromatographic methods, infrared spectroscopy, and vacuum, fractional, and molecular distillation would not be acceptable.*<sup>115</sup>

*The applicant must include a precise and accurate description of the scent that will be entered as an endorsement of the application. The description must include both what the scent is, and how it is to be used in respect of the goods or services claimed. For instance, one of the acceptable descriptions provided on the website includes "the application is a scent mark, consisting of the smell of apple blossoms applied to car tyres"*<sup>116</sup>

*If the description or representation of the trademark is not satisfactory in that it does not demonstrate the nature of the trademark sufficiently or show each feature of the trademark sufficiently, the applicant may be requested to provide a description or further description of the trademark (sub registration 4.3(8)). The office does not usually request a specimen of the scent, but it would be acceptable in these circumstances to request an example of the scent in use on the goods claimed.*<sup>117</sup>

The official website enumerates the various scents that are deemed non-distinctive and thus, ineligible for trademark registration.<sup>118</sup> Table 1 consolidates the categories of olfactory marks that have been classified as non-registrable within the Australian trademark law framework.<sup>119</sup>

Table 1: Australian Guidelines for Registration of Olfactory Trademarks

CATEGORY OF SCENT	DESCRIPTION OF THE CATEGORY	EXAMPLE	PERMISSIBILITY
Natural scent of a product	The natural scent of a product will have no inherent adaptation to distinguish the goods. These scents either form the goods themselves or are a natural attribute of the goods. The scent thus refers to the goods, and not to the trade source.	Scents of chocolate or vanilla for bakery goods or smell of rubber for car tyres	Not Allowed <b>*E.I.P.R. 746</b>
Masking scents	Masking scents are scents that are used to mask unpleasant natural odors in the goods they sell. A masking scent has a functional purpose and is not capable of distinguishing for that reason.	Use of lemon to scent domestic bleaches and laundry sprays, and lavender to scent carpet deodorants	Not Allowed

Scents which are common to trade	A non-functional use, but nevertheless use which is common to the trade, and hence not adapted to distinguish, is use of a scent to make a product more pleasant or attractive.	Use of pine or cedar scents for disinfectants and herbal scents for shampoos and soaps.	Not Allowed
Scents which may be capable of distinguishing	In order to fulfill this condition, the scent needs to be something apart from the goods themselves. It should be neither a natural characteristic nor an expected characteristic of the product, but something added to identify the applicant's goods from those of others in the same market	Smell of beer for dart flights and a smell of frangipani (plumeria) flowers for embroidery yarn	Allowed

The Australian trademark framework mirrors a relatively progressive and pragmatic outlook on the registrability of olfactory trademarks and provides a rather comprehensive and lucid catalogue of protectable scent marks. The threshold for registrability remains high with notable exclusions such as natural scents, masking agents and common fragrances to trade and commerce. Fair competition and preventing the monopolization of functional product features serve as the foundation for the reasoning behind the exclusion of these fragrances.<sup>120</sup> Australia's strategy can be viewed as cautiously experimental since it maintains the traditional trademark principles of distinctiveness, non-functionality, and clarity of representation while symbolically embracing non-conventional marks like scents. However, in practice, the development is rather slow. Currently, there are only two registered olfactory trade marks in Australia—one for E-Concierge Pty Ltd's scented golf tees, and another for the cinnamon scent applied to the non-wood-based furniture of NorvaNivel Pty Ltd.<sup>121</sup> *Annexure 2* summarises the details of the status of registration of olfactory trademarks in the Australian Context. As seen from the data, the low volume reflects both the novelty of such marks and the high evidentiary burden for distinctiveness. The successful applications mostly come from industries where the scent is not inherently functional. This plausibly indicates that IP Australia applies the functionality doctrine strictly, consistent with s.41 of the Trade Marks Act 1995.

The examination of comparative jurisdictions uncovers the varying degrees of openness to the protection of olfactory trademark protection. While the United States and Australia provide limited but evolving recognition to olfactory trademarks, there are technological impediments restricting the protection in the context of the European Union. The next section analyses the Indian position, using insights from these jurisdictions as a normative baseline.

