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# **CONCEPT OF SMELL MARKS IN INDIA**

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## **THE CONCEPT OF TRADEMARK**

A Trademark is a sign that is allocated to a brand which distinguishes the goods and services from its competitors. For example, the trademark “NIKE” along with the “swoosh” helps the customers identify that the shoes belongs to NIKE brand. The intention behind allocating trademark is to prevent the third party to use such goods and services that are being provided by the original owner and hence it prevents the likelihood of confusion that may arise in such case.

“*Sell the sizzle, not the steak*” is the marketing strategy followed these days where customers don’t care what they are buying, their concern is only attached to the name of the brand, its goodwill and reputation and trademark law relates to such ideology by branding a business through trademark.

In the living century, the competition scale in the market is moving upwards at a very high speed, so to sustain in the competition; trademark law has emerged with vital importance by granting monopolistic character for certain goods and services to an individual. Such an individual has the sole right over its business and any third party cannot infringe it, in case trademark infringement takes place, the owner can initiate trademark infringement proceedings against the defaulting party.

As per the Indian Trademark Act, 1999, Trademark is “*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 colors*”.<sup>1</sup>

The interpretation of the said definition can be done in different ways as the definition is itself very exhaustive.

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<sup>1</sup> Section 2(zb), Trademarks Act, 1999

There are non-conventional marks which are not specifically included and excluded from the above definition. The researcher has predominant focus on one such mark i.e., “SMELL MARKS”

There are certain legal requirements and on fulfillment of such requirements, the trademark is granted and they are as follows:

- The mark should be capable of graphical representation i.e., it can be drawn on paper.<sup>2</sup>
- The mark should be distinctive in nature; it should differentiate the goods and services of one company from the goods and services of the other.<sup>3</sup>

The first legal requirement is that the mark should be capable of graphical representation which can be fulfilled in the case of conventional marks but cannot be fulfilled in the case of non-conventional marks because smell, taste, sound cannot be placed on paper. So in this case, this requirement becomes the greatest hurdle in registration of the non-conventional marks.

The second legal requirement is of distinctiveness of the mark; a mark should have the ability to distinguish its good and services of one company from the other. This requirement again is one of the hurdle for the registration of the non-conventional mark, virtually it is very easy for differentiating two products but non-conventional marks are based on human senses and sense of a person differ from each other.

### **ORIGIN OF THE LAW OF TRADEMARK**

The origin of the trademark law dates back to 1266 where a “*Baker’s Law*” was made and which was also known as “*Baker’s Marking Law*” where bakers were required to allocate a mark on each and every loaf of bread they are selling. The purpose of such an act was to identify the baker making those loaves of bread.<sup>4</sup> In case, any bread that is not stamped was confiscated by the officer in charge and was made to pay heavy penalty for the same. This was considered as the most important act in the history of emergence of trademark law.

With the development of commerce, marks became very significant as during Greek and Roman times “Potter’s Mark” was allocated to the vessels which were made by the

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Trademarks past and present (2005), World Intellectual Property Organization, Available at: [http://www.wipo.int/wipo\\_magazine/en/2005/02/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2005/02/article_0003.html)

manufacturers and the sole aim was the identification of the manufacturer.

Eventually, these marks were of great importance to prove the ownership of the goods. In 14<sup>th</sup> and 15<sup>th</sup> centuries, the merchant and craft guilds were highly emerging, so these logos and marks were used for the identification of such goods. During industrial revolution was gleaming, civil protection to such manufacturers was given whose goods were replicated by other manufacturer.

The need for the protection of marks from infringement was felt at that time and hence the first statutory act was enacted in Britain in 1875. Prior to the enactment of the statutory law for trademarks, it was considered to as common law marks.

The British trademark act, 1875 was passed because of the case “*Southern v How*<sup>5</sup>” where the manufacturer had the clothing business and he had gained reputation because of the quality of his products and all the clothes he was selling had a mark on it.<sup>6</sup> Thereafter, the other trader copied his mark and started selling his clothes, hence deceiving the public and earning a huge amount of profit. Herein the court recognized the principle of “*Passing Off*”<sup>7</sup>.

The British trademark act, 1875 was repealed and was substituted by patent, design and trademark act, 1883. This act was also repealed and trademark act 1905 came into place and re-enactment was made by trademark act, 1938.

