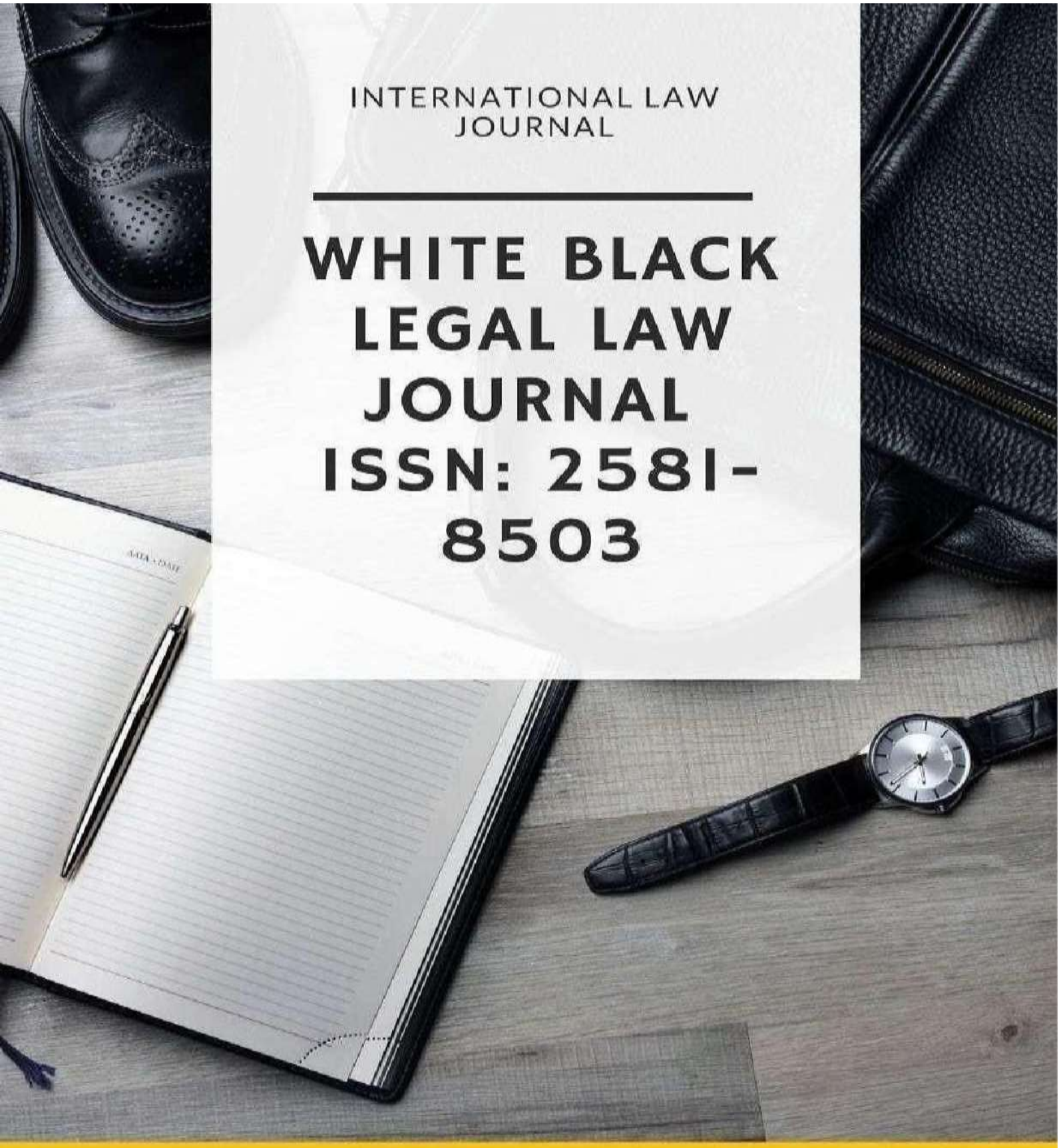

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PROTECTION OF NON-TRADITIONAL TRADEMARKS IN INDIA: A STUDY OF SOUND, SMELL, AND SHAPE MARKS