### **Conceptualizing Olfactory Trademarks in India: Reinterpreting Representation, Functionality and Distinctiveness**

The comparative survey of United States, Australia and the EU provide regulatory insights to accommodate olfactory trademarks within the Indian trademark regime. Jurisdictions such as the United States and Australia have cautiously embraced olfactory trademarks by lessening the graphical representation requirements and recalibrating distinctiveness whereas the EU experience underscores the role of technology in operationalizing such reforms. The comparative lens shows that reform is plausible without abandoning core trademark principles. These findings position Indian trademark regime at a distinct crossroad: it can perhaps retain the status-quo, remain out of the step with the global trademark practices, or it can strategically modernize the law to reflect the rich-potential of olfactory and multi-sensory branding. Kewpegowda International Airport in the Indian city of Bengaluru has collaborated with the fragrance design firm Aéromé and built a signature

fragrance called "Dancing Bamboo".<sup>122</sup> As illustrated by the case study of ITC Sonar and Kewpegowda International Airport, Indian enterprises are already exploring scent-based branding experiences. Without legislative reform, such innovations remain unprotected under the Indian trademark register. The next rational step is to adapt, improvise and adjust these strategies from the comparative insights to India's statutory and institutional realities.

The Indian Trade Marks Act, 1999 (*TM Act*) largely remains silent on non-conventional marks and continues to adhere to a strict standard of graphical representation. This poses fundamental obstacles to the legal recognition *\*E.I.P.R. 747* of olfactory marks that require advanced technological techniques for the graphical representation. The conceptualization of olfactory trademarks is dependent on demonstrating higher evidentiary requirements of distinctiveness and usefulness, which is supported by s.34 of the TM Act and the Indian courts' longstanding emphasis on user-based rights. This section of the paper examines the viability of accommodating olfactory trademarks in India by unpacking the three core issues—the graphical representation requirement, the test of distinctiveness and lastly, the functionality doctrine. Addressing these challenges requires a coherent legislative and administrative roadmap—one that draws from international best practices while tailoring them to India's legal and technological landscape. The next section carves out such pathways.

### 3.1. The Graphical Representation Requirement in India

The Trade Marks Act, 1999 governs the registration of trademarks in India, including provisions related to non-traditional marks such as sounds, shapes and colors.<sup>123</sup> Section 2(1)(m) of the TM Act defines "mark" to be inclusive of "a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof".<sup>124</sup> While this is an inclusive definition, the Draft Manual of Trade Marks 2015 clarifies that certain categories of marks, such as shapes, colours, sounds and smells, "will require special consideration".<sup>125</sup> Section 2(1) (zb) of the TM Act defines 'trademark' in the following manner:

*"trade mark means a mark capable of being represented 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"*<sup>126</sup>

The TM Act does not provide specific guidance on whether a fragrance or smell can be registered as a trademark.<sup>127</sup> The definition of trademark under s.2(1) (zb) of the TM Act emphasizes graphical representation, thereby precluding olfactory trademarks.<sup>128</sup>

Notably, the words "capable of being represented graphically" would mean that the mark should be such as capable of being put on the register in a physical form and also being published in the journal.<sup>129</sup> The Draft Manual of Trade Marks therefore devotes several pages to the graphical representation requirements for colour, sound, scent, hologram and shape marks.<sup>130</sup> It specifies that the graphical representation should be independently sufficient to identify the applicant's mark; the representation should stand in place of the mark; and it should enable those inspecting the register to understand what the mark is.<sup>131</sup> The table below summarises the specific graphical representation requirements outlined for different categories of non-conventional marks.

Table 2: Comparison of Graphical Representation in the Indian Draft Manual for Sound & Smell Marks

S.No	Type of Trademark	Graphical Representation Requirements
1	Sound Marks	Graphical representation requirements are met by representation of the sign by a musical stave divided into measures and showing, in particular, a clef, musical notes and rests, indicating relative value, and sharps, flats and naturals (accidentals).
2	Smell Marks	The definition of trade mark

		makes it clear that in order to constitute a trade mark it should be "represented graphically" [section 2(1)(zb)] Accordingly since smell marks do not meet this requirements, under the Indian trademark system.
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Rule 28 of the Trade Mark Rules 2017 defines 'graphical representation' as that which can be expressed in both paper and digital form.<sup>132</sup> There is a clear insistence on graphical representation as underlined by the confluence of Trade Marks Act, 1999, the Draft Manual of Trade Marks and the Trade Mark Rules, 2017.<sup>133</sup> Since olfactory marks inherently lack a visual or graphical representation, it becomes unattainable to satisfy this crucial criterion. The inability of representing an olfactory trademark graphically becomes an insurmountable obstacle for its registration under the present Indian trademark law framework.