India embraced the British Trademark Act, 1938 and drafted its first act named “Trademark Act, 1940”. After India got independence, this act was substituted by Trade and Merchandise act, 1958 which had certain loopholes in it and hence this act was also repealed and now the Trademark act, 1999 is operative which deals with all the provisions related to trademarks allocated to goods and services.<sup>8</sup>

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<sup>5</sup> Popham’s Reports 143 (1618), 79 Eng. Rep. 1243 (K.B. 1907); J. Bridgeman’s Reports 125 (1659), 123 Eng. Rep. 1248 (K.B. 1912); Cro. Jac. 468 (1659), 79 Eng. Rep. 400 (K.B. 1907); 2 Rolle’s Reports 5 (1676), 81 Eng. Rep. 621 (K.B. 1908); 2 Rolle’s Reports 26 (1676), 81 Eng. Rep. 635 (K.B. 1908).

<sup>6</sup> Keith M. Stolte, How did Anglo-American trademark law begin (1997), Vol 8 Issue 2, Fordham Intellectual Property, Media and Entertainment Law Journal

<sup>7</sup> Passing off is a common law remedy which is used to enforce unregistered trademarks.

<sup>8</sup> Shruti Srinivasan, Evolution of trademark laws in India.

## **INTERNATIONAL AGREEMENTS ON TRADEMARK**

**TRIPS:** The agreement on Trade Related Aspects of Intellectual Property Rights is the legal agreement which is been signed by various nations including India, hence they become the members to such agreement. It has placed certain minimum standards for the regulation of the Intellectual property and it includes Trademarks as well.

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.<sup>9</sup>

The above definition under the TRIPS Agreement is not exhaustive because it has stated the dimensions for the registration of the trademark. But the other interpretation of this definition could lie in the distinctiveness requirement of the trademark, where if the mark is distinctive in nature, no matter it is virtually perceptible or not, can be registered as trademark. So the definition under the TRIPS Agreement neither explicitly included the non-conventional marks, nor has excluded them from the ambit of its definition.

**PARIS CONVENTION (1883):** Paris convention was enacted in 1883 and till now it has been revised number of times.<sup>10</sup> There is no particular definition for trademark under the Paris Convention. However, the convention does not provide any rules and regulations for the registration of the trademark, in spite of that it focuses on the domestic legislation of every country. Any conditions for filing in one contracting state will have no effect on the other contracting state and the same rule applies in the case of registration, annulment or lapse of trademark.

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<sup>9</sup> Article 15, Agreement of trade-related aspects of Intellectual Property Rights, Available at: [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm)

<sup>10</sup> At Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979

**THE MADRID SYSTEM:** The Madrid system includes a Madrid Agreement and a Madrid Protocol. The Madrid agreement was enacted in 1891 and since then it has been revised number of times<sup>11</sup>. The Madrid agreement was followed by Madrid protocol in 1989, to make the Madrid system flexible and at par with the domestic legislations of the states. The Madrid agreement and the protocol concerns with the registration of the mark internationally. There is no explicit definition of mark under the agreement and hence the interpreters may include non-conventional marks in the ambit of the agreement because there is no explicit exclusion of such marks. The wide definitions under the international agreements have made space for the non-traditional marks to get protection under these international conventions.

**SINGAPORE LAW TREATY (2006):** The Singapore law treaty is an extension of the Trademark law treaty of 1994. There were changes in the scope of trademark protection, there were much technological advancement, so there was need to update the trademark law treaty and hence the updated version is the “Singapore law treaty”. The most significant change that was made in Singapore law treaty was to inculcate the non-traditional marks in the definition of the trademark. This was for the first time, that there is explicit inclusion of non-visual marks in the ambit of trademark law.<sup>12</sup> The treaty has dealt with the procedural aspect for the filing of such marks but has not dealt with the substantive requirements for the protection of non-traditional marks. So this has led to the interpretations of an individual regarding the basis for the protection of the non-conventional marks.

### **CONCEPT OF NON-CONVENTIONAL MARKS**

In the era of globalization, where national and international markets have been merged, trademark is playing a significant role in the identity of a company and also it denotes the goodwill and reputation of the company in the market. The modern trade, the changed preferences of the consumers have led to the modern trademark law. Earlier the trademark used to be simply either a symbol or a logo but the recent trends have given a new face to the trademarks which includes smell, sounds, taste, holograms, and colors as the identity to a business. Such marks which are not the traditional marks are the non-conventional marks. Although, these marks have not been given major acceptance in all the countries of the world

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<sup>11</sup> At Brussels (1900), Washington (1911), The Hague (1925), London (1934), Nice (1957) and Stockholm (1967), and amended in 1979.