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ABSTRACT

This paper critically examines the legal framework governing non-traditional trademarks in India, with particular focus on sound marks, smell marks, and shape marks under the Trade Marks Act, 1999. It interrogates four interlocking questions: whether the graphical representation requirement operates as a structural barrier to registration; how India compares with the European Union, United Kingdom, and United States in accommodating non-traditional marks; whether Indian law should evolve to explicitly recognise smell marks; and whether shape mark protection risks conferring perpetual monopolies over functional product features. The paper argues that India's insistence on graphical representation, while rooted in legitimate concerns of legal certainty, is increasingly anachronistic in an era of digital filing systems. Drawing on comparative analysis and doctrinal critique, the paper proposes a graduated reform framework that preserves distinctiveness standards while dismantling the graphical representation barrier.

Keyword: Non-traditional trademarks India Unconventional trademarks, Trade Marks Act 1999, Graphical representation trademark law India, Sound marks India trademark registration, Smell marks trademark law, Shape marks functionality doctrine, Trademark distinctiveness non-conventional marks.

I. INTRODUCTION

Trademark law has historically conceived of marks in visual terms, words, logos, labels, and devices that consumers associate with a single commercial source. However, the sensory reality of modern commerce extends far beyond the visual. A mobile telephone plays a distinctive chime; a luxury perfumier uses a singular fragrance to identify its brand; an

ergonomically designed product communicates quality through its very contours. These non-traditional marks, sounds, smells, and shapes, occupy an uncertain and contested terrain in Indian intellectual property law.

The Trade Marks Act, 1999 defines a 'mark' broadly to include 'a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof'.[1] A 'trade mark' must additionally be 'capable of being represented graphically'.[2] This dual requirement, that a mark be a 'mark' and be 'graphically representable', has generated significant doctrinal tension when applied to sensory phenomena that resist easy visual expression.

The global conversation on non-traditional marks has advanced considerably since the turn of the millennium. The Court of Justice of the European Union (CJEU) laid down the celebrated *Sieckmann* criteria in 2002, requiring that graphical representations be clear, precise, self-contained, easily accessible, intelligible, durable, and objective.[3] The EU subsequently abolished the graphical representation requirement altogether in 2015.[4] India, by contrast, has retained the original formulation of the 1999 Act with minimal reform. This paper evaluates whether such legislative inertia is defensible.

The paper proceeds in five parts. Following this introduction, Part II addresses the doctrinal barrier posed by the graphical representation requirement. Part III offers a comparative analysis of EU, UK, and US approaches. Part IV considers the policy case for recognising smell marks. Part V interrogates the monopoly risks associated with shape marks. Part VI concludes with reform recommendations.

II. THE GRAPHICAL REPRESENTATION REQUIREMENT AS A DOCTRINAL BARRIER

A. The Statutory Framework

Section 2(1)(zb) of the Trade Marks Act, 1999 defines 'trade mark' to mean 'a mark capable of being represented graphically and which is capable of distinguishing the goods or

[1]Trade Marks Act, 1999 (Act 47 of 1999), s. 2(1)(zb).
[2]Ibid., s. 2(1)(m).
[3]Sieckmann v Deutsches Patent- und Markenamt (C-273/00) [2002] ECR I-11737 (CJEU).
[4]Regulation (EU) 2015/2424 of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark, [2015] OJ L 341/21.

services of one person from those of others'.[5] This formulation makes graphical representability a *threshold* requirement,a mark that cannot be graphically represented is not a trade mark at all, regardless of how distinctive it may be in the marketplace. The Trade Marks Rules, 2017 further require that all applications be accompanied by a representation of the mark in a prescribed form.[6]

For conventional marks,word marks, device marks, and colour marks,graphical representation poses no difficulty. The challenge arises with marks that are inherently non-visual. A scent cannot be rendered in two dimensions with any fidelity; a sound can be notated musically but such notation may not capture all acoustic characteristics; a three-dimensional shape mark, while representable through multiple views, may still fail to convey the tactile or gestalt qualities that create consumer recognition. The statute's visual default thus imposes an artificial constraint on trademark protection.