The requirement of graphical representation poses a significant barrier to the registration of olfactory marks under the Indian trademark law. With the increasing global acceptance of unconventional trademarks and the evolution of consumer association with branding, it is desirable to re-assess the continued necessity and relevance of this requirement in India.

Graphical representation delineates the precise scope of the trademark and enables a systematic and searchable trademark register. The advancements in digital technologies and growing diversity in branding strategies necessitate a more flexible and inclusive approach. The European Union, through the implementation of Regulation (EU) 2017/1001 has taken steps to move *\*E.I.P.R. 748* beyond a strictly graphical representation-based criteria and has allowed for representation *vis-à-vis* any generally available technology. While the Indian Draft Manual of Trade Marks explicitly notes the difficulty of graphically representing olfactory trademarks, there needs to be a paradigm shift for enabling innovation in brand representation and aligning with the global trends.

### **3.2. Test of Distinctiveness in the Indian Context**

#### **3.2.1. The Legal Basis and Barriers for Distinctiveness**

Distinctiveness is the cornerstone of the trademark law and serves as the threshold criterion for registrability under the Indian TM Act.<sup>134</sup> Distinctiveness refers to the unique ability of a trademark that enables it to identify the source of goods or services. Distinctiveness of a trademark is assessed under ss 9 and 11 of the TM Act pertaining to the absolute and relative grounds of refusal for the registration of a trademark in India.<sup>135</sup> Section 9(1)(a) of the TM Act explicitly provides that "a trademark shall not be registered if it is devoid of any distinctive character".<sup>136</sup>

Section 9(1) of the TM Act carves out an exception wherein the trademark shall not be refused registration if before the date of application for registration, the trademark has "acquired distinctiveness" or "secondary meaning" under the proviso to s.9(1) and s.32 of the TM Act.<sup>137</sup> The proviso to s.9(1) of the TM Act states that a descriptive mark can only be registered if it has become distinctive prior to the application for registration.<sup>138</sup> Section 32 of the TM Act provides that if a mark has been registered in violation of the s.9(1) of the Act, then such trademark shall not be declared void if it becomes distinctive after registration and before any legal proceedings for contesting the validity of such registration are initiated.<sup>139</sup>

It is established that common words, descriptive words or names cannot be registered under the TM Act unless they have acquired secondary meaning and a strong reputation and goodwill in the market.<sup>140</sup> The Indian trademark law jurisprudence acknowledges two categories of distinctiveness-inherent and acquired distinctiveness.<sup>141</sup> Inherent distinctiveness refers to the *prima facie* originality or uniqueness of a mark.<sup>142</sup> Acquired distinctiveness pertains to the association developed over time in the minds of the average consumers between a mark and the source of the product or service.<sup>143</sup> The TM Act indirectly deals with "acquired distinctiveness" or "secondary meaning" under proviso of s.9(1) and s.32.<sup>144</sup>

TM Act, 1999 is rather silent on the factors for considering whether a mark has "acquired distinctiveness" or "secondary meaning".<sup>145</sup> In assessing the distinctive character of a registered mark, the market share, intensity and coverage of use, amount invested by the undertaking in



promoting the mark, proportion of the relevant class of persons who identify the goods as coming from a particular understanding, and trade and commercial statements should be considered.<sup>146</sup>

The threshold of distinctiveness becomes convoluted when applied to olfactory marks since there is a lack of visual perceptibility due to which establishing inherent distinctiveness becomes difficult. Establishing acquired distinctiveness for such marks is challenging considering that this shall require the applicants to demonstrate that the scent alone unequivocally identifies the commercial origin of a product to a significant section of the consumers. The functional aspect of certain scents-especially for the purposes of masking or product enhancement may preclude them from protection under the s.9(3) of the TM Act that bars the registration of features resulting from the nature of the goods themselves.<sup>147</sup>

