

Registrability of non-conventional trademarks: A critical analysis

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ABSTRACT: *In the globalized age when international cross-border trade is taking place, marks have become a key tool to indicate an identity of the company. A good trade mark has its own picture, attaches distinctive personality to the goods and is a competitive essence. Modern marking law reflects some innovations in terms of "marking" itself. The 'modern market' is in the process of inventing new products that have a typical smell, special touch and uniqueness of sound to offer the 'modern customers' 'more' sensory' consumer products. While these new trademarks have still not been widely accepted in every jurisdiction, the use of these brands in contemporary markets is common. Modern times are the result of certain legislative amendments or judicial interpretations, new forms of sensory trademarks have become accepted globally as intellectual property. Non-traditional trademarks continue to be a practice in the modern market and the case-law is evolving in this respect. Studies show, however, that the request for non-traditional marks to be registered in international trade from the owners is increasing. On the contrary, in examination, registration and enforcement of these marks, there are no uniform standards worldwide. Against this background, this paper contains a brief history, by various case studies, on registration and enforcement of non-traditional marks, the reason for their protection under legal regimes, prevalent in the US, European Union (EU) and India. It also looks at how these marks perform their trademark functions. The paper also analyzes the problems caused by the absence of a uniform practice in the international examination and registration of non-traditional marks. It concludes with proposals to harmonize the review and registration process through different registers.*

Key Words: : Non-traditional trademarks, Smell marks, Sound marks, Colour marks, Holograms, Touch marks, Motion marks.

1. INTRODUCTION

THE trademark HISTORY is as ancient as human history. It started with the start of the flow of goods. It was believed that the Roman blacksmiths were the first users of marks on their swords. Potters used 'potter marks' in ancient Greece and Rome, to identify the vasa maker. The 'marketing mark' appeared particularly in the 10th century to demonstrate that shipwreck and other disasters held the ownership rights of missing items. The craftsmen and traders used to attach 'production marks' in guilds to differentiate their products from goods of lower quality. The Parliament of England owes credit to passing the first trademark law in 1266 which requires the bakers to use a distinctive mark for their bread. This helps them maintain confidence in the guilds and take action on manufacturers of goods of lesser quality for failure to meet Guild Standards. In 1857, France passed the Manufacture and Wars Mark Act and in 1862, Great Britain passed the Merchandise Marks Act. The Trade Marks Registration Act of 1875 allowed the official registration of marks at the UK Patent Office. Act 1875 defined trade marks as "a device or mark, or the name of a person or business, or a signature or a copy of an individual or firm in written form; or the specific label or ticket."

2. HISTORICAL OVERVIEW

The traditional and traditional trademarks for the distinction between goods like simple words, devices, logos and designs have long been used. Over time other elements have served as identifiers for the source of goods / services, other than words, logo, color combinations and graphic design, thereby fulfilling the function of marks. These new brands go beyond the nature, characteristic, scope and economic potential of traditional trademarks. In the branding strategies, the digital and social media revolution brought paradigm shifts. The most striking branding strategy of the 21st century are non-traditional trademarks.¹ This technological reevaluation has convinced many companies to use colour,² sound,³ smell,⁴ scent of the raspberries,⁵ touch⁶ and so on to experiment with "extreme marking."

¹Lindstorm Martin, Brand Sense: Build Powerful Brands through Touch, Taste, Smell, Sight and Sound (Kogan Page Publisher, 2005).

²For e.g., pink colour for fiber insulations of Owens Corning.

For more than a decade, form, colour, stitch design and sound have been used by various companies to represent brand origins, although they have been legal protected and registered thereafter. For example, only in the 1960 registration of trademarks was granted to the contour bottle of coca cola originally designed in 1915. The shape of the Coco-cola packages bottle is iconic and is the only brand recognizable in the world by itself.⁷ Since 1830s there had been colour trademarks. On its distinctive 'tiffany blue' packages Tiffany maintains a color mark–special blue boxes for the jewellery. Tiffany blue is a light blue shade, which the company created for its own 1845 products.⁸

Pink color trademark is another example. Since 1956, the isolation of Owens Corning⁹ has been dyed pink for visual contrast. As a result, the company became so connected with its pink insulation product that it recorded for its isolation the word mark PINK. While color blends, long protected as a trademark, it was only in the 1980s, when Owens-Corning launched the Think Pink campaign in favor of fiberglass insulating, that the US law recognized a single color as a trademark. Finally, pink color was deemed protective as a trademark by judicial resolution¹⁰ in 1985, and the US Court ruled the company's right to prevent others from applying 'pink color' for insulation.¹¹

History shows that a mark can also be a stitching pattern. From 1873 the arcuate stitching design or a prominent piece (strengthening red tab) was consistently applied to jeans as trademarks.¹² The lion's roar has been announced since 1924 by Metro-Goldwyn-Mayer Corporation (MGM). It subsequently requested that the sound mark be registered in 1985.¹³ The NBC chimes had been registered in 1950 for sound trademarks. Since 1994 Intel has been using its sound signature as an audio signature and is worldwide registered in several countries. Trademark rights are established by consumer acknowledgement in non-traditional marks.

