



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.

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With this thought, we hereby present to you

BRANDING THE UNSEEN: LEGAL PROTECTION OF SENSORY AND MULTI-SENSORY MARKS IN THE AGE OF EXPERIENTIAL MARKETING

AUTHORED BY - ASHIM NANDA

Abstract

In today's dynamic and innovation-driven marketplace, brand identity is no longer limited to the realm of visual logos and verbal slogans. The rise of experiential marketing has transformed branding into a multi-dimensional strategy, incorporating sound, smell, texture, taste, and motion into the consumer experience. These unconventional elements, often referred to as sensory and multi-sensory marks, have become crucial tools for companies looking to differentiate themselves and build deeper emotional connections with their audiences. However, the Indian legal framework under the Trademarks Act of 1999 and Copyright Act, 1957 has not yet evolved to fully accommodate these new forms of intellectual property.

This article explores the emerging legal need to recognise and protect sensory and multi-sensory branding elements. It critically analyses the limitations of Indian trademark and copyright laws in this regard and draws from international jurisprudence, particularly from the United States and European Union, to offer a comparative legal understanding. Cases such as *Qualitex Co. v. Jacobson Products Co.* and *In re Clarke*, are examined for their pioneering role in expanding the scope of non-traditional marks. The article also investigates the role of technology in enabling recognition and enforcement of such marks, and the challenges of subjectivity, functionality, and representation. Finally, it provides a comprehensive set of recommendations for reforming India's intellectual property laws to align with modern branding strategies and international best practices.

Introduction: The Rise of Sensory Branding

The evolution of branding in the 21st century reflects a profound shift in how companies communicate with their consumers. No longer confined to visual symbols, logos, slogans, or colour schemes, modern branding is increasingly about evoking emotions, triggering memory, and creating immersive sensory experiences. In a world oversaturated with visual content—

ranging from digital billboards and social media feeds to mobile advertisements— brands are seeking alternative and deeper pathways to embed themselves in the consciousness of consumers. This emerging strategy, widely known as sensory branding, engages multiple human senses to create a unique, holistic brand experience that transcends the limitations of sight alone.

The origins of sensory branding can be traced to early marketing experiments in the automobile, food, and luxury industries, where factors like the *sound of a car door closing*, the *smell of a leather interior*, or the *crispness of a biscuit*—were found to significantly influence consumer satisfaction. Over time, such sensory cues have evolved into core brand identifiers. For instance, the Nokia ringtone, developed in the 1990s, became so iconic that it has been described as the “soundtrack of a generation.” Similarly, the click of a Zippo lighter, the scent of Johnson’s baby powder, or the haptic feedback on a high-end smartphone are not just product features but sensory trademarks that foster brand association and loyalty.

The psychology of consumer behaviour supports this shift. Studies in marketing have shown that multi-sensory engagement significantly enhances brand recall and emotional attachment. Humans process sensory inputs at various levels of consciousness, and associations formed through sound, smell, and touch are often more durable than those formed through sight alone. As competition intensifies in every market, the ability to differentiate based on emotional and sensory impact has become a crucial commercial strategy.

This transformation, however, poses serious challenges for existing intellectual property regimes, which are predominantly designed to protect visual and textual identifiers. Can a scent, a tactile feel, or a sound pattern be legally protected as a trademark? How does one define ownership of an experience that is perceived subjectively? Is it feasible to determine infringement or dilution in non-visual domains, where consumer perception varies across cultural and physiological boundaries?

These questions are no longer hypothetical. In jurisdictions like the United States, European Union, and Australia, legal systems have begun to adapt to the age of experiential branding. The U.S. Lanham Act, for example, allows for the registration of sound and scent marks,

provided they serve as identifiers of origin and are not merely functional.¹The European Union, through reforms to its Trademark Regulation (EUTMR), has removed the graphical representation requirement, thus enabling the registration of multimedia, motion, and holographic marks. These developments indicate a growing recognition that non-traditional marks are not only valid but necessary to reflect the complexity of modern branding.