<sup>12</sup> Summary of Singapore Treaty on the Law of Trademarks (2006), World Intellectual Property Organization, Available at: [http://www.wipo.int/treaties/en/ip/singapore/summary\\_singapore.html](http://www.wipo.int/treaties/en/ip/singapore/summary_singapore.html)

but it is still an evolving concept because the international trade demands it because traders want to attract the consumers by designing the mark in such a way that it hits the aesthetic sense of the consumers. This is one of the business strategy followed by manufacturers these days to survive in the competitive market.

The non-traditional marks take different forms such as:

- Sound marks
- Smell marks
- Taste marks
- Color marks
- Holograms

### **EMERGENCE OF NON-CONVENTIONAL MARKS**

The new types of marks were firstly discussed in the sixteenth session of standing committee on law of trademarks where the discussion was actually based on the WIPO questionnaire that was circulated to know whether to accept non-conventional marks in the ambit of law of trademark.<sup>13</sup>

The traditional marks have the ability to easily distinguish goods and services of one from the other but this session of the committee stated about such marks which don't have visual perception and are generally perceived through human senses.

It laid down the detailed description of certain visible signs such as three dimensional marks, color marks, holograms, motion signs, gesture marks and certain non-visible signs such as sound marks, olfactory marks, taste marks and texture marks. Along with the detailed description of such marks, it also provided the measure to represent these marks which are visually not perceptible.<sup>14</sup>

The olfactory marks were accepted by many people according to the questionnaire circulated but it can only be registered if certain requirements are being fulfilled: (a) the applicant is the sole person who is included in the marketing of the concerned goods. (b) the smell attached to

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<sup>13</sup> Sixteenth Session (2006), Standing Committee on Law of Trademarks, Industrial Designs and Geographical Indications, World Intellectual Property Organization, Available at: [http://www.wipo.int/edocs/mdocs/sct/en/sct\\_16/sct\\_16\\_2.pdf](http://www.wipo.int/edocs/mdocs/sct/en/sct_16/sct_16_2.pdf)

<sup>14</sup> *Ibid.*,

the goods is not the natural characteristics of the goods but the smell is the additional factor that is attached to the goods, the smell is not used by the manufacturers in the ordinary course of business. (c) The smell mark has to be advertised during the promotions of the product.

The representation of the smell marks depends on the domestic trademark laws. For example, in India, the graphical representation is the mandatory requirement for the registrability of the trademark but in such situations, it is not possible to graphically represent the mark. But there can be other substitutes for it i.e., through chemical formula, by written description, by depositing the sample of the smell. But criticism always takes an upper hand stating that the actual fragrance is not represented but the substance is represented in all the above stated situations.

Furthermore, the Singapore law treaty was concluded in 2006 which has explicitly included non-conventional marks in the ambit of the trademark law, clearing the position of non-traditional marks to some extent.<sup>15</sup>

### **INTRODUCTION TO SMELL MARKS**

Herein, the researcher is more focused on the smell/scent marks which are one type of non-traditional marks. Smell marks is the type of non-conventional marks where the smell is attached to any goods or services or any class of goods or services, which plays the function of its trademark. The aim of the trademark law is to grant a monopoly over a good or service by allocating a trademark to it, which any other person cannot use it. Similarly the non-conventional marks are also playing the same role, in the present scenario; the researcher is dealing with the smell marks where the smell will have the monopolistic character, restricting every other person to use it.

The most important factor that strikes in the registrability of the smell marks is the requirement of the graphical representation of the mark. According to the definition of the trademark under the trademark act, 1999 "*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 colors.*"<sup>16</sup>

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<sup>15</sup> *Supra* Note 25

<sup>16</sup> *Supra* Note 15

The graphical representation of the mark is the mandatory requirement which if not fulfilled will not be registered as trademark. But in case of the smell marks, which is not visually perceptible cannot be represented graphically. This is the greatest impediment in the registration of the smell marks because one of the main conditions is not fulfilled. The requirement of graphical representation is to lower down the cases for trademark infringement. The marks which are visually perceptible can be easily compared and differentiated with the other visual marks but in the case of smell marks, there is no visual perception, so the smell cannot be compared with the other smell because of its subjective nature. The sense of smell of one person can be better than the sense of smell of the other person. The ability to smell also depends on the human perception, a person's mood, environment; pregnancy can also be one factor, sex of a person, age of the person.<sup>17</sup>

The subjectivity of the smell marks makes it very difficult to get protection under the domestic trademark law. Nevertheless, it is an emerging area of law. In coming years, it will have to cross many hurdles to make its place in the domestic legislation.