It is submitted that the graphical representation requirement, while serving legitimate purposes of public notice and register clarity,[7] has become an end in itself rather than a means to those ends. Legal certainty, the underlying rationale,can equally be achieved through technological means such as digital audio files for sound marks or olfactory databases for scent marks.

B. Sound Marks in India

Sound marks have achieved the most success among non-traditional marks in India, largely because they can be represented through musical notation or spectrogram. The Indian Trade Marks Registry has, in principle, accepted sound marks where accompanied by an MP3 file and a musical notation or description. Prominent global registrations, such as the Yahoo! yodel and the Nokia ringtone, have been extended to India through the Madrid Protocol.[8] However, Indian applicants continue to encounter procedural difficulties because the Registry's online filing system does not consistently accommodate audio attachments, and examination guidelines do not explicitly address the standard of description required for sounds that cannot be musically notated, such as animal vocalisations or mechanical sounds.

The absence of dedicated statutory guidance means that sound mark applications are evaluated on an ad hoc basis. Examiners may refuse applications on the ground that the

[5]Trade Marks Act, 1999, s. 2(1)(zb). The definition expressly requires that a mark be 'capable of being represented graphically'.
[6]Trade Marks Rules, 2017 (GSR 892(E)), Rule 25 and Form TM-A.
[7]P. Narayanan, Law of Trade Marks and Passing Off (6th edn, Eastern Law House, 2004) 12.
[8]Yahoo! Inc. v Akash Arora, (1999) 78 DLT 285 (Del HC).

description is insufficiently precise, a decision that mirrors the pre-*Sieckmann* position in Europe, without any settled criteria for what precision requires. This uncertainty discourages applicants and results in inconsistent Registry practice.

C. Smell Marks in India

Smell marks present the most acute challenge to the graphical representation requirement. In the landmark CJEU decision in *Sieckmann*, the Court held that a chemical structural formula, a written description, and a sample deposit, individually or in combination, could not satisfy the graphical representation standard for an olfactory mark.[9] If even these relatively precise methods failed European scrutiny, the position in India, where the statutory text is equally demanding and the Registry's technical capacity less developed, is almost certainly that smell marks are unregistrable under the current framework.

This is not a theoretical concern. India is the world's largest producer of essential oils and a significant player in the fragrance and flavouring industries. Distinctive product scents, the smell of a particular brand of incense, a proprietary fragrance incorporated into a cosmetic product, or even the scent used in a retail environment, may perform genuine trademark functions by signalling commercial origin to consumers. The law's failure to accommodate such marks leaves producers without an important tool of brand protection.

D. The Case for Abolishing the Graphical Representation Requirement

The most principled critique of the graphical representation requirement is that it conflates the *function* of the register with the *form* of representation. The register serves to give public notice, provide legal certainty, and delimit the scope of protection. These functions can be achieved through any representation that is clear, precise, self-contained, easily accessible, intelligible, durable, and objective, the *Sieckmann* criteria,irrespective of whether that representation is graphic, sonic, or digital. Mandatory graphical representation is thus a form-over-function requirement that has no principled justification in trademark theory.[10]

India's TRIPS obligations provide additional impetus for reform. Article 15(1) of TRIPS requires members to define registrable signs as 'capable of distinguishing the goods or services of one undertaking from those of other undertakings', and expressly contemplates that 'where signs are not inherently capable of distinguishing the relevant goods or services,

[9]Ralf Sieckmann v Deutsches Patent- und Markenamt (C-273/00) [2002] ECR I-11737, para 55.
[10]Annette Kur, 'Non-Traditional Trade Marks — Problems and Perspectives' (2009) 40(1) IIC 58.

