



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

No part of this publication may be reproduced, stored, transmitted, translated, or distributed in any form or by any means—whether electronic, mechanical, photocopying, recording, scanning, or otherwise—without the prior written permission of the Editor-in-Chief of *White Black Legal – The Law Journal*.

All copyrights in the articles published in this journal vest with *White Black Legal – The Law Journal*, unless otherwise expressly stated. Authors are solely responsible for the originality, authenticity, accuracy, and legality of the content submitted and published.

The views, opinions, interpretations, and conclusions expressed in the articles are exclusively those of the respective authors. They do not represent or reflect the views of the Editorial Board, Editors, Reviewers, Advisors, Publisher, or Management of *White Black Legal*.

While reasonable efforts are made to ensure academic quality and accuracy through editorial and peer-review processes, *White Black Legal* makes no representations or warranties, express or implied, regarding the completeness, accuracy, reliability, or suitability of the content published. The journal shall not be liable for any errors, omissions, inaccuracies, or consequences arising from the use, interpretation, or reliance upon the information contained in this publication.

The content published in this journal is intended solely for academic and informational purposes and shall not be construed as legal advice, professional advice, or legal opinion. *White Black Legal* expressly disclaims all liability for any loss, damage, claim, or legal consequence arising directly or indirectly from the use of any material published herein.

ABOUT WHITE BLACK LEGAL

White Black Legal – The Law Journal is an open-access, peer-reviewed, and refereed legal journal established to provide a scholarly platform for the examination and discussion of contemporary legal issues. The journal is dedicated to encouraging rigorous legal research, critical analysis, and informed academic discourse across diverse fields of law.

The journal invites contributions from law students, researchers, academicians, legal practitioners, and policy scholars. By facilitating engagement between emerging scholars and experienced legal professionals, *White Black Legal* seeks to bridge theoretical legal research with practical, institutional, and societal perspectives.

In a rapidly evolving social, economic, and technological environment, the journal endeavours to examine the changing role of law and its impact on governance, justice systems, and society. *White Black Legal* remains committed to academic integrity, ethical research practices, and the dissemination of accessible legal scholarship to a global readership.

AIM & SCOPE

The aim of *White Black Legal – The Law Journal* is to promote excellence in legal research and to provide a credible academic forum for the analysis, discussion, and advancement of contemporary legal issues. The journal encourages original, analytical, and well-researched contributions that add substantive value to legal scholarship.

The journal publishes scholarly works examining doctrinal, theoretical, empirical, and interdisciplinary perspectives of law. Submissions are welcomed from academicians, legal professionals, researchers, scholars, and students who demonstrate intellectual rigour, analytical clarity, and relevance to current legal and policy developments.

The scope of the journal includes, but is not limited to:

- Constitutional and Administrative Law
- Criminal Law and Criminal Justice
- Corporate, Commercial, and Business Laws
- Intellectual Property and Technology Law
- International Law and Human Rights
- Environmental and Sustainable Development Law
- Cyber Law, Artificial Intelligence, and Emerging Technologies
- Family Law, Labour Law, and Social Justice Studies

The journal accepts original research articles, case comments, legislative and policy analyses, book reviews, and interdisciplinary studies addressing legal issues at national and international levels. All submissions are subject to a rigorous double-blind peer-review process to ensure academic quality, originality, and relevance.

Through its publications, *White Black Legal – The Law Journal* seeks to foster critical legal thinking and contribute to the development of law as an instrument of justice, governance, and social progress, while expressly disclaiming responsibility for the application or misuse of published content.

NON-CONVENTIONAL TRADEMARKS: A LEGAL ANALYSIS

AUTHORED BY - ANKITA GUPTA

1. INTRODUCTION

As competition has been increasing day by day, several brand owners, as directed by consumer society, adopt innovative techniques so as to surpass their competitors and to lift their own products, thereby achieving a distinctive frame. Trademarks are the marks which help in recognizing the source of products distinctively.

A trademark allows the buyer to distinguish the good or service that he prefers to buy from that of other goods or services, which subsequently encouraged the producer of preferred good to maintain the quality of goods. In addition to this, if another undertaking uses a similar mark, then it amounts to infringement of that particular trademark and party can claim compensation for the damage caused to its goods. This prevents the other party from unjustly enriching from the reputation of the holder of original mark.