3. REGISTRABILITY OF NON-TRADITIONAL TRADEMARKS

The trademark must meet certain statutory requirements in order to be eligible for protection and registration. Depending on national legislation, these requirements can vary from country to country. The TRIPS agreement itself provides this flexibility by seeking to achieve certain levels of standardization and uniformity in international treaties like The Paris Convention, the Madrid System, the Trade Mark Act Treaty, the Singapore Law Treaty etc. Registration for non-traditional marks is usually difficult to obtain as opposed to conventional marks. Some countries like India's legislation is silent and does not have any explicit provision on the registrability of non-traditional marks. Many countries provide some form of protection for non-traditional markings. However, it does provide the necessary directives on examination procedures and on the criteria for recording non-traditional trademarks in such cases by the trademark register handbook of the concerned registered trademarks. As with conventional trademarks, non-traditional trademarks have, pursuant to Article 15 of TRIPS, to fulfill fundamental prerequisites:

³Dhinchikdhinchik tune of ICICI is an example.

⁴For e.g., floral scent of thread as found in *In Ré Celia Clarke*, USPQ 2d 1238 (1990) (TTAB).

⁵Myles Ltd. 's Application (2003)ETMR 56

⁶Velvety surface of wine bottle of Diageo is an example.

⁷B.M. Katherine, "Non-traditional Trademarks: Tips for the 21st Century" Boardroom 37-39 (2011).

⁸Tiffany's Blue Book published this colour long back in 1845 with PMS number 1837 signifying Tiffany's year of foundation. They spent more than one century to establish colour alone as a trademark. Tiffany blue reveals the story of creativity in selection of a non-traditional trademark and more than 100 years dedication in the promotion of the colour mark to develop into a famous brand icon. See, Michelle Gonzale, "So Let the Paint be Spread, We're Painting the Soles Red" 15 (1) Wake Forest Journal of Business And Intellectual Property Law (2014).

⁹Owens Corning Corporation is rated as the world's largest manufacturer of fiberglass and related products.

¹⁰Re Owens-Corning Fiberglas Corp , TIA F.2d 1116 (Fed. Cir. 1985).

¹¹The cartoon character of the Pink Panther is being used by Owens Corning as a visual representation. According to the company, for years, it has used the colour pink and the Pink Panther as a way to distinguish its insulation products from other companies. Also see, Jerome Gilson and Anne Gilson LaLonde; "Cinnamon Buns, Marching Ducks And Cherry-Scented Racecar Exhaust: Protecting Nontraditional Trademarks" 95 (4) TMR 773- 820 (2005.)

¹²To promote the images of the arcuate stitching design and the red tab, the company ran regular advertising campaigns and it could establish consumer recognition in these mark.

¹³USPTO registration no. 1395550.

differentiation, view or graphical representation. It must be made from a distinctive sign capable of acting as the identifier of the source. It should not create confusion in the minds of the public, and should not deceive them. ¹⁴A specific type or graphic representation, acceptable in one country, of non-traditional trademarks may not be satisfactory in another country.¹⁵

4. SPECIAL CHARACTERISTICS

Modern technology has produced products more in the physical world than would otherwise be able to see, smell, touch, taste or hear. However, due to statutory omissions and lack of uniform practice, these marks are comparatively difficult to register. As mentioned above, the laws of various jurisdictions on trademarks include not-traditional trademarks as eligible subject-matter of protection by not excluding them from the definition of a trade-mark. These marks are based on look, shape, sound, odour, taste and texture. They are, of course, innovative works. Either they can be seen signs like color, shapes, moving pictures, holograms or invisible signs such as sounds, fragrances, tastes and textures. Inventive ways to communicate the source of the origin of the goods / services with consumers are not traditional trademarks. It provides traders in the global market with a dynamic opportunity. These characteristics have a large economic potential and leave consumers with their unique smell or touch a better level of commercial impression. Factors determining whether the signs can be registered include: the trademark impression, the relevant trade practice-whether the sign is uniquely or is just a refining of a common feature and whether there are any secondary uses of the sign. A mark which inherently did not function as a mark due to its nature would be necessary to demonstrate the acquired distinctive nature. For example, if the product itself is inherent in functional scents, such as smell for perfume, these marks should not be acceptable for registration in many jurisdictions. These marks must not be operative. Under the ' test of functionality,' even if a sign was used and could be used as a mark, the ' test of functionality,' if it was essential to use or purpose the product, or it affected its costs or quality, might not be able to distinguish between public policy issues.