Members may make registrability depend on distinctiveness acquired through use'.[11] TRIPS does not mandate graphical representation as a threshold requirement; it is India's *domestic* legislative choice that imposes this additional hurdle.

III. COMPARATIVE ANALYSIS: EU, UK, AND USA

A. The European Union

The EU's trajectory on non-traditional marks offers the most instructive comparison for India. The original Community Trade Mark Regulation required graphical representation, and the CJEU in *Sieckmann* elaborated a seven-limb test for any representation to qualify.[12] In subsequent cases, *Libertel* and *Shield Mark* extended these principles to colour and sound marks respectively.[13] The effect was that the bar for non-traditional mark registration was extremely high but not insurmountable, sound marks representable through musical staves passed, but smell marks uniformly failed.

The paradigm shift came with the 2015 amendment to the EUTM Regulation, which replaced 'graphical representation' with 'representation on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor'.[14] The implementing regulation elaborated specific formats for each non-traditional mark type: audio files in MP3 format for sound marks, video files for motion marks, and written descriptions combined with digital files for smell marks where available.[15] This technology-neutral approach allows the register to evolve as scientific tools for representing smells (such as gas chromatography profiles or olfactory databases) become standardised.

The European reform demonstrates that the twin goals of register certainty and broad mark eligibility are not in tension: the former can be achieved through format standards rather than through mandatory graphical representation. India would do well to follow this model.

B. The United Kingdom

Post-Brexit, the UK has implemented its own non-traditional mark framework through the Trade Marks Regulations 2019. Section 1(1) of the Trade Marks Act 1994 now requires only that a sign be 'capable of being represented in the register in a manner which enables the

[11]TRIPS Agreement, art. 15(1) (Marrakesh, 15 April 1994).
[12] Commission Implementing Regulation (EU) 2018/262, art.3(3).
[13]Libertel Groep BV v Benelux-Merkenbureau (C-104/01) [2003] ECR I-3793; Shield Mark BV v Joost Kist (C-283/01) [2003] ECR I-14313.
[15]Commission Implementing Regulation (EU) 2018/626, art. 3(3).

registrar and other competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor'.[16] The Intellectual Property Office (IPO) has issued detailed practice guidelines allowing sound marks to be filed with audio files and smell marks to be accepted where a sufficiently precise written description, supplemented where possible by a chemical formula or chromatography data, can be provided.[17]

The UK position is notable because it explicitly acknowledges that smell marks *may* be registered, subject to meeting the clarity and precision standard. No smell mark has yet achieved registration in the UK, but the doctrinal door is open in a way that it is not in India. This nuanced approach, acknowledging registrability in principle while maintaining stringent substantive requirements, represents a middle path between the permissive US approach and India's current near-total prohibition.

C. The United States of America

The United States offers the most permissive framework for non-traditional marks. The Lanham Act does not require graphical representation, defining 'trademark' simply as 'any word, name, symbol, or device, or any combination thereof' used to identify and distinguish goods.[18] The US Patent and Trademark Office (USPTO) will accept any mark that can be adequately described and that is capable of distinguishing goods or services in commerce.

The foundational smell mark case is *In re Clarke* (1990), where the Trademark Trial and Appeal Board (TTAB) allowed registration of a fresh floral fragrance of plumeria blossoms for sewing thread.[19] The TTAB reasoned that the scent was not functional (it served no purpose related to the thread's use) and had acquired secondary meaning. The Supreme Court's decision in *Qualitex Co. v Jacobson Products* confirmed that 'almost anything at all that is capable of carrying meaning' can serve as a trademark, provided it is non-functional and distinctive.[20]