Traditionally, trademarks have been related to logos, words, letters etc. **The Trade Marks Act, 1999** defines the term “**mark**” in the following manner: “*mark*” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.”¹

The Act defines ‘**trademarks**’ as: “*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.*”²

The definition sets down two criteria that a mark has to satisfy so as to become a trademark. If non-conventional marks fulfill the criteria of both distinctiveness and graphical representability, then they can fit into the ambit of trademark. Over the years non-traditional trademarks have grown and as the definition of ‘trademark’ has extended after an amendment

¹ The Indian Trademarks Act 1999, S. 2(m).

² The Indian Trademarks Act 1999, S. 2(zb).

came in 1999, non-conventional trademarks have come to be widely accepted now a days. A trademark to be called as non-conventional if it based on shape, smell, sound, taste etc. and it does not fall under the conventional set of marks i.e. logos, letters, words and so forth.

2. NON-CONVENTIONAL TRADEMARKS

Non-conventional trademarks would contain any visible signs such as colour, shapes, moving images, etc., or any non-visible signs such as sounds, smell, taste or textures. The Manual (Draft) of Trademarks Practice and Procedure of Indian Trademark Registry, 2015 states that “colour, sound, shape of goods, packaging and smell trademarks fall under the category of unconventional trademarks.”³

In recent years, various number of trademarks brought forth before the registering authorities, due to which they faced numerous challenges. These untraditional trademarks included shape, scent, texture, outline, body movement, and even Tarzan’s yell.⁴ This rise in the number of untraditional trademarks can be attributed to the non-concrete legal definition provided for a trademark. Trademark laws, on one hand, emphasizes on where the function of the mark is given primary significance. Any mark, can be registered as trademark, if it satisfies the commercial function of differentiating the said good from other goods. The development of trademark laws, on the other hand, emphasizes more on traditional and conventional marks.

Certain conditions are required to be satisfied to register an unconventional trademark-

- “The mark should be intrinsically distinctive.
- The mark should be able to distinguish the particular product from other products.
- The mark should be capable of graphical representation.”⁵

A question was raised by these kinds of untraditional trademarks that what all can be included within the ambit of a trademark. Trademark Laws of India are developing in nature. It was reported that the sound marks for Yahoo!⁶ and AllianzAktiengesellschaft were registered by

³ A draft of *Manual of Trade Marks Practice & Procedure*, Office of Controller General Patents, Designs & Trade Marks (March 10, 2015),

http://www.ipindia.nic.in/writereaddata/Portal/IPOGuidelinesManuals/1_32_1_tmr-draft-manual.pdf.

⁴ Dev Gangjee, *Non-Conventional Trade Marks In India*,

<http://docs.manupatra.in/newslines/articles/Upload/BB1047DA-5CCF-41BC-9C82-487F5DC570D3.pdf>.

⁵ Prmit Bhattacharya, *Unconventional Trademarks*, *IPleaders* (July 5, 2016),

<https://blog.ipleaders.in/unconventional-trademarks/>.

⁶ Prakruthi Gowda, *Yet Another Sound Mark Granted*, *SpicyIP* (July 30, 2009),

the Indian Trade Mark Registry. The Delhi High Court also gave a favorable decision against a trade mark infringement which was claimed by “Zippo Lighters” to protect the shape of their products.⁷

3. NON CONVENTIONAL TRADEMARKS AND ITS PROTECTION **UNDER VARIOUS JURISDICTIONS**

3.1 THE EUROPEAN UNION

European trademark law includes the national laws of countries with European Directives and the decisions of the European Court of Justice. Another important source of norm-setting is the Madrid Protocol. Trademark can be registered in two basis, either at national level or at the Office for Harmonisation in the Internal Market (OHIM) by achieving the status of a Community trademark.