5. RATIONALE FOR PROTECTION

TRIPS acknowledge that product form, packaging, trade dress and color combination are specifically registered as marks under the TRIPS agreement. While not explicitly referred to in the definition clause are marks, such as smells, sounds, tastes, touches, holograms, etc., a simple reading of this section suggests that the Agreement provides an inclusive definition and is broad enough to include such unconventional marks within its scope. All jurisdictions shall provide inclusive mark definition as such and, provided other legal requirements are complied with, there are no statutory prohibitions on non-traditional mark protection. Four essential functions of a non-traditional trade mark are: 1) to identify the source or origin; (ii) to link the trademark, the goods and the owner; (iii) to guarantee quality and (iv) to publicize the product.¹⁶ The potential is greater than conventional trademarks. In the new international trade environment, this has the greatest impact on consumers. Because the primary function of the trade mark is to identify the product, it is especially important to recognize non-traditional trade marks when people in the areas of low learning can not recognize conventional trade marks and usually identify goods with shapes, color, touch or aroma. For a section of society as visually impaired and illiterate , they have become very important, in which people can not recognize conventional marks.¹⁷

In view of developments in trade and business practices and the increasing globalization of trade and industry, the recognition of unconventional marks could also be justified. Several countries including the U.S. and the EU have accepted several unconventional trade marks and granted them their registration. Unconventional trademark assets are of high commercial value and a major part of an evolving business strategy and intellectual property Portfolio, like traditional trademarks.

6. CATEGORIES OF NON-TRADITIONAL TRADEMARKS

¹⁴ V. A. Mohta, Trademarks, Passing off and Franchising (All Nagpur, 2004).

¹⁵For e.g., a particular colour registrable in one jurisdiction may being a culturally or religiously relevant colour. Also see, Neha Non-Traditional Trademarks" 13(1) Journal of Intellectual property Rights 43-50(2008).

¹⁶Kerly, Law of Trademarks and Trade Names (Sweet and Maxwell, South Asian edn., 2007).

¹⁷See Graham Dutfield and Uma Suthersanes, Global Intellectual Property Law (Edward Elgar Publishing Ltd., 2008).

Non-traditional trademarks cover all five senses. It would have I any signs that are visible such as colors, shapes, moveable images, holograms, etc. or (ii) any invisible signs like smell, sound, feel or textures.¹⁸ The Indian Mark Registry Trademark Manual (Draft) 2015 stipulates that colour, sound, shape, packaging and odor markings fall into the category of unconventional marks.¹⁹ These marks are subject to different jurisdictions in the level of protection countries. In one country, protection can not be given in another country as a protective mark. The main categories of non Traditional Trademarks can be registered from a global perspective: The following:

- i. Smell/scent/olfactory marks;
- ii. Sound/aural marks/audio signature;
- iii. Tactile/touch/texture/haptic marks ;
- iv. Single colour marks;
- v. Shape marks/three dimensional/3D marks;
- vi. Taste/gustatory marks;
- vii. Holograms; and
- viii. Moving images/motion/animatedmarks .

a) SMELL MARKS

Also known as odour / olfactory marks are smell marks. As a trademark, Scent is theoretically safe. Odour marks are generally applied to cleaning products, cosmetics and soft materials. For the first time, the American courts²⁰ recognized the smell signs in which the application for registration was accepted as a graphical representation and granted trademark protection for the written description of the smell of "a high impact, fresh floral perfume evoking Plumería blooms." In this case, Smell was compared to colors although this is unrecommended scientifically. The court distinguished the functional and non-functional smell of products which have them as their inherent characteristics such as fragrances and so on. The trademark application in John Lewis of Hungerford Ltd.'s²¹ the trademark was represented graphically by the description that "marking includes the smell, aroma or essence of cinnamon" in relation to furniture. In view of the degree of subjectivity it enabled the application to be decided in determining whether the fragrance is an exemplary "smell, flavor or essence of cinnamon" and the extent to which the different perceptions by different persons could equally be viewed as benchmarks for the in the wording "smell, aroma or essence of cinnamon" A write description of the "smell of fresh cut grass" for tennis balls was accepted in the Venootschap Firma Senta Aromatic Marketing Application.²²

In Myles Ltd's application ²³on fuel and diesels "The smell of raspberries" was accepted. A "rose-resistant floral fragrance / smelling scent." was successfully registered by the Sumitomo Rubber Company in Great Britain, as it was applied to tyres. The world's leading producer of darts, the Unicorn Products, was awarded the mark with respect to their darts ' "strong smell of bitter beer" by the applicant.