The US approach is not without critics. The 'anything at all' standard may stretch the trademark system beyond its original purpose of preventing consumer confusion, potentially enabling brand owners to leverage trademark registrations for competitive exclusion. The Supreme Court's later decision in *Wal-Mart Stores Inc. v Samara Brothers Inc.* (2000)

[16]Trade Marks Act 1994 (UK), s. 1(1) (as amended by Trade Marks Regulations 2019, SI 2019/269).
[17]Intellectual Property Office (UK), 'Non-conventional trade marks' (Examination Guidelines, 2020) <https://www.gov.uk/guidance/trade-mark-manual> accessed 10 April 2025.
[18]Lanham Act (15 USC § 1127); USPTO, Trademark Manual of Examining Procedure (TMEP) §§ 807.09, 1202.13.
[19]In re Clarke, 17 USPQ2d 1238 (TTAB 1990) (fresh floral fragrance of plumeria held registrable for sewing thread).
[20]Qualitex Co. v Jacobson Products Co. Inc., 514 US 159 (1995).

expressed concern about the anti-competitive effects of protecting inherently distinctive product designs, requiring proof of acquired distinctiveness for product configuration trade dress.[21] Nonetheless, for smell marks specifically, the US remains the jurisdiction most receptive to registration.

D. Synthesis

The comparative survey reveals a spectrum of approaches. At one end sits the United States, with its capacious and technology-neutral definition that accommodates smell marks, sound marks, and shape marks with relative ease. In the middle, the EU and UK have moved from graphical representation to a representation-agnostic standard while maintaining rigorous substantive requirements. At the other end, India retains the graphical representation requirement in its original 1999 formulation, creating structural barriers that no other major trading partner imposes. Given India's growing integration into global value chains and its aspirations to become a significant intellectual property jurisdiction, this divergence is increasingly untenable.[22]

IV. SHOULD INDIA EXPLICITLY RECOGNISE AND REGULATE SMELL MARKS?

A. The Policy Case for Smell Mark Recognition

The policy argument for smell mark recognition rests on three pillars: economic incentive, consumer protection, and doctrinal consistency. First, scents can and do function as source identifiers in commerce. The Singapore Airlines 'Stefan Floridian Waters' cabin fragrance, the 'Play-Doh' smell, and the fragrance of Hasbro's 'Play-Doh' compound all illustrate that olfactory cues can be as strongly associated with a commercial source as any visual mark.[23] Denying legal protection to such marks creates a free-rider problem: competitors can copy a distinctive brand scent without incurring the investment required to develop it.

Second, consumer protection is advanced, not harmed, by smell mark recognition. Consumers who associate a particular fragrance with a trusted brand benefit from knowing that others cannot pass off inferior goods under that olfactory identifier. The confusion-prevention

[21]Wal-Mart Stores Inc. v Samara Brothers Inc., 529 US 205 (2000).
[22]World Intellectual Property Organization (WIPO), 'Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications: Non-Traditional Marks' (SCT/16/2, 2006).
[23]Shubha Ghosh, 'Reflections on Scent Marks' (2015) 5(2) Queen Mary Journal of Intellectual Property 115.

rationale of trademark law applies with equal force to sensory marks as to visual ones.[24]

Third, doctrinal consistency demands that the law's protection extend to all modes of commercial signalling. If Indian trademark law protects the visual appearance of a product, its acoustic signature, and the shape of its packaging, the principled basis for excluding olfactory indicators is unclear. The exclusion is a historical accident of drafting, not a reasoned policy choice.

B. Challenges Specific to Smell Marks

The case for smell mark recognition must engage seriously with the distinctive challenges these marks present. Three are particularly acute.