3.1.1 Scent Trademark

UK Trademarks Act, 1994 was enacted to implement the European Community Directive 89/104/EEC. The English judiciary decided the early relevant cases related to scent under this trademarks act. Some of them are:

- In 1994, well-known brand **Chanel** applied for the registration for the scent of its fragrance ‘Chanel No. 5’. The application was failed to proceed and rejected on the ground of being functional as the scent was the product itself.⁸
- On the same day, **Sumitomo Rubber Co.** applied for registration of “*a floral fragrance/smell reminiscent of roses as applied to tyres*”⁹ and this application was successful.
- Again in the same year, **Unicorn Products** sought to register “*the strong smell of bitter beer applied to flight darts*”.¹⁰ This applications was also accepted.
- **Vennootschap onder Firma Senta Aromatic Marketing v. OHIM**, in this case OHIM allowed the registration of “the smell of freshly-cut grass” as a trademark for tennis balls. the Board of Appeal decided that: “*The smell of freshly-cut grass is a distinct smell which everyone immediately recognizes from experience. For many, the*

<https://spicyip.com/2009/07/yet-another-sound-mark-granted.html>.

⁷ Zippo v. Anil Manchandani (unreported, CS (OS). 1355/2006).

⁸ Chanel’s Application, 31 October 1994.

⁹ Sumitomo Rubber Co’s Application No. 2001416, 31 October 1994.

¹⁰ Unicorn Products’ Application No 2000234, 31 October 1994.

scent of fragrance of freshly-cut grass reminds them of spring, or summer, manicured lawns or playing fields, or other such pleasant experiences. The Board is satisfied that the description provided for the olfactory mark sought to be registered for tennis balls is appropriate and complies with the graphical representation requirement of Article 4 CTMR".¹¹

A landmark case decided by the European Court of Justice is the case of **Ralf Sieckmann v. Deutsches Patent und Markenamt**¹². In this case, registration to smell mark was refused by the ECJ on the basis of non-fulfilment of the criteria of graphical representability. The principle issue in this case was whether a smell mark described as "*balsamically fruity scent with a slight hint of cinnamon*"¹³ could be registered as a trademark.

The Court said that the graphical representation must be "*clear, precise, self-contained, easily accessible, intelligible, durable and objective*"¹⁴. These considerations has come to be known as the "**Sieckmann seven-fold test**", which applies not only to scent marks, but also to other non-traditional trademarks. The purpose of the graphic representation was to find out the exact sign in public registry by competent authorities, competitors and the general public.

The Court also notes that only a few people could ascertain the scent by reading a chemical formula. Moreover, the smell sought to be registered as a mark, should not be the outcome of the nature of the product itself. Therefore, the ECJ decided to reject registration to this trademark by rejecting the chemical formula, verbal description and the sample of the smell mark submitted by the Applicant, as none of these methods, individually, or in combination, constituted valid representation.

3.1.2 Sound Trademarks

The most landmark case, is the case of **Shield Mark BV v. Kist**.¹⁵ The European Court of Justice decided on whether sounds could be trademarked, and if yes, could they be graphically

¹¹ *Vennootschap onder Firma Senta Aromatic Marketing v. Office for Harmonization in the Internal Market*, Decision of the Second Appeal Board of 11.02.1999 in Case R 156/1998-2, Application No. 428.870, para 14-15, http://www.copat.de/download/R0156_1998-2.pdf.

¹² *Ralf Sieckmann v. Deutsches Patent und Markenamt*, Case C-273/00, 12 December 2002, European Court of Justice [hereinafter *Sieckmann*].

¹³ *Ibid*, para 11.

¹⁴ *Ibid*, para 55.

¹⁵ *Shield Mark BV v. Kist*, Case C-283/01, The European Court of Justice [hereinafter *Shield Mark*].

represented. As per Article 2, a sign needed to have two features i.e. the characteristic of distinctiveness and the criteria of graphical representability. The Court stated that a sound will definitely receive the trademark protection, provided that it was distinctive. Also, Graphical representation was required as these signs were not capable of visual representation.

In the light of this, the Court analysed the various trademarks. The ECJ decided that the written description of a sound, lacked precision and clarity, and hence, did not constitute a graphical representation.

The requirement of graphical representation was not fulfilled, when the sound is represented graphically by means these following written description:

- “An indication that the sign consists of the notes going to make up a musical work
- An indication that it is the cry of an animal
- By means of a simple onomatopoeia
- By means of a sequence of musical notes”¹⁶

The graphical representability requirements are fulfilled where the sound is represented as a “stave divides into the measured and showing, in particular, a clef, musical notes and rests whose form indicates the relative value and where necessary, accidentals”.¹⁷ The ECJ was of the opinion that this representation was intelligible, durable and easily accessible, apart from precise and self-contained. This judgment, thus, restricts the scope of registration of sound marks.