## **POSITION OF SMELL MARKS IN INDIA**

### **THE TRADEMARK ACT, 1999**

In India, position regarding the protection of smell marks is not stable. Such marks are not widely acceptable because of its drawbacks which are being posed by the domestic legislation of our country. The Trademark Act, 1999 is the sole legislation of our country which deals with the grant and protection of the trademarks. The framers of the legislation are not being able to include the concept of smell marks but also it has not been explicitly excluded.

There are two requirements for the grant of the trademark in the Indian context, the mark should be distinctive in nature and it should be capable of graphical representation<sup>18</sup>. The smell of one product's mark can be a good distinctive factor from the other product's mark. The requirement of graphical representation is the major impediment in the protection of smell marks in India. Graphical representation means that any mark which is to be protected as trademark should be capable of to be written down on the paper. In smell marks, it is impossible to put a smell on a

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<sup>17</sup> Maria Larsson, Nancy L. Pedersen, Odor Identification: Influences of age, gender, personality (2000), Vol 55 Issue 5, The Journal of Gerontology

<sup>18</sup> As per Rule 2(k) of Trade Marks Rules, 2017, 'Graphical representation' means the representation of a trademark for goods or services represented or capable of being represented in paper form and includes representation in digitized form.

paper, the chemicals and substances used in making of the smell can be penned down on a paper but not the actual smell of the mark<sup>19</sup>.

## **THE PROBLEM OF GRAPHICAL REPRESENTATION OF THE MARK**

Section 2(1)(zb) of the trademark act, 1999 states about the condition of graphical representation of a valid trademark which means that the mark should be in a physical form and is capable to be penned down on a paper. There are two main reasons for the condition of graphical representation which are as follows:

- There will be no confusion in the minds of the traders as well as the consumers regarding the mark to be registered and also for which product, the mark is getting registered.
- There will be clear understanding of the mark, hence there will be less disputes pertaining to the trademark infringement.

In the Indian context, the word “graphical representation” should be interpreted in the most liberal manner. Under TRIPS, the word “graphical representation” has been used rather than the word “visual perceptibility” which means that it has given a room to accommodate the non-conventional marks.

The requirement of graphical representation in smell marks is actually a practical problem rather than a legal problem. There are very few jurisdictions where the smell marks have been granted protection, other than those few examples, many of the applications related to the smell marks have been rejected or they have been withdrawn on the non-fulfillment of the requirement of the graphical representation of the mark.

Following the ruling of *Ralf Sieckmann v German Patent Office*<sup>20</sup>, the Indian courts have also reached to a conclusion that, it is impossible to graphically represent a smell mark and only on the basis of distinctive nature of the mark, the smell mark cannot be protected. There are various difficulties that are encountered in graphically representing a smell mark:

- Making a drawing of a smell mark is impossible.

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<sup>19</sup> Swaraj Paul Barooah, The Smell Mark Conundrum, SpicyIP, Available at <https://spicyip.com/2015/01/guest-post-the-smell-mark-conundrum.html>, published on January 7, 2015.

<sup>20</sup> Ralf Sieckmann v Deutsches Patent- und Markenamt Case C-273/00, 12 Dec 2002, European Court of Justice.

- Writing down the chemical formula will not be sufficient because it will be the representation of the substances used in making such odor and not the actual odor which is the subject matter of the protection.
- Technicality of the chemical formula and its reaction will not be understandable to a person who does not have knowledge about it.
- Depositing the sample of the odor will also not work because it is not the graphical representation. Moreover, the odor is volatile in nature, the smell may fade away or it can also disappear in some span of time<sup>21</sup>.

But the proposal to remove such a requirement has been placed. The present proposal of 27 March 2013 to recast Directive 2008/95/EC, which is seeking to partially harmonize the laws of the Member States relating to trademarks, and Regulation (EC) No 207/2009 (on the Community trade mark) is driven by objectives such as modernizing and improving the existing provisions of the Directive by amending outdated provisions, increasing legal certainty and clarifying trade mark rights in terms of their scope and limitations. In particular, the proposal considers amending Articles 3 of the Directive and 4 of the Regulation to remove the obligation to represent a trade mark graphically.