In contrast, India's legal framework remains rooted in a more traditional conception of trademarks, focused on visual signs capable of graphical representation. Despite some progress—such as the allowance for sound mark registrations in the Trademarks Rules, 2017—the country's IP regime has yet to establish mechanisms for accommodating more abstract or sensory brand identifiers. As Indian companies compete on global platforms and foreign brands expand their presence in the domestic market, the need for legal recognition of sensory branding is becoming increasingly urgent.

This article seeks to bridge the existing legal and regulatory gap. It critically evaluates the scope and limitations of India's current trademark and copyright laws in the context of sensory branding. Drawing upon comparative jurisprudence and technological innovations, it highlights the emerging forms of brand identification and examines how other jurisdictions have responded. Finally, it presents a comprehensive roadmap for legal reform, proposing both legislative amendments and institutional innovations that can make India's IP regime responsive to the needs of experiential commerce in the digital age.

The Scope of Sensory Marks and Their Commercial Relevance

In the traditional paradigm of trademark law, brands were identified through names, logos, color combinations, and slogans—primarily visual and textual elements. However, in the age of experiential commerce, consumers are not just buying products or services; they are buying experiences. These experiences are increasingly curated to involve multiple human senses, making sensory trademarks an emerging and powerful form of brand identity.

Sensory marks are those that appeal to one or more of the five senses—sight, hearing, smell, taste, and touch. They include sound marks (such as recognisable brand jingles or chimes), scent marks (a signature fragrance associated with a brand or product), motion marks (animated

¹ The Lanham Act, 15 U.S.C. §§ 1051–1127 (U.S.).

sequences or logo transitions), texture marks (unique tactile surfaces on packaging or products), and, in rarer cases, taste marks (where the flavour itself becomes a distinguishing brand element). Each of these plays a significant role in influencing consumer perception and loyalty.

From a commercial standpoint, the power of sensory marks lies in their ability to create immersive and emotionally resonant brand experiences. According to marketing studies, human memory retention is significantly stronger when multiple senses are engaged.

For example, while visual memory may fade, olfactory memory is deeply rooted in the brain's limbic system, which governs emotion and long-term memory. This is why certain smells—such as the distinct aroma of a bookstore or the fragrance of a soap—can instantly recall a brand or childhood memory.

Globally, brands have strategically leveraged sensory identifiers to gain competitive advantages. The Intel five-note chime, played at the end of its commercials, is not just a jingle but a sonic logo that has become synonymous with innovation and reliability.

Similarly, Play-Doh's floral vanilla scent—trademarked in the United States—is considered so essential to its brand identity that altering the formula would potentially diminish the consumer experience.² The NBC chimes³, the click of the Zippo lighter, and the velvet-like texture of luxury wine packaging⁴ are further illustrations of how non-traditional sensory elements have become mainstream in branding strategies.

Even more recent developments show that virtual and tech-driven companies are using sound, motion, and haptic feedback to reinforce brand identity in digital and immersive environments. For instance, companies operating in augmented reality (AR) or virtual reality (VR) platforms are now designing multi-sensory brand cues—such as a brand-specific vibration, a motion-triggered sound, or an ambient scent release—to create immersive loyalty.

Despite the demonstrable commercial value and brand equity tied to these sensory cues, legal systems across jurisdictions remain inconsistent in their recognition of sensory marks. Some

² Play-Doh Scent Mark – U.S. Trademark Reg. No. 5467089.

³ NBC Chimes – U.S. Trademark Reg. No. 916,522.

countries allow for the registration of certain types of non-traditional marks under specific procedural frameworks, while others dismiss them due to technical and doctrinal challenges, particularly around representation and subjectivity. As branding continues to expand beyond the visual, legal harmonisation and reform become essential to ensuring fair protection and enforcement of these intangible yet powerful identifiers.

Indian Legal Framework: Scope and Limitations

The Indian trademark law framework, rooted in the Trademarks Act, 1999, offers a relatively broad definition of what constitutes a trademark. Section 2(1)(zb) defines a trademark as any mark “capable of being represented graphically” and capable of distinguishing goods or services of one party from those of others.⁴ This definition theoretically accommodates a wide range of identifiers—including the shape of goods, their packaging, and even combinations of colors. However, in practice, the requirement of graphical representation has significantly limited the registration and protection of non-visual and sensory marks.