### 3.2.2. Rethinking Distinctiveness for Olfactory Trade Marks

With the influx of immersive branding experiences, the role of non-visual cues such as scent, has gained prominence.<sup>148</sup> These developments compel a reappraisal of the very notion of distinctiveness in the Indian context. The Delhi High Court recently in the case of Alphavector India v Sach Industries has granted protection to mark "91" for bicycles and stopped the Sach Industries from using "99" accepting the Alphavector India's argument that the numeral nine is a dominant part of both the marks.<sup>149</sup> The Delhi High Court noted that: ***\*E.I.P.R. 749***

*"As an arbitrary mark, "91" or "NINETY ONE" is entitled to greater protection under the Trade Marks Act. The defendants have no explanation as to why they have chosen to use the mark "99". The mark "99", when used on a bicycle, is clearly deceptively similar to the mark "91" especially as the first digit of both numbers, "9" is the same."*

This Delhi High Court judgment indicates that non-conventional marks, such as numbers, can acquire source-distinguishing significance in the Indian market even when the sign is not inherently distinctive in nature. It also highlights a degree of acceptance for evidence of secondary meaning through usage for non-conventional marks. The Court accepted argument for market recognition and use-based reputation of "91" parallels the argument of "acquired distinctiveness" that olfactory trademark proprietors may potentially utilize.

Conventionally, distinctiveness has been understood in largely perceptive terms, the conception of distinctiveness in the Indian context is rather rooted in the convenience of assessing evidence for establishing it. There lies no principled argument for the exclusion of non-visual indicators if the primary function of the olfactory trademark is to distinguish the goods or services in a consistent and reliable manner. While the Indian trademark law remains moored to a formalist framework of registrability, it is crucial to draw reference to the developments in the United States where the registration of olfactory trademarks such as "bubble gum scent" have been accommodated by relaxing the evidentiary burden upon the proprietors of such marks.<sup>150</sup> Reconceptualizing the notion of distinctiveness in the Indian context requires moving away from appearance to association of the product. While establishing the distinctiveness of a scent is rather complicated, empirical studies have demonstrated that olfactory stimuli are effective in triggering memory associations and emotional recall.<sup>151</sup>

The United States' experience offers a good example—the evidentiary focus is on the functioning of scent in the marketplace as a source identifier and the proprietors often rely on marketing evidence, consumer surveys and consistent use. This approach provides a model for recalibrating the Indian trademark law jurisprudence in order to finetune it to the modern-day consumer and branding experience. Section 2(1)(zb) of the TM Act contextualizes a trademark in terms of "its ability to distinguish" and does not explicitly prescribe a mode through the trademark shall be perceived. There is potential for a reinterpretation of functional distinctiveness in the light of this omission. As long as the scent serves as a marker of distinguishing goods or services, there exists no defensible rationale for its categorical exclusion.

### 3.3. The Functionality Doctrine: Intersection between Utility and Aesthetics

Functionality Doctrine implies that the features of the product that serve a functional purpose are not eligible for trademark protection.<sup>152</sup> A mark is considered functional when it is necessary for the usage or purpose of the product, or when it influences the product's price or quality, rather than only because it adds to its aesthetic appeal.<sup>153</sup> While the trademark registration provides exclusivity for functional use, the functionality doctrine aims to prevent monopolies over the essential product features that could stifle competition<sup>154</sup> and ensures that the essential features of a product remain

accessible to all the market participants.<sup>155</sup>

Section 9(3) of the TM Act reflects this position by barring the registration of marks which consist exclusively of shapes that result from the nature of the goods, are necessary to obtain a technical result or provide substantial value to the goods.<sup>156</sup> While the section pertains specifically to shape marks, the prevention of the monopolization of the functional features may be analogically extended to olfactory signs. The conceptual framework of the functionality doctrine within the Indian trademark law remains under-theorized, particularly when tested against the expanding landscape of non-conventional marks.