Specifically, under the proposal, Article 3 of the Directive would read:

*A trade mark may consist of any signs ~~capable of being represented graphically~~, in particular, words, including personal names, designs, letters, numerals, colors as such, the shape of goods or of their packaging, or sounds, provided that such signs are capable of:*

- (a) Distinguishing the goods or services of one undertaking from those of other undertakings.;*
- (b) **Being represented in a manner which enables the competent authorities and the public to determine the precise subject of the protection afforded to its proprietor.***

The wording in (b) reflects the reality of a highly competitive environment in which companies use new technology, media and communication strategies to distinguish themselves from each other. For example, they use and file registrations for a new generation of marks that affect the different senses of the consumer, namely sound, smell, taste, touch, in addition, or in place of, vision.

The idea of the proposed amendment is not to extend unlimited modes of representation in respect of trademarks, but to allow more flexibility while increasing legal certainty as, at

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<sup>21</sup> *Ibid*

present, the current wording and case law in respect of the ‘unusual’ marks is somewhat unclear.

In this regard, whilst the European Court of Justice allowed the representation of a ‘smell mark’ in the form of the written description, ‘smell of freshly cut grass’ for tennis balls, on the ground that it was a “smell that everyone recognizes immediately on the basis of their own memories”, what happens in respect of unknown smells? Many fashion brands sell perfumes in their stores and online. However, these are highly unlikely to be smells that are recognizable in everyone’s memory and therefore likely to be considered unregistrable under the present guidelines. Further, currently, “the requirements of graphical representation are not satisfied by a chemical formula or by a description using the written word”, judgment of 12 December 2002 ‘Siekmann’.

Also, with regards to taste, the perception of taste is subjective and variable. As a result, taste marks have been rejected on the grounds that they are not sufficiently capable of an accurate and repeatable graphical representation. For instance, there is no one apple taste, but varying apple tastes. So tastes are not objective and sustainable.

By removing the requirement for graphic representation in the new provisions, will these modes of representation previously rejected become acceptable? The proposed wording does allow for broader scope and interpretations, such that it potentially allows such representations. That said, there remain numerous uncertainties with the trade mark protection of a sound, smell, taste or touch. Such uncertainties relate to the filing of a trade mark application, the examination of the application, and the distinctiveness of the mark, for example. Also, how does one keep a smell or taste, without degradation of its “distinctiveness” over time? Uncertainties relate also to trade mark searches in order to establish whether there are any earlier rights. It is unclear how one would conduct trade mark searches for sound, scent, taste or touch marks.

Therefore, despite proposed changes in the Directive, with the current ever changing technologies and in the absence of alternative administrative tools, the graphical representation of a mark might in fact be the better wording as it currently ensures legal certainty, albeit limiting the number of ‘unusual marks’ that are granted registered trade mark protection.

The scenario in India is different from United States where the examination procedure requires that a non-conventional mark should be registered only when a written detailed description is filed along with it and drawings are not required to be submitted for non-visual marks.

Nevertheless, there is no proper solution that has been offered till now to resolve the issue of graphical representation but there are scientific discoveries coming up which can make a way for the protection of smell marks by resolving the issue of graphical representation.

### **DRAFT MANUAL OF TRADEMARKS- PRACTICE AND PROCEDURE**

The trademark office in the year 2009 came up with the draft manual of trademarks- practice and procedure which has incorporated the unconventional marks in its ambit. It covers sound, shape, smell marks and holograms. The draft manual has stated that the requirement of graphical representation has to be fulfilled in order to prove a mark as a valid trademark.

The chemical formula written on a paper, the sample of an odor will not suffice the requirement of graphical representation<sup>22</sup>. All such acts will provide the knowledge about the substance used and not the actual odor which is important for the trademark protection.

The graphical representation means the presentation of a mark in a paper form which cannot be made possible in case of smell marks because it is a sensory mark and a non-visual mark. So the draft manual has also stated about the impediment that is coming in the way for the protection of the non- conventional marks. But the inclusion the non-conventional marks in the draft manual can be interpreted in a positive sense, that the legislators have given a thought about the protection of non- conventional marks. Eventually, one day this would lead to the protection of smell marks by removing the existing impediments coming in its way.

There has not been a single registration for the smell mark in India because of the requirement of graphical representation but there have been registration around the globe for the smell marks. Those registration are been granted because there are fixed criteria's and on such basis they are granted protection. There is functionality test and distinctiveness test which are followed in other countries for resolving the issue of the registration of the smell marks.