One notable advancement came with the Trademarks Rules, 2017, which permitted the filing of sound marks in MP3 format (not exceeding 30 seconds), accompanied by musical notation.⁵ This marked a progressive move toward recognising non-traditional marks. Yahoo! Inc.’s registration of its yodel sound became the first Indian precedent for a sound trademark, thereby opening a small but vital door for auditory branding. Yet beyond sound marks, progress has been minimal. Scent, motion, texture, and taste marks still face formidable legal and administrative barriers.

There is currently no regulatory framework for evaluating or examining marks that are not easily representable in graphic form. For example, a signature scent—say, the lemon-grass fragrance used consistently in a chain of luxury hotels—cannot be submitted as a trademark because the Indian registry lacks both the mechanism to accept non-graphical data and the expertise to assess such applications. Similarly, motion marks, such as a dynamic brand intro or animation, cannot be filed using MP4 or GIF formats, as the registry does not yet accept multimedia submissions.

⁴ The Trade Marks Act, No. 47 of 1999, § 2(1)(zb) (India).

⁵ The Trade Marks Rules, G.S.R. 46(E) (2017) (India).

Moreover, the Trademark Registry's examination guidelines do not provide clarity on how to determine distinctiveness, functionality, or infringement for sensory marks. This administrative gap leads to uncertainty for brand owners, particularly startups and creative industries, who are often discouraged from filing non-traditional marks due to the complexity and cost of defending them.

In parallel, the Copyright Act, 1957 offers limited respite. While the Act protects literary, dramatic, musical, and artistic works, and cinematographic films, it requires that such works be fixed in a tangible medium. This “fixation doctrine” excludes ephemeral sensory experiences such as smells, tastes, and textures. However, overlap arises in areas where branding elements serve both as identifiers and creative works. Sound jingles, animated brand logos, and motion graphics can be protected simultaneously under both copyright and trademark law, depending on their usage and expression.

Even in these overlapping areas, the lack of harmonised procedural pathways complicates matters. For instance, a business seeking protection for a musical logo must file separately with the Trademark Registry and the Copyright Office, with no shared application interface or cross-reference database. This bifurcation adds to the complexity and often results in inconsistent enforcement standards.

Overall, the Indian legal system shows limited adaptability to the realities of modern, multisensory branding. While the legislative intent may permit a broader interpretation of “mark,” the procedural, technological, and jurisprudential gaps create a practical framework that remains hostile or indifferent to innovation in brand identity. In the absence of reform, India risks undermining the brand protection needs of emerging sectors, particularly in digital media, luxury goods, food tech, gaming, and virtual reality commerce, all of which are increasingly dependent on sensory engagement.

Case Law Analysis: International Precedents and Their Influence

A pivotal moment in the recognition of non-traditional marks came in the United States with the landmark decision in *Qualitex Co. v. Jacobson Products Co.*⁶ The U.S. Supreme Court held that the green-gold colour of the Qualitex’s press pads had acquired secondary meaning and

⁶ *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 162 (1995).

was protectable under the Lanham Act. Justice Breyer, writing for the Court, emphasised that “a colour can meet the legal requirements for a trademark if it identifies and distinguishes a particular brand.” This decision expanded the horizon for non-conventional trademarks by setting a precedent for source identification beyond words and symbols.

Equally significant was the case of *In re Clarke*⁷, in which the U.S. Trademark Trial and Appeal Board recognised a floral scent applied to sewing thread as a valid trademark. The Board noted that consumers had come to associate the scent with an only source, satisfying the core function of a trademark—source identification. This case stays one of the few to recognise olfactory marks, illustrating both the potential and the challenge of such registrations. While the U.S. allowed the scent mark based on affidavits and consumer surveys, most jurisdictions demand aim and durable representations, which are harder to satisfy in the case of scents.