The **representation problem** is the most formidable. No currently standardised system permits the reliable and reproducible representation of a scent in a manner that satisfies the *Sieckmann* criteria of clarity, precision, and objectivity. Chemical structural formulae are inadequate because the same compound may smell differently in different concentrations or combinations. Written descriptions are inherently subjective, the description 'the smell of freshly cut grass' is neither precise nor self-contained because olfactory perception varies across individuals. Gas chromatography data are more objective but are not universally interpretable and cannot convey the gestalt experience of a complex fragrance.[25]

The **functionality problem** is a second significant obstacle. Trademark law consistently refuses protection to functional features, on the ground that monopolising them would impede legitimate competition. Many product scents are functional, masking unpleasant odours, indicating freshness, or reinforcing the product's intended sensory experience. The line between a distinctive brand scent and a functional olfactory property is difficult to draw, and over-protection risks creating anti-competitive monopolies in olfactory space.[26]

The **distinctiveness problem** is the third challenge. Scents, unlike words or logos, are not inherently associated with commercial sources in the minds of most consumers. Establishing acquired distinctiveness, secondary meaning,for an olfactory mark requires extensive evidence of long and exclusive use, consumer survey evidence, and expert testimony. The evidentiary burden is considerably higher than for visual marks, and Indian trademark courts have limited experience with such evidence.[27]

[24]N.S. Gopalakrishnan and T.G. Agitha, Principles of Intellectual Property (2nd edn, Eastern Book Company, 2012) 248.
[25] Christian Louboutin SAS v Van Haren Schoenen BV (C-163/16) [2018] ECR I-495
[26]Trade Marks Act, 1999, s. 9(3)(a)–(c).
[27]Cipla Ltd. v F. Hoffmann-La Roche Ltd., (2009) 40 PTC 125 (Del HC) — the court recognised non-visual

C. A Proposed Framework for Smell Mark Regulation in India

Notwithstanding these challenges, this paper argues that India should amend its trademark legislation to explicitly permit the registration of smell marks, subject to a rigorous regulatory framework. The following elements are proposed:

(i) Abolition of Graphical Representation. Section 2(1)(zb) should be amended to replace 'capable of being represented graphically' with 'capable of being represented in the register in a manner which enables the Registrar and the public to determine the clear and precise subject matter of the protection afforded to the proprietor', mirroring the EU and UK formulations.

(ii) Technology-Neutral Format Standards. The Trade Marks Rules should be amended to specify permissible formats for each non-traditional mark type. For smell marks, acceptable representations should include a chemical structural formula, a GC-MS (gas chromatography-mass spectrometry) profile, and a written description. The Rules should also permit the Registrar to prescribe additional formats as technology evolves.

(iii) Mandatory Distinctiveness and Non-Functionality Examination. All smell mark applications should be subject to enhanced examination for acquired distinctiveness and non-functionality. The burden of proving secondary meaning should rest on the applicant, with direct consumer survey evidence being ordinarily required.

(iv) Narrow Scope of Protection. Smell mark registrations should be construed narrowly to protect only the specific olfactory combination registered, not olfactory 'families' or similar fragrances. Infringement should require substantial identity, not mere similarity, so as to preserve olfactory space for competing users.

This framework draws on the Singapore model, which replaced graphical representation with a general representation standard and has issued detailed practice circulars for each non-traditional mark type.[28] It preserves India's commitment to distinctiveness and non-functionality while removing the anachronistic visual format requirement.

attributes as potentially relevant in trade dress contexts.

[28]Singapore IP Office, 'Circular No. 1/2019: Non-Traditional Trade Mark Applications', IPOS Practice Circular (2019).

V. SHAPE MARKS AND THE RISK OF PERPETUAL MONOPOLY

A. Shape Marks Under the Trade Marks Act, 1999

The Trade Marks Act, 1999 expressly includes 'shape of goods' within the definition of 'mark', thereby making shape marks registrable in principle.[29] However, section 9(3) imposes three absolute grounds for refusing registration of shapes: (a) shapes that result from the nature of the goods themselves; (b) shapes necessary to obtain a technical result; and (c) shapes that give substantial value to the goods.[30] These exclusions, mirroring those in the EU Trade Mark Directive, reflect legislative concern that trademark law should not substitute for the time-limited protection available under design law or patent law.