3.1.3 Colour Trademarks

To examine the issue of graphical representation of non-traditional trademarks, it is essential to investigate decision of the European Court of Justice in *Liberal Group BV v Benelux Trade Mark Office*¹⁸. In this case, the issue was whether a mark could be registered as trademark if it consists of a single colour ‘orange’. The judges based its decision on Sieckmann criteria for graphical representation. Further, it was said that describing a colour ‘orange’ on a piece of paper is not enough. The ECJ stated: “[An abstract] colour per se cannot be presumed to

¹⁶ Arka Majumdar et al, *The Requirement of Graphic Representability for Non- Conventional Trademarks*, Vol. 11, Journal of Intellectual Property Rights, pp 313-317 (2006).

¹⁷ *Ibid.*

¹⁸ *Libertel Groep BV v. Benelux-Merkenbureau*, Case C-104/01.

*constitute a sign. Normally a colour is a simple property of things. Yet it may constitute a sign. That depends on the context in which the colour is used*¹⁹.

After *Libertel*, the ECJ examined the matter of colour trademarks registration in case *Heidelberger Bauchemie GmbH*²⁰. The court examined the issue of a combination of two pure colours. Graphical representation did not offer sufficient uniformity and precision, as various combinations in forms of appearance of the colours were encompassed by the description. This was found by the judges while considering the matter by applying the *Sieckmann's* and *Libertal's* reasoning. It was “*necessary to establish that in the context in which they are used colours or combinations of colours which it is sought to register in fact represent a sign; and an application for registration must be systematically arranged by associating the colours concerned in a predetermined and uniform way*”²¹. A mere statement such as ‘Blue and Red’ would not be sufficient to satisfy graphical representation. Therefore, the judges set the systematic arrangement rule in this case.

3.2 UNITED STATES OF AMERICA

The position is different in US for granting protection to untraditional trademark, as per the definition of trademark there is no prerequisite of a graphical representation per se. In other words, in application for registration of mark of a sound, a scent, or other non-visual matter would not be required to submit a clear drawing. However, they would only require a detailed verbal description and are equally capable of protection under the US laws.

Section 1052 of the Lanham Act²² is the important provision, which is negatively worded as it lays down what cannot qualify for a trademark. The positive requirement is that the mark should be distinctive, or have acquired distinctiveness and should also be non-functional. Moreover, mark should enable consumers to differentiate the goods of the holder from that of others.

Trademark was defined in this act as: “*The term “trademark” includes any word, name, symbol, or device, or any combination thereof— (1) used by a person, or (2) which a person*

¹⁹ *Supra note 43.*

²⁰ *Heidelberger Bauchemie GmbH*, Case C-49/02 [2004] E.T.M.R. 99 (European Court of Justice).

²¹ *Ibid*, para 42.

²² U.S. Lanham Act, 15 U.S.C. § 1052.

*has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”*²³ It is an inclusive definition and does not expressly preclude registration of sound, scent and shapes as trademark.

The decision of the U.S. Supreme Court in *Qualitex Co. v. Jacobson Products Co.*²⁴, helped in the the registration of non-conventional marks, wherein it held that a trademark can be “almost anything at all that is capable of carrying meaning”.

3.2.1 Scent Trademark

The most prominent judicial decision in which the first scent to receive trademark protection is **Clark, In Re**. In this case, the scent was described as a “*high impact, fresh, floral fragrance reminiscent of Plumeria blossoms.*”²⁵ It laid down the normal restrictions for deciding what can be trademarked. The scent could not be functional and it had to be distinctive of the product. In addition, in terms of graphical representation, the Court stated that description of the scent was required, even if drawings were not required.

Another case is related to Brazilian footwear company **Grendene**, which successfully trademarked their line of bubble gum-scented jelly sandals in June, 2015. They sent their manufactured sandals along with the application to the Commissioner for Trademarks as one an example for consideration²⁶.