In Sieckmann c. Deutsches Patent-und Markenamt,²⁴ the candidate had described the fragrance as "battle fruit with a little hint of cinnamon" There are some practical problems with regard to registration of 'smell marks.' The court first observed that a registered trademark could consist of a sign that could itself not be visually seen, so long as it could be graphically represented. Second, a clear, precise, self-contained, easily accessible, durable and objective graphic representation must be. The court ruled that the requirements for graphical representation are not met in written words with respect to the olfactory sign by a chemical formula. The chemical formula that represents the scent does not constitute the odor of a substance because it is not clear and precise sufficiently. In addition, a formulation does not represent the odour, but the substance itself. A deposit of the odor sample does not represent a graphical representation.

¹⁸HarsimranKalra, "Unconventional Trademarks: The Emergent Need for a Change" 4 India Law Journal (2007), available at: http://www.indialawjournal.com/volume 4/issue 1/ article_by_harsimran.html Oast visited on Feb. 25, 2015).

¹⁹Sr. No. 3 2.4 of Draft Manual, 2015 at 143, amilable at http://www.ipindia.nic.in/tmr_new / TMR_Manual/ TMR_DraftManual_11March2015.pdf last visited on May 28, 2015).

²⁰In Re Celia Clarke, USPQ 2d 1238 (1990) (TTAB).

²¹(2001) RPC 573.

²²(1999) E.T.M.R 429 OHIM BoA R 156/1998/2.

²³Myles Ltd. 's Application (2003)ETMR 56.

²⁴C-273/00, 2002 E.C.R I-1173.

Temperature, humidity and wind conditions affect Smell. Smell. It can become stronger or weaker. Perceptibility is another determining factor for smell, and thus physical, mental, sensitivity and health play a crucial role. The problem may occur more than with soundmarks, which graphically represent the mark. Many products have added fragrance to make the product more aromatic or pungent, as in case of perfumes, cosmetics, fabric conditioners, detergents, etc. These scents are unlikely to be taken by potential buyers to indicate the origin of goods. It is therefore uncomfortable to prove that a specific smell shows the goods of the trader. The courts have held que, in the form of a simple chemical formula, a description in written words and/or the deposit of a sampling odour, or a combination of those elements, the odour mark did not meet the requirements for graphical representation.

b) SOUND MARKS

Aural marks / audio signatures are referred to as the sound trademark. The sound of the famed theme song of Tarzan's yell,²⁵ merrie melodies,²⁶ the spoken letters ' AT&T'²⁷ and the sounds' ooh it's good' ²⁸are well-known examples of sound marks recorded in America. In India the graphical representation of sound marks can not be excluded. In addition to this,' dhinchichtchik (2011),' Yahoo yodel has become the sound signature given by Indian Trade Mark Registry (2008). Germany recognize sound signals in the USA, Austria, Denmark, France, Germany, Germany, Ireland, Italy, OHIM, Spain, Sweden, United Kingdom, Norway, Switzerland, Switzerland. The test is' whether other traders wish to use the sound in the ordinary business without improper motives.' It depends on whether the sound is or has become an distinctive trademark to accept a sound like words or other trademarks.

A sound mark may be songs, notes strings with or without jingles, famous sounds in nature, unusual sounds that occur in the wild or electronic sounds which do not occur in the wild. Classical music, for example, may prima facie be acceptable as a mark. The examiners must see, however, how more than a few classical music bars can be marked. The pitch or duration of notes, which are essential parameters of the sought-after recourse and therefore do not meet the requirements of clear representation, can not be determined in a mere musical sequence. Whole or large parts of classical pieces can be rejected because they are unlikely to be considered as a trademark. The acceptance of a sound trademark depends on whether the sound is or has become a distinctive sign; in other words, the average consumer perceives it as an exclusive trademark for a product. In the same way, a simple onomatopoeia alone can not fulfill the graphic representation requirement. Where the sound sign is graphically represented by a simple onomatopoeia, it is unknown whether it is the onomatopoeia itself or the true sound or noise from which the phonetary imitation is the onomatopoeia itself. Even when it is made clear that the signal is the pronounced onomatopoeia, it is not less likely because it is perceived differently depending on the individual that it lacks the required clarity or precision. offices can demand that the representation of sound marks be a musical notation on a stave, sound description that is a mark, or an Analog or Numerical recordings of that Sound, or any combination,,," says the World Intellectual Property Organization (WIPO) Standing Committee on Trademark Law, Industrial Designs and Geographical Indications (SCT).²⁹