### **3.4. Differential Treatment of Non-Conventional Marks in India**

While olfactory trademarks have been excluded categorically, other non-conventional marks have seen gradual regulatory acceptance and accommodation. For instance, the Delhi High Court has protected the distinct red-color sole of Louboutin shoes and held the color to be distinctive on the sole of non-red shoe.<sup>157</sup> However, contrastingly in a different case involving the brand Christian Louboutin, the Delhi High Court held that it was not possible to trademark single color and hence, red colour on the sole of the footwear had not been infringed by the Abu Baker (the defendant). *\*E.I.P.R. 750*<sup>158</sup>

Sound marks including Yahoo Inc.'s yodel<sup>159</sup> and ICICI Bank's jingle<sup>160</sup> have been granted the trademark status in as early as 2010s in India. For a sound to be registered as a trademark in India; an MP3 recording of the said jingle, chime or musical composition, which is not more than 30 seconds in length, has to be submitted to the Office of Registrar of Trade Marks as per s.26(5) of the Trade Marks Rules, 2017.<sup>161</sup> Additionally, a graphical representation of its notations also has to be submitted.<sup>162</sup> Rule 26(3) of the Trade Mark Rules, 2017 provides a rather lax standard for the representation of a three-dimensional trademark;<sup>163</sup> the process of representation is rather unfavourable. The applicant must provide three different views of the trade mark in two-dimensional graphic or photographic form.<sup>164</sup> The interesting catch here is—if the TM Registrar finds these views insufficient to show the particulars, the applicant may be asked to provide up to five additional views and a written description within two months.<sup>165</sup> If still insufficient, the TM Registrar may require the applicant to submit a specimen of the trade mark.<sup>166</sup> In the Indian context, shape marks have been registered by Zippo Manufacturing Company (Zippo Lighter),<sup>167</sup> Krafts Foods Schweiz Holding GmbH (Toblerone) etc.

While such regulatory flexibility is commendable, it cracks open potential inconsistencies and gaps. The differential treatment of the various classes of non-conventional marks by the judiciary and registry suggests that the conceptual coherence in relation to non-conventional trademarks is still in the nascent stages. The procedural asymmetry for the representation of three-dimensional marks raises concerns over equitable standards of proof and potential arbitrariness. India's approach reveals a rather cautious stance and progression for incorporating brand innovation however greater legislative clarity and consistent judicial reasoning shall be crucial for streamlining protection and reducing the conflicting outcomes for olfactory trademarks and other non-conventional trademarks.

### **Reconciling Olfactory Marks within India's Trademark Law Framework**

The reform of Indian Trade Marks Act, 1999 can commence with a clarification of the statutory definition of "trademark" in line with s.6 of Australia's Trade Marks Act, 1995 that includes scent as a "mark". Based on the Australian experience, India could adopt a hybrid model for diluting the stringent standard of graphical representation in the case of olfactory marks. Under this hybrid model, following the Australian suit, India could permit the verbal description of the scent, description of the chemical formula and the deposition of a sample deposit to be maintained at Trade Marks Registry for the registration of olfactory trademarks. The Examination Manual in India could be updated to require proof of long-standing and exclusive use, consumer surveys, advertising data and sales figure mirroring the standards followed by the US TTAB in *Clarke and Pohl-Boskamp*. Functional or natural scents could be excluded explicitly to prevent any monopolisation following the Australian position.

An amendment to the Trade Marks Rules, 2017 shall be feasible as it already incorporates and prescribes representation methods for other non-conventional trademarks such as the sound mark. The aspect of distinctiveness in the Indian context can be accommodated by a wider interpretation of "acquired distinctiveness" and update its Examination Manual to include evidentiary requirements such as proof of longstanding and exclusive use of the scent in a specific product category, market recognition through advertising and volume of sales and the consumer perception studies.

Adherents of non-conventional trademarks have highlighted the emergence of a nascent theory-the "five senses" argument in modern-day branding and marketing practices.<sup>168</sup> According to the "five senses" argument, brand owners should think about the proprietary potential of moving beyond the conventional use of two-dimensional eye candy appeal of words and toward trademarks that can be felt, tasted, smelled, or heard in order to develop creative marketing strategies.<sup>169</sup> The *five senses* argument essentially implies moving beyond the visual identity of the brand. This kind of transformation is essential for encouraging corporate innovation and might help Indian companies create comprehensive, olfactory, and sensory brand identities, increase customer engagement, and successfully compete in both local and foreign markets.