3.2.2 Sound Trademarks

The statutes as well as judicial opinions regarding registration of non-conventional trademarks in USA is perhaps the most liberal in the world. Many sounds have received trademark protection in the U.S.A. Some of them are:

- The court held in *Oliveira v. Frito Lay*²⁷, that musical works could receive trademark protection and they could not be deprived of trademark protection only because it already have copyright protection.

²³ U.S. Lanham Act, 15 U.S.C. § 1127.

²⁴ *Qualitex Co v. Jacobson Products Co.*, 514 US 159 (1995).

²⁵ *In re Clarke*, 17 USPQ2d 1238 (TTAB 1990).

²⁶ US Registration no. 4754435.

²⁷ *Oliveira v. Frito-Lay Inc* (251 F3d 56 (2d Cir 2001)).

- In *Kawasaki Motors Corp USA v. Harley-Davidson Michigan Inc*²⁸, the plaintiff contented that as per the doctrine of functionality, the sound of the motor bike of Harley-Davidson could not be registered. Irrespective of which company motorcycle was, the sound of every type of motorcycle aforementioned was common in all. Before the court could be arrived at a decision, Harley-Davidson abandoned its application.

Unlike the EU, US courts have accepted representations through sonograms or sound recordings. Metro Goldwyn Mayer (MGM) Corporation created a huge uproar when they trademarked ‘lion’s roar’ in the U.S.²⁹. This was possible only because the US’ requirements are focused more upon the distinctiveness of the sound and not on whether the mark applied for is a musical notation or represented through a sonogram.

3.2.3 Colour Trademarks

The Supreme Court of the United States in *Qualitex Co. v. Jacobson Prodcuts Co.*³⁰ rejected the colour depletion theory, on the ground that there are ‘hundreds of colour pigments that are manufactured and thousands of colours can be obtained by mixing’, therefore, other sellers in the market could choose easily and would not be out of options. The Court further said that “Sometimes, a colour will meet ordinary legal trademark requirements. And, when it does so, no special rule prevents colour alone from serving as a trademark”³¹. Prior to the registration of shade of green-gold colour on press pads which were sold to dry cleaning firms, Qualitex co. had filed a lawsuit against Jacobson for unfair competition and after the registration, the suit of infringement were also filed. Firstly, the District Court gave its judgement in favour of Qualitex Co. but then later, it was overturned by the Court of Appeals for the Ninth Circuit on the grounds that under the Lanham Act, 1946 the registration of a single colour as a trademark was not allowed. This decision was later on challenged before the Supreme Court of the United States and was finally reversed, resulting in the trademark protection for colour in favour of Qualitex Co.

Other non-conventional trade mark cases were scrutinized by the judges, before they took their final view that there is not “any obvious theoretical objection to the use of color alone as trademark, where the color has attained ‘secondary meaning’ and therefore identifies and

²⁸ *Kawasaki Motors Corp USA v. Harley-Davidson Michigan Inc*, 1997 TTAB LEXIS 11 (TTAB 1997).

²⁹ US Registration no. 1395550.

³⁰ *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159 (1995).

³¹ *Supra note 14.*

*distinguishes a particular brand (and thus indicates its 'source')*³²

3.3 INDIA

Only a few unconventional marks have received registration in India, unlike in US and EU which have followed the liberal approach for their registration. Earlier, the Trade and Merchandise Marks Act, 1958 does not include non-conventional trademarks, but now, the Trade Marks Act, 1999 do refer to non-conventional trademarks under Sections 2(1)(zb) and 2(1)(m), which shows that the definition of “trade mark” has been broadened to include shapes, packaging and combination of colours. If non-conventional marks fulfills the criteria of both distinctiveness and graphical representability, then they can fit into the ambit of trademark.

3.3.1 Scent trademarks

In the context of scent marks in India, the Trademark Registry has applied the Sieckmann test and states that smell marks are registrable if they fulfill the graphical representation criteria. This becomes difficult post the Sieckmann holding. The Registry has not come up with any alternative method of graphical representation.

Because of this rigid statutory force against smell mark, its recognition and registration is difficult prospect to put into practice. There are some other factors also which cause this difficulty such as inadequate infrastructural requirements for a mark’s testing and its analysis etc.