In practice, Indian courts and the Registry have grappled with shape mark applications involving well-known bottle designs, product packaging, and distinctive product configurations. While there is no equivalent of the extended Lego or Louboutin litigation in India, the Delhi High Court has in passing affirmed that three-dimensional product configurations can attract trademark protection where they have acquired secondary meaning.[31]

B. The Perpetual Monopoly Problem

The most serious objection to shape mark protection is that trademark registrations, unlike patents and design registrations, are potentially perpetual, renewable indefinitely provided the mark remains in use and retains its distinctiveness. This creates a risk that manufacturers will use trademark law to obtain a monopoly over product shapes after their design or patent protection has expired, thereby circumventing the legislature's deliberate decision to limit such protection to a fixed term.

The CJEU addressed this problem directly in *Philips v Remington*, holding that shapes necessary to obtain a technical result cannot be registered as trade marks because such registration would allow the proprietor to prevent competitors from using shapes 'even if that shape is the only one which could achieve the desired technical result'.[32] In *Lego Juris A/S v OHIM*, the Court extended this reasoning to refuse registration of the classic Lego brick shape, even though it had acquired worldwide recognition, on the ground that its studs were technically necessary for interlocking.[33]

In *Louboutin v Van Haren*, the CJEU drew a more nuanced line: a colour applied to the sole of a shoe (the Louboutin red sole) did not fall within the shape exclusion because the

[31]Tata Sons Ltd. v Greenpeace International, (2011) 178 DLT 705 (Del HC).
[32]Koninklijke Philips Electronics NV v Remington Consumer Products Ltd. (C-299/99) [2002] ECR I-5475.
[33]Lego Juris A/S v OHIM (C-48/09) [2010] ECR I-8403.

colour, not the shape of the sole, was the substance of the mark.[34] This distinction, between a shape mark and a mark *applied to* a shape,is relevant to India's adjudication of product configuration marks.

In the UK, the Court of Appeal's decision in *Cadbury v Nestlé* refused registration of the shape of Cadbury's four-finger Kit Kat bar, holding that the shape gave substantial value to the goods within the meaning of the relevant exclusion.[35] The decision underscores that even globally recognised product shapes may be excluded from trademark protection where the shape itself, rather than any source-identifying function, accounts for the product's commercial appeal.

C. Applying the Monopoly Analysis to Indian Law

The risk of perpetual monopoly is particularly acute in India because the doctrinal framework for challenging an existing shape mark registration is less developed than in the EU or UK. The abolition of the Intellectual Property Appellate Board (IPAB) in 2021[36] and the transfer of its functions to High Courts has created uncertainty in the post-grant challenges to trademark registrations. A registered shape mark can theoretically be challenged on the ground that it falls within one of the section 9(3) exclusions, but the procedural and evidentiary requirements for such a challenge are burdensome.

Moreover, Indian courts have not yet squarely addressed the intersection of section 9(3)(b),the technical necessity exclusion,with three-dimensional marks in the pharmaceutical sector, where tablet and capsule shapes may be both distinctive and technically necessitated. The Supreme Court's landmark decision in *Novartis AG v Union of India*, while dealing with patent law's Section 3(d) exclusion, articulates a broader principle that the IP system should not grant monopolies that impede access to goods essential to public welfare.[37] This principle should inform the interpretation of section 9(3) in the shape mark context.

D. Towards a Balanced Shape Mark Doctrine

This paper proposes that Indian trademark doctrine should develop along the following lines to address the monopoly concern without denying all protection to genuinely distinctive

[34]Christian Louboutin SAS v Van Haren Schoenen BV (C-163/16) [2018] ECR I-495.
[35]Cadbury UK Ltd v Société des produits Nestlé SA [2017] EWCA Civ 358 (Court of Appeal, England and Wales).
[36]Intellectual Property Appellate Board (IPAB) — note that IPAB was abolished by the Tribunals Reforms Act, 2021 and its functions transferred to High Courts.
[37]Novartis AG v Union of India, (2013) 6 SCC 1 (Supreme Court of India) — while dealing with patents, the Court's reasoning on functional monopoly is instructive for shape marks.

product shapes:

(i) **Strict Application of Section 9(3).** The Registry and courts should apply the three exclusions in section 9(3) strictly and not merely as a preliminary hurdle. A shape that results from the nature of the goods, serves a technical function, or gives substantial value to the goods must be refused registration even if it has acquired extensive consumer recognition.