In Europe, the evolution has been more structural. The European Union Trademark Regulation (EUTMR) dropped the graphical representation requirement in its 2017 reform, replacing it with a more flexible standard that mandates a trademark be “clear, precise, self-contained, easily accessible, intelligible, durable and objective.”⁸ This allowed for the registration of motion marks, multimedia marks, and even holograms, provided they could be submitted in formats like .mp4 or .gif.

The EU’s Sieckmann criteria (from *Ralf Sieckmann v. Deutsches Patent- und Markenamt*), further clarified the expectations for scent marks. The court held that a chemical formula, a written description, or a sample was not sufficient by itself unless it satisfied the clarity and objectivity test.⁹ This judgment highlighted the inherent limitations of representing intangible marks within existing registration systems.

Technological Solutions and Enforcement Challenges

The legal protection of sensory marks faces several unique obstacles, foremost among them being the subjective nature of human perception. Unlike traditional trademarks—such as words, logos, or colour combinations—that are visually assessed, sensory trademarks rely on

⁷ *In re Clarke*, 17 U.S.P.Q.2d (BNA) 1238 (T.T.A.B. 1990).

⁸ Regulation (EU) 2017/1001 of the European Parliament and of the Council, on the European Union Trademark (EUTMR).

⁹ *Sieckmann v. Deutsches Patent- und Markenamt* (Ralf Sieckmann), Case C-273/00, [2002] E.C.R. I-11737.

experiences like smell, taste, and touch, which vary significantly across individuals. What one consumer may identify as a distinctive fragrance, another may not even perceive. This subjectivity makes it difficult to apply conventional legal tests such as the likelihood of confusion or distinctiveness, which require a certain degree of objectivity.

Enforcement presents a separate, equally difficult challenge. Courts have well-established methods for assessing visual and phonetic similarity, but no comparable standards exist for evaluating scent, texture, or taste in trademark litigation. Even where a brand has developed a unique fragrance or tactile sensation, there is no definitive legal doctrine for assessing infringement of such characteristics. This is particularly problematic in industries like luxury goods, perfumes, or food and beverages, where multi-sensory experiences are core to brand identity.

At the administrative level, border protection mechanisms are ill-equipped to detect sensory infringement. Customs officers are trained to intercept counterfeit goods based on visual cues like packaging, serial numbers, or barcodes. They lack the tools or protocols to assess whether a shipment contains counterfeit perfumes that copy the scent of a protected mark, or whether a touch-sensitive packaging design has been unlawfully reproduced. Consequently, companies suffer from brand dilution and consumer deception with little recourse at the entry point.

Technological innovation, however, is beginning to offer promising tools to overcome these limitations. Olfactory biosensors, capable of detecting and digitally encoding scent profiles, are a potential notable change.¹⁰ These sensors convert chemical compositions into unique digital identifiers—akin to fingerprints—which can be stored and referenced in enforcement databases. Similarly, AI-powered waveform analysis tools can be used to detect and compare sound logos or jingles with near-perfect precision, enabling better monitoring in digital platforms like YouTube, TikTok, or advertising networks.

Smart packaging technologies have also entered the commercial arena, particularly in the consumer electronics and premium cosmetics sectors. These packages can be programmed to emit a sound, change texture, or release scent upon opening, making the unboxing experience

¹⁰ Kur, Annette & Dinwoodie, Graeme B., “Functionality in EU Trademark Law,” Max Planck Institute Research Paper No. 17-12 (2017).

itself a brand asset. Such dynamic packaging innovations raise important questions about how the law can evolve to protect not just the static brand image, but the entire sensory experience associated with a product. Moreover, blockchain technology offers a decentralised solution for managing proof of ownership and enforcement. By registering scent compositions, sound files, motion animations, or haptic designs on blockchain, companies can create tamper-proof timestamps of their brand assets. This evidence can later be used in court to assert originality and priority. Such digitisation also enables licensing and auditing of multi-sensory IP through smart contracts, thus increasing legal and commercial certainty.

Harmonising Trademark and Copyright Law in Multi-sensory Branding

As brands increasingly rely on complex, multi-dimensional identifiers, the lines between different branches of intellectual property law—particularly trademark and copyright—are becoming blurred. Traditionally, trademarks protect signs that serve as source identifiers, while copyright protects creative expressions. However, modern brand assets often qualify under both categories, especially in the case of sound logos, animated sequences, and multimedia brand reveals.