In 2009, a Draft Manual on Trade Marks³³ was constituted for the practice and procedure of registering trademarks in India. It has been the first and only official communication on the state of non-conventional trademarks in India. With regard to smell marks, the Draft Manual states that, *“Consumers of such fragranced goods are unlikely to attribute the origin of the products to a single trader based on the fragrance. Whatever may be the case, for purposes of registration as a trade mark, unless the mark is ‘graphically represented’ it will not be considered to constitute as a trade mark.”*³⁴

³² *Ibid*, para 162.

³³ Manual of Trade Marks Practice and Procedure, issued by Office of Controller General Patents, Designs & Trade Marks, Mumbai,

http://www.ipindia.nic.in/writereaddata/Portal/IPOGuidelinesManuals/1_32_1_tmr-draft-manual.pdf.

³⁴ *Ibid*, Page 86.

3.3.2 Sound trademarks

India has followed the Shield Mark doctrine with respect to the graphical representation of sound marks. As with regard to distinctiveness, the Manual specifically lists sounds which are not distinctive and thus will not be registered.³⁵

Some of the cases and instances of registration of sound trademarks in India:

- The registration of a sound mark by Yahoo, most prominent instance of registration of non-traditional trademark in India. The registration was granted in 2008 to a sound of human voice yodeling the words “Yahoo”.
- ICICI bank has trademarked their ‘corporate jingle’, which is used in their commercial advertisements.
- Nokia has registered the sound which plays whenever one of their devices is switched on.
- The most recent registration, **National Stock Exchange of India** successfully got trademark protection for its theme song.³⁶

3.3.3 Colour Trademarks

The Draft Manual noticeably recognizes the potential of a colour by saying that, “*In order to constitute a trade mark, a colour or combination of colours must be capable of distinguishing the goods or services of one trader from those of other traders. If a particular colour of packaging has become distinctive in fact as indicating the goods of a particular trader, there is no reason why it should not be protected by registration.....A single colour may be registerable as a trade mark if it is very unusual and peculiar in a trade and is recognized by traders and consumers alike that it serves as a badge of origin for that class of goods.*”³⁷

Victorinox AG was able to secure trademark protection for its brown colour (RAL 3003) in India.³⁸ **Deutsche Telekom AG** was granted single colour trademark registration in India for its magenta colour label.³⁹

The courts have recognised trademark rights in colour combinations. For example, in **Colgate Palmolive Company v Anchor Health and Beauty Care Pvt Ltd**⁴⁰ the plaintiff has filed the case

³⁵ Section 5.2.2.2, Draft Manual.

³⁶ Application no. 2152242, under Class 36.

³⁷ Draft Manual Ch II, at 3.2.4.

³⁸ Application no. 1394234, under Class 8.

³⁹ Application no. 1462271, under Class 38.

⁴⁰ Colgate Palmolive Company v. Anchor Health and Beauty Care Pvt Ltd, 2009 (40) PTC 653 (Mad.).

as the defendant using the same colour combinations of red and white for dental products. Therefore, the court ruled that a colour combination was included in a definition of 'trademark' under the act and it includes no exclusion. Also, even a single colour is entitled to protection under the law of passing off.

Also in the famous Cadbury case, *Cadbury Uk Limited V. The Comptroller General Of Patents Designs And Trademarks & Société Des Produits Nestlé S.A.*⁴¹, the distinctive shade of purple (Pantone 2865C) on the wrappers packaging for Cadbury's milk chocolates had gained a distinctive character. Trademark protection was granted in 2012 after a public survey was submitted as a proof to this assertion. This puts an end to the long drawn battle with Nestle. In *Deere & Co. & Anr v. Mr. Malkit Singh & Ors.*⁴², the protection was granted by Delhi High Court in 2018 to the Plaintiff's green and yellow color combination, which is used on its tractors manufactured for agricultural use. The protection was granted on the basis of reputation, distinctiveness and from source of identification of plaintiff's products.