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<sup>22</sup> Swaraj Paul Barooah, The Smell Mark Conundrum, SpicyIP, Available at <https://spicyip.com/2015/01/guest-post-the-smell-mark-conundrum.html>, published on January 7, 2015.

The researcher will elaborate the above stated tests in the next chapter which is dealing with the registration of smell marks around the globe and they are widely acceptable by the people. But the Indian Trademark law is of such nature, that prima facie it does not allow protection to the smell marks in its domestic regime. There are various debates going on this aspect of law that whether smell marks should be protected or not based on their advantages and disadvantages.

## **INDIAN VIEWS ON “FOR” OR “AGAINST” FOR THE PROTECTION OF SMELL MARKS**

### **ARGUMENTS IN FAVOUR OF SMELL MARKS:**

- Now days, consumers preference has been drastically changed, there is high level of competition in the market and because of that they prefer something different from their everyday routine. Not only the consumers, but also the traders and the manufacturer’s way of making the product and selling the product has also been changed. They are not only selling their products but also competing with the other competitors in the market. These days smell is not only used to sell a product but also helps in distinguishing one product from the other. This is the main essence of the smell marks that a unique smell is attached to a product which acts as a distinguishing factor for the product. This is a new kind of business strategy followed these days by the manufacturers and the traders. This would help increase their consumer base, profits and eventually they will be able to sustain in the competition for a longer run in the market.
- There is a strong relationship between smell and human memory because it has a close connection with it. A smell can trigger any past event or experience. For example, the wet muddy smell will automatically link to the rainy day because we sense such a smell during rainy days. Studies have also shown and proved that odor affects the memory of a person more than any other sensory function of the human body. The same positive affect can also be created in the market by giving protection to smell marks that are attached to goods and services. For example, a flowery smell is attached to the notepad, this would become a distinguishing factor for a product and people will easily relate that smell to a product. This would help traders increase their consumer base and their profits and consumers can add certain extra in their daily routine.
- Any sensory function of human body is not easy to unlearn. The same methodology applies to smell also. When a person smells a particular odor, it is not easy for a person

to remove the odor from its mind. It will remain for a very long time as compared to the other senses. So if an odor is attached to a good or service as its trademark, it will be beneficial for the traders because once they are familiar with the smell attached to the product, they will never forget the product and the smell will always attract the consumers to buy the product. This will again help the manufacturers in increasing their profits and will help them to remain at par in the competition in the market.

#### ARGUMENTS IN AGAINST SMELL MARKS

- The function of scent mark should be started from the time of its sale; otherwise the jurisprudence of the scent marks will fade away. The function of a trademark is to attract a consumer by a unique sign, logo, shape, color or smell but in case of smell marks, it will not happen. For example, a person has to first buy the product and make use of it in order to smell it. So in such circumstances the main essence of the trademark is lost. So there is no reason of granting protection to smell marks.
- The consumer should not only be able to recognize the smell but also it should be of such nature that it links with the identity of the product. If it does not happen, there is no reason for granting protection to such non-conventional marks. In most of the cases, it is very difficult to fulfill these above stated two requirements, if they are fulfilled, the essence of smell marks will be protected.
- There could be likelihood of confusion in the minds of the consumers buying the product. There could be a situation where a consumer gets confused between two smells related to a same product. In traditional marks, such a situation will never arise because those are the visual marks, it can be easily compared with the other mark but in case of non-visual marks, it is really very difficult to compare two smells.
- The subjective nature of the smell also leads to a negative argument. The person's ability to smell depends upon certain factors i.e. age, gender, mood, hormonal changes, mental disorders, environment, and pregnancy factor. So every person smells an odor in its own capacity and capability, which will definitely vary from person to person. The essence of the trademark will be faded away because mark is the unique identity of a brand which every person perceives it in a different way. This is a strong argument in impeding the way for the protection of smell marks in India.
- In case of similar blend of odors, where the same chemical reaction and substances are used to make a fragrance, it will be difficult to distinguish between two smells and it

would require expert opinion and assistance and hence such an odor should practically not be granted protection under the Indian Trademark Law.

- There are various odors which are volatile in nature, they may remove and fade away in certain period of time. This will hence hamper the main essence of the mark. The trademark is the unique identity which is the brand value of the product and if that brand value fades away after a period of time, there is no strong reason for protecting such a smell as trademark for a product.