## Conclusion

The comparative examination of the United States, European Union and Australian frameworks governing olfactory trademarks reveal acceptance of their conceptual registrability, with divergent standards on evidentiary *\*E.I.P.R. 751* burden and regulatory receptiveness. While the United States and Australia have adopted cautious yet welcoming approaches-tethered in the principles of non-functionality, acquired distinctiveness and precise descriptive representation. The European Union's formal change after the enactment of Directive (EU) 2015/2436 and Regulation (EU) 2017/1001 has yet to translate into practical registrability, owing to the absence of standardised technological mechanisms for the graphical representation of the scent. These comparative experiences underscore that reform in this domain is attainable without undermining the foundational objectives of trademark law, namely distinctiveness, clarity and preservation of competition in the market. Within the Indian context, the statutory insistence on graphical representation under ss 2(1)(zb) and 2(1)(m) of the Trade Marks Act, 1999, combined with an underdeveloped jurisprudence on non-visual indicators of distinctiveness, effectively excluding olfactory trademarks. This lacuna stands in a peculiar discordance with the contemporary commercial realities wherein Indian brands such as ITC Sonar and Kempegowda International Airport are employing olfactory cues to foster consumer engagement and to carve a niche brand identity. The calibrated reform of the Indian trademark regime to include olfactory trademarks would ensure compliance with the TRIPS obligation and also position itself as jurisdiction attuned to commercial realities. With India's growing consumer market and digitalized branding, olfactory trademarks can become "the experiential factor" in brand differentiation and consumer engagement.

## Annex 1 (Olfactory Trademarks in the United States)

No	Name of the Owner	Scent Description <sup>170</sup>	US Registration Number <sup>171</sup>	Status Date <sup>172</sup>	Publication Date <sup>173</sup>	Currently in Use (Yes/No)
1.	CLARKE, CELIA <sup>174</sup>	The mark is a high impact, fresh, floral fragrance reminiscent of plumeria blossoms.	1639128 (Serial No. – 73758429)	Sep. 29, 1997 (= Date of Cancellation)	Jan. 01, 1991	No (Abandoned)
2.	MOROCCAN OIL, INC <sup>175</sup>	The mark consists of a high impact fragrance primarily consisting of musk, vanilla, rose, and lavender.	4057947	May 17, 2022	Sep. 06, 2011	Yes
3.	Harvest Dental	The mark consists of	5940433	Dec. 17, 2019	N/A	Yes

	Products, LLC <sup>176</sup>	vanilla scent contained within wax for the manufacture of CAD/CAM milled dental wax patterns.				
4.	Crayola Properties, Inc. <sup>177</sup>	The mark consists of a scent reminiscent of a slightly earthy soap with pungent, leather-like clay undertones.	7431203	Jul. 02, 2024	Apr. 16, 2024	Yes
5.	Bushnell Inc. <sup>178</sup>	The mark consists of a scent of banana and evergreen, with a hint of ammonium and kerosene.	6016544	Mar. 24, 2020	Jan. 07, 2020	Yes
6.	Deep Blue Indoor Play LLC <sup>179</sup>	The mark is a floral scent that invokes a sense of being at an ocean/beach.	7369089	Apr. 23, 2024	N/A	Yes <i>*E.I.P.R. 752</i>
7.	Natural Fiber Welding, Inc. <sup>180</sup>	The mark consists of a warm woody scent with clove spice undertones.	6854397	Sep. 20, 2022	N/A	Yes
8.	Helen of Troy Limited <sup>181</sup>	The mark consists of the scent of jasmine, sandalwood, and Madagascar vanilla.	88011948 (*Serial Number)	Mar. 05, 2021	Abandonment Date = February 16, 2021	No & Abandoned due to incomplete process
9.	Helen of Troy Limited <sup>182</sup>	The mark consists of the scent of coconut,	88011947 (*Serial Number)	Mar. 05, 2021	Abandonment Date = February 16, 2021	No & Abandoned due to incomplete