The Delhi High Court in one of its recent judgment on May 25, 2018, *Christian Louboutin v Abu Baker*⁴³, refused the trademark of red colour on the sole of heeled shoes, by saying that the mark was consisting of a single colour which is invalid as per the definition of a mark under Section 2(1)(m) of the Trademarks Act, 1999. The intention of the legislature is to not allow single-colour trademarks as it requires a mark to be a 'combination of colours'. The Court does not agreed with the previous case *Deere & Company & Anr. v. Mr. Malkit Singh & Ors.*, as in that case the provisions of Section 2(1)(m) and Section 30(2)(a) were not taken into consideration.

The graphical representation of a colour can be done by referring to Pantone, RAL, Focoltone, or other such internationally acknowledged systems for classification of colours. However, the possibility of a conflict may arise due to difference between what appears to consumers and what is recognized separately on the Pantone scale. Therefore, this should not be ignored by the authorities while granting trademark registration to colours.

⁴¹ Cadbury UK Limited V. The Comptroller General of Patents Designs and Trademarks & Société Des Produits Nestlé S.A., A3/2016/3082.

⁴² Deere & Co. & Anr v. Mr. Malkit Singh & Ors., CS (COMM) No. 738/2018.

⁴³ Christian Louboutin v Abu Baker CS (COMM) No.890/2018.

4. REGISTRABILITY OF NON-CONVENTIONAL TRADEMARKS IN INDIA

4.1 Registration of Smell Trademarks

As per Rule 25(12) (b) of the Trademark Rules, 2002, graphical representation is necessary for an application for registration of a trademark. While Rule 28 and 30 says that mark for which protection is sought, is to be presented on paper and in a durable form. This requirement acts as a hindrance to the recognition of smell mark as trademark in India.

There are low registration of smell mark in other nation, is due to the reason that they are subjectively defined and are open for interpretation. Subjective views are inadequate as every other human has different perception of odours, through which the complications arise when determine whether the smell mark functions as a trademark. These smell trademarks are difficult to represent graphically and is one of the reason that why protection to smell trademark is not yet granted to any brand in India.

4.2 Registration of Sound Trademark

Prior to the enactment of the Trademark Rules, 2017, the registration of sound marks were practically very difficult. Now that these rules came, it have this provision for filing an application for registration of sound marks. Along with the application, a sound file not exceeding 30 seconds in MP-3 format would be required to be submitted with graphical representation of its notation.

4.3 Registration of Colour Trademark

The procedure of registration of colour trademark is same as the procedure for any other trademark given under the Trademark Act, 1999. However, the Registration of single colour trademark is allowed in exceptional cases as colour is not majorly a source of identification of goods or services. It can be registered when it is not very usual and peculiar in a business or if it serves as a source of identification by customers for particular goods. Large number of application registration of single colour trademark is questioned by the Trademark Examiner on the ground of distinctiveness of product.

Whereas the Registration of trademark for combination of colours is allowed if it fulfills both the criteria of registration. Section 2(1) (m) of the Trademarks Act, 1999 requires a mark to be

a combination of colours. A mark should be unique and is capable of distinguishing goods and services. For one to obtain the registration of trademark for combination of colours, has to prove that the colours are going to strike the customer as a sign of trade source. Single colour trademark registration is very uncommon in India as the number of registration for the combination of colour trademark.

5 CONCLUSION AND SUGGESTIONS

The prima facie question is that whether a mark will get the trademark protection despite having any capability of graphical representation. As per the TRIPS Agreement, graphical representation is not an essential condition for registration of a trademark. Same goes with the Trademark Regime of the US. Whereas the position in India is quite different, the capability of graphical representation is a cardinal principle in case of granting trademark. In this regard, the Indian Trademark Regime has imitated the stand of European Union, which makes the registration process of non-conventional trademark much more rigorous in India.

Thus, we can also conclusively hold that the provisions of Non-conventional Trademark of the Indian Trademark Act, 1999 have made their registration more difficult. As the globalized world is increasing, the use of smell, sound, colour or other non-traditional trademark is bound to increase in the near future. For Smell marks, an exact odour matrix should be defined to distinguish smells, this will help these marks to represent graphically and to thereby get protection. There is a need for law to amend as per the requirement of modern marketing techniques as the use of scent, sound, colour and shape has been increasing to make their product distinctive. Therefore, in India, the legislature has to take necessary steps to amend the present Trademark law which will make the registration process of non-traditional trademark much liberal.