Take, for example, the iconic “ta-dum” sound of Netflix¹¹, accompanied by its dynamic red logo animation. This element is simultaneously a registered trademark, and an audiovisual work protected under copyright law. While trademark protection offers perpetual validity (as long as it is used and renewed), copyright protection provides the creator with moral rights, including the right to attribution and protection against distortion or unauthorised derivative works. Together, these rights offer layered protection that enhances brand security.

A compelling illustration of this duality is the “Roar of the MGM Lion”, which is both a sound mark registered with the USPTO and a copyrighted sound recording.¹² Unauthorised use of this sound in parody videos or remixes raises questions: is this an infringement of trademark rights, a copyright violation, or both? Indian courts have not yet grappled with such cases, but the potential for conflict of jurisdictions and conflicting standards of infringement is evident.

To address this, India must undertake efforts to harmonise the trademark and copyright

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regimes, especially in the context of non-traditional marks. Trademark and copyright offices should coordinate databases and filings, allowing applicants to cross-reference filings or obtain dual protection through a unified interface. Moreover, judicial interpretation must acknowledge overlapping rights, especially when disputes arise from new-age branding practices.

Legal education and IP training programs should include joint modules on crossover IP strategies, so that practitioners and businesses are better equipped to leverage both systems. Multi-sensory brand assets should no longer be pigeonholed into traditional IP silos; instead, a more fluid and integrated protection model is needed for the digital-first economy.

Recommendations for Reform in Indian Law

To align India's intellectual property regime with the modern dynamics of branding, several forward-looking and context-specific reforms are urgently needed. First, India should abolish the graphical representation requirement currently enshrined in Section 2(1)(zb) of the Trademarks Act, 1999. In its place, the law should adopt a functionality-based standard: whether the mark, in whatever form, can unambiguously represent the source of goods or services. India can draw from the European Union's post-2017 standard, which allows digital file submissions (e.g., .mp3, .mp4, 3D models, or scent samples) as long as the representation is clear, precise, durable, and objectively intelligible.

Second, India should establish a dedicated unit within the Trademarks Registry—tentatively titled the “Division for Sensory and Non-Traditional Marks”.¹³ This unit should be staffed with multidisciplinary experts, including IP attorneys, scent scientists, digital artists, and AI analysts. Their role would be to examine applications based on scientific, perceptual, and market-based evidence, such as scent stability reports, consumer recall surveys, or haptic simulation data.

Third, to aid startups and creative industries, the government should launch a Sensory IP Grant Scheme, which subsidizes the cost of filing and testing non-traditional marks. Many Indian startups in wellness, organic food, luxury cosmetics, and audio branding are creating novel sensory identities but lack the resources or legal knowledge to protect them. Such a scheme would encourage innovation while contributing to the broader IP ecosystem.

¹³ Dev Gangjee, “Non-Conventional Marks and the Obscurity of Trademark Law,”

Fourth, the Trademark Rules, 2017 should be amended to include a classification system for sensory marks, categorising them based on their perceptual medium (e.g., auditory, olfactory, tactile, motion-based).¹⁴ This taxonomy would help in building searchable databases, conducting prior art searches, and streamlining examination.

Fifth, the government should pilot a National Sensory Mark Archive, an open-access digital repository where registered and pending sensory marks can be stored, queried, and reviewed by businesses, consumers, and enforcement agencies. By archiving scent signatures, sound waveforms, texture scans, and interactive files, this platform would ensure transparency, ease of enforcement, and public awareness.

Finally, India should consider creating a sui- generis statute—a separate protective regime for marks that are too abstract for traditional trademark law, such as smells, tastes, and immersive brand experiences. This law could define standards for originality, fix conditions for exclusivity and fair use, and offer enforcement mechanisms suited to sensory disputes. By doing so, India would join the ranks of countries like the U.S., Japan, and the EU in proactively expanding the scope of IP law to cover the full sensory dimension of modern branding.¹⁵

Conclusion: Toward a Future-Ready Intellectual Property Framework

Branding today is no longer just about a clever name or a flashy logo. In a world where consumers are bombarded with information, what truly stands out are brands that resonate—not just visually, but through sound, scent, texture, and even emotion. This marks the rise of sensory and multi-sensory branding, where experiences matter more than visibility, and memorability is built through a symphony of human senses.