(ii) **Acquired Distinctiveness Through Use.** For shapes that are not excluded under section 9(3), registration should require clear and convincing evidence of acquired distinctiveness,that consumers *primarily* perceive the shape as a source indicator rather than as a product feature. Survey evidence of the kind used in *Wal-Mart v Samara Brothers* should be required.[38]

(iii) **Periodic Distinctiveness Review.** Unlike word marks, which may retain their acquired distinctiveness indefinitely, product shape marks are susceptible to genericisation as shapes become standard in an industry. The Registry should be empowered to require, at renewal, fresh evidence that the shape continues to function as a source identifier.

(iv) **Narrow Construction of Shape Mark Rights.** Courts should construe the scope of shape mark protection narrowly, confining infringement to cases of substantial identity rather than mere similarity, so as to preserve freedom to operate for competitors and industrial designers.[39]

VI. CONCLUSION AND REFORM RECOMMENDATIONS

The protection of non-traditional trademarks in India stands at an inflection point. The Trade Marks Act, 1999 created the legislative architecture for a modern trademark system, but the graphical representation requirement has become a structural barrier that increasingly sets India apart from its major trading partners. Sound marks have found limited acceptance; smell marks are effectively excluded; and shape marks, while registrable in principle, are surrounded by insufficient doctrinal safeguards against monopoly abuse.

This paper has argued for a three-track reform programme. First, the graphical representation requirement should be abolished and replaced with a technology-neutral 'clear

[38] Wal-Mart Stores, Inc. v. Samara Brothers, Inc. 529 U.S. 205 (2000)
[39] Trade Marks Act, 1999, s. 9(1)(a)–(c) (absolute grounds for refusal).

and precise representation' standard, with format-specific rules prescribed under the Trade Marks Rules for each category of non-traditional mark. This aligns India with the EU, UK, and Singapore frameworks and removes an anachronistic drafting choice that was never a principled policy decision.[40]

Second, smell marks should be explicitly recognised under Indian trademark law, subject to stringent requirements of acquired distinctiveness, non-functionality, and representational precision. The economic rationale,protecting investment in brand-building through olfactory means,is compelling, and the policy challenges are surmountable through a carefully designed regulatory framework. India's fragrance and flavouring industries stand to benefit significantly from such reform.

Third, the doctrine governing shape marks should be strengthened through stricter application of the section 9(3) exclusions, mandatory acquired distinctiveness requirements, periodic distinctiveness review at renewal, and narrow construction of the scope of shape mark rights. These measures would preserve the legitimate function of shape marks as source identifiers while preventing the trademark system from being used as a vehicle for perpetual monopoly over functional or aesthetically significant product forms.

Taken together, these reforms would bring India's non-traditional trademark law into alignment with international best practice, better serve Indian innovators and brand owners, and ensure that the trademark system continues to fulfil its foundational purpose: facilitating honest competition by protecting the source-identifying function of marks while preserving freedom of competition in the marketplace. As India's economy diversifies and its brands become global, the case for a non-traditional trademark framework fit for the twenty-first century is not merely academic, it is a matter of economic and competitive urgency.[41]

[40]Draft National Intellectual Property Rights Policy, 2016 (Department For Promotion Of Industry And Internal Trade, Government Of India).
[41]Intellectual Property India, Annual Report 2022-23 (Office Of The Controller General Of Patents, Designs And Trade Marks, 2023).