		amber, and vanilla.				process
10.	Mike Mantel DBA Manhattan Oil <sup>183</sup>	The mark consists of the grape scent of the goods.	77179347 (*Serial Number)	Apr. 02, 2008	Abandonment Date = Mar. 01, 2008	No & Abandoned due to late response
11.	Deep Blue Indoor Play LLC <sup>184</sup>	The mark is a floral scent that invokes a sense of being at an ocean/beach.	7369089	Apr. 23, 2024		Yes
12.	G. Pohl-Boskamp GmbH & Co. KG <sup>185</sup>	The mark consists of a peppermint scent in connection with nitroglycerin.	85008626 (*Serial Number)	May 14, 2013	Abandonment Date = May 14, 2013	Abandoned after an appeal of examining attorney's final refusal
13.	Andrew Vaughn <sup>186</sup>	The mark consists of the scent of fresh, sweet oranges.	6338566	May 04, 2021	Feb. 16, 2021	Yes
14.	SHS International, Inc. <sup>187</sup>	The mark consists of the scent of a pina colada.	4144511	Dec. 21, 2018	Date cancelled = Dec. 21, 2018	Registration cancelled
15.	SOL IMPORTS LLC <sup>188</sup>	The mark consists of the scent of tropical coconut blend.	5881616	Oct. 08, 2019	N/A	Yes
16.	Grendene S. A. <sup>189</sup>	The mark consists of the scent of bubble gum.	86353984 (*Serial Number)	Jun. 19, 2015	Abandonment Date = Jun. 01, 2015	Abandoned due to late response
17.	Le Vian Corp. <sup>190</sup>	The mark consists of the scent of chocolate.	4966487	Sep. 21, 2023	N/A	Yes <i>*E.I.P.R. 753</i>
18.	CESI Chemical, Inc. <sup>191</sup>	The mark consists of the scent of oranges.	86293496 (*Serial Number)	Aug. 11, 2016	Abandonment Date = Nov. 30, 2015	Abandoned
19.	Cellco Partnership	The mark consists of a	4618936	May 14, 2021	Cancellation Date = May	Registration cancelled

	<a href="#">192</a>	flowery musk scent.			14, 2021	
20.	Hisamitsu Pharmaceutical Co., INC. <a href="#">193</a>	The mark is a scent mark having a minty scent by mixture of highly concentrated methyl salicylate (10wt%) and menthol (6wt%) and Camphor (3.1 wt%).	86719138 (*Serial Number)	Nov. 28, 2016	Abandonment Date = Oct. 18, 2016	Abandoned
21.	Hisamitsu Pharmaceutical Co., Inc. <a href="#">194</a>	The mark is a scent mark having a minty scent by mixture of highly concentrated methyl salicylate (10wt%) and menthol (3wt%).	3589348	Oct. 19, 2018	N/A	Yes (renewal application was successful)
22.	Hasbro, Inc. <a href="#">195</a>	The mark is a scent of a sweet, slightly musky, vanilla fragrance, with slight overtones of cherry, combined with the smell of a salted, wheat-based dough	5467089	Aug. 19, 2024	Feb. 27, 2018	Yes

### Annex 2 (Olfactory Trademarks in the Australian context)

S.No	Trademark No.	Description of the Scent	Owner	Filling Date	Registration Date /lapsing Published Date	Status
1	700019 <a href="#">196</a>	Strong smell of beer	Unicorn Products Limited	02 Jan 1996	07 Aug 1997	Lapsed

2	727820 <sup>197</sup>	The mark comprises the scent of musk applied to human skin by hand painting the liquid scent over temporary tattoo transfers, stencils and other body art designs	R J Mellick	17 Feb 1997	17 Dec 1998	Lapsed <b>*E.I.P.R. 754</b>
3	762286 <sup>198</sup>	The trade mark comprises the scent of eucalyptus, including the eucalyptus scent derived from eucalyptus trees and/or from eucalyptus essential oil.	Unipep Australia Pty Ltd	18 May 1998	16 Mar 2000	Lapsed
4	821444 <sup>199</sup>	The trade mark comprises the scent of COFFEE fragrance for self tan lotions and hair lotions, sun-preparations.	Debra Lee Brammall	28 Jan 2000	18 Apr 2002	Lapsed
5	823865 <sup>200</sup>	Scent of Melon Midori (Bronson and Jacobs	Debra Brammall	17 Feb 2000	18 Apr 2002	Lapsed
6	936188 <sup>201</sup>	The trade mark comprises the smell of lemon for tobacco.	D J Tobacco Co., Ltd.	02 Dec 2002	25 Aug 2005	Lapsed
7	1065702 <sup>202</sup>	The mark comprises the smell of lemon for tobacco.	D J Tobacco Co., Ltd.	02 Dec 2002	29 Mar 2007	Lapsed