India stands at a pivotal moment in this evolution. Our digital economy is booming, creative industries are flourishing, and startups are redefining what it means to be innovative. Yet, the laws designed to protect these innovations still operate in an older paradigm. The Trademarks Act, 1999 and the Copyright Act, 1957, while foundational, are rooted in a worldview that prioritises traditional forms of expression—visual marks, written words, and fixed formats.

¹⁴ Dinwoodie, Graeme B., “The Architecture of the Trademark System,” 103 Iowa L. Rev. 1095 (2018).

¹⁵ Bently, Lionel & Sherman, Brad, “Intellectual Property Law,” 5th ed. (Oxford 2018).

This disconnect between market innovation and legal structure leaves new-age brands—especially those investing in non-traditional identifiers like sound jingles, textures, and olfactory designs—at risk of going unprotected and unrecognised.

The core challenge lies in the subjectivity of human perception. Unlike logos or names, which can be objectively analysed for similarity, scents or textures don't lend themselves easily to legal scrutiny. How does one determine whether a scent has been "copied"? How does a customs official detect tactile infringement? Our current IP infrastructure offers few answers. There are no established legal tests, no enforcement mechanisms, and little institutional knowledge to evaluate such claims.

But the global stage offers guidance—and hope. The United States, in cases like *Qualitex Co. v. Jacobson Products Co.* and *In re Clarke*, has allowed the registration of colour and scent marks, provided they are distinctive and function as source identifiers. The European Union went a step further: through reforms in its EUTMR (2017), it eliminated the outdated requirement of graphical representation, opening the doors to multimedia and motion marks that are defined by clarity and objectivity rather than visual form.

India can—and should—learn from these jurisdictions. A 21st-century IP regime needs more than legislative tweaks; it requires a complete mindset shift. We must start by modernising our statutes. The Trademarks Act should be amended to allow non-visual, digital submissions—such as sound files, motion graphics, and even scientifically encoded scent samples. More importantly, India needs to build institutional capacity: a dedicated Sensory IP Division, staffed by scientists, branding experts, and legal professionals, can evaluate complex applications. A National Sensory Mark Archive could serve as a digital repository of approved non-traditional marks, aiding in both registration and enforcement.

To fuel this innovation, public-private partnerships, startup grants, and government-led awareness programs should be introduced. Many Indian businesses remain unaware that sensory branding can be legally protected. A targeted effort to educate and enable them would unleash a new wave of creative IP filings.

Moreover, our legal education and judiciary must evolve. Law schools should teach modules on neuro-branding, AI-authored content, and immersive brand identity. Judges and IP

examiners must be sensitised to emerging issues around emotional memory, digital mimicry, and non-conventional mark infringement. Technology must be central to this shift—blockchain for immutable proof of ownership, AI for similarity detection, and smart contracts for dynamic licensing of sensory IP.

A crucial piece of the puzzle is harmonising trademark and copyright law. Many sensory assets—like motion logos or sound jingles—straddle both domains. India must develop interoperable application systems, unified enforcement mechanisms, and dual registration protocols that prevent redundant filings and legal uncertainty.

Finally, we must think beyond traditional IP altogether. The time has come for India to consider a sui- generis law specifically crafted for ultra-abstract brand elements—scents, tastes, and virtual experiences that don't fit neatly into existing legal boxes. With the rise of the Metaverse, AI-generated content, and immersive virtual branding, such a statute would not only plug legal gaps—it would place India at the forefront of global IP discourse.

In essence, protecting sensory and multi-sensory marks is not just about ticking legal boxes. It's about empowering creativity, building consumer trust, and enabling India's innovators to compete on the world stage. The invisible, after all, often holds the deepest emotional power. And by recognising the value of the unseen, Indian law can build a future that is as immersive, inclusive, and imaginative as the brands it seeks to protect.