8	1241420 <sup>203</sup>	Eucalyptus Radiata	E-Concierge Australia Pty Ltd	20 May 2008	26 Feb 2009	Registered & Protected
9	1386906 <sup>204</sup>	The trade mark consists of the scent of peppermint as applied to the goods.	G. Pohl-Boskamp GmbH & Co. KG	05 Oct 2010	23 Feb 2012	Lapsed
10	1446529 <sup>205</sup>	Spa salom, that only use all organic products, lemon grass.	Mary Mouawad	05 Sep 2011	05 Sep 2013	Lapsed
11	1513647 <sup>206</sup>	The mark consists of clear scent adding clear and fresh green essences which remind someone of the sea and forest, in harmony with fresh citrus scent and neat and refreshing scent of lily of the valley.	Uni-Charm Corporation	11 Sep 2012	16 Oct 2014	Lapsed
12	1513652 <sup>207</sup>	The mark consists of mild and sweet floral scent in harmony with fresh fruits scent of apple and pear, and transparent scent of rose, freesia and water lily.	Uni-Charm Corporation			Lapsed
13	1513655 <sup>208</sup>	The mark consists of gorgeous and romantic scent in harmony with	Uni-Charm Corporation	11 Sep 2012	16 Oct 2014	Lapsed <i>*E.I.P.R. 755</i>



		sweet-and-sour raspberry scent, graceful and elegant scent of Bulgaria rose, and exotic scent of Ylang-Ylang.				
14	1639647 <sup>209</sup>	The Trade Mark consists of Papua New Guinean cultural services and teachings of - Papua New Guinea traditional dancing and ceremony, drumming (the playing of drums),singing traditional songs, cooking Papua New Guinea food, traditional weaving, making bilums (traditional style bags), Arts and crafts (carving and painting), jewelry making, making traditional costumes, traditional clothing and teaching of languages.	Papua New Guinea Australia Association	07 Aug 2014	NA	Rejected (examination requirements were not met)
15	1640467 <sup>210</sup>	The Trade Mark consists of all ingredients of spicy pho recipe with	PHO FLINDERS PTY LTD	13 Aug 2014	03 Mar 2016	Lapsed

		taste, smell, appearance.				
16	1666803 <sup>211</sup>	The Trade Mark consists of Enzo's Design.	Crescenzo Enzo Puopolo	25 Dec 2014	23 Apr 2015 (*Date of Withdrawal published)	Withdrawn
17	1858042 <sup>212</sup>	Cinnamon (being principally Cinnamaldehyde)	NorvaNivel Pty Ltd	11 Jul 2017	13 Sep 2018	Registered & Protected
18	2528211 <sup>213</sup>	The trade mark is a scent mark. Bubble Gum scented head lice treatment products. It consists of the smell of bubble gum (being principally Bubble Gum Fragrant Oil). The banana fragrant oil is incorporated during the formulation process for head lice treatment products as outlined in the specification of goods for lice treatments preparations and preparations for destroying lice in the hair.	Deborah Faehrmann	06 Mar 2025	17 Sep 2026 (*Acceptance Date)	Published: Under examination
19	2528212 <sup>214</sup>	The trade mark is a scent mark. Banana scented head lice treatment products. It	Deborah Faehrmann	06 Mar 2025	17 Sep 2026 (*Acceptance Date)	Published: Under examination

		consists of the smell of banana (being principally Banana Fragrant Oil). The banana fragrant oil is incorporated during the formulation process for head lice treatment products as outlined in the specification of goods for lice treatments preparations and preparations for destroying lice in the hair.				
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E.I.P.R. 2025, 47(12), 736-755

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