The songs are usually used as chimos; popular music is known as entertainment, park services etc; kindergarten rhyme and music strongly associated with particular regions or countries for the type of goods. sounds can be accepted only with evidence of factual distinctiveness. The examples of these are: simple pieces of music consisting of only one or two notes; If, for registration purposes, the mark consists of a non-differentiated sound but contains other distinct elements, such as a word, it can be considered as whole. In determining whether the mark is distinctive or not, the registrar may require the applicant to provide such additional information about music submitted for registration, as may be necessary to the examiners. The proposed sound must be able to be registered graphically. Most sounds can be graphically represented by a visual musical notation. Musical notation and description of the sound in words can represent Soundmarks.³⁰ The title of the piece of music by itself can not meet the graphical representation requirement. If it forms part of the brand or if the sound emanates from a musical instrument, then the instrument on which music is played must be included. The representation must contain a graphic /

²⁵Registration no: 2210506, a yell consisting of a series of approximately ten sounds .

²⁶Registration no: 2473248, the mark consists of thirty musical notes .

²⁷Registration no: 1761724, the mark consists of the spoken letters 'AT&T'.

²⁸Registration no: 200096.

²⁹Report of the Standing Committee, on the law of Trademarks, Geographical Indications, WIPO SCT 16/9/2007.

³⁰Martin Lindstorm, Brand Sense: Build Powerful Brands through Sight and Sound (Kogan Page Ltd.2005).

electronic measurement of the sound volume and character. If the sound is partly represented by a visual notation, the application should contain a clarifying description in words of the sound. The graphical representations can also include onomatopoeic words, sonograms or spectrograms. The sound characteristics made in the use of products which arise exclusively because of such use can not constitute a good sound characteristic. The sound mark should also be non-functional. A siren's sound does not constitute a siren's trade mark. On the other hand, the application may be considered if the applicant can demonstrate that sound, although descriptive, has achieved "differentiation by usage." For example, registration may be granted with a toilet flushing sound for plumbing services, which has become distinctive through use.³¹

c) TACTILE MARKS

Also known as touch / texture / haptic marks are tactile marks. The conceptual protection of a distinctive touch, such as the 'velvety surface surface of a wine bottle' or the feeling of cotton, is to show the origin. Touch marks are also called haptic marks due to their origin from Greek haptesthai, which mean 'relevant to touch.' In 2006, the IMA adopted a "resolution supporting the recognition and recording of touch marks." In 1996, the US trademark Louis Vuitton Malletier sought protection for his luxury baggage and leather products, his 'distinctive human-made textured pattern used as a surface feature.' On the basis of an application file in the name of Underberg AG on the basis of several goods in classes 32 and 33, the German Patent and Trade Mark Register granted trade marks in 2003. For "container configuration used to dispense" facial tissue, Kimberly Clark is registered as a federal mark. Kimberly-Clark's intentional application to use its raised, alternative dot pattern on paper towels was also permitted by the United States Patent and Trademark Office (USPTO). Touchdown is registered with a trade mark in its basketball-shaped Cologne dispenser's 'pebble grain texture' and 'softer touch,' and Fresh Inc.'s 'cotton-texted paper' is a registered mark which is wrapped in its soap products. American Wholesale Wine & Spirits Inc. received a sensory, tangible and used Khvanchkara wine marking registration in 2006. A velvet textured coverage on the surface of a bottle of wine is the description of the registration of the mark.

It is not an easy task to transform touch into protective sensory branding. Tactile marks should not be functional, like other non-traditional trademarks. A cell phone that rings in the bag to get warmer can attract the attention of the user or an artificially adhesive steering wheel that increases his performance may not be registered. If the touch is 'essential to the usage and purpose of the article or affects its costs or quality inherently,' then legal protection shall not be guaranteed. When the touch mark is first used, a trademark doesn't work automatically. Artificial textures can not be eligible for trademark protection automatically. The established use over a period of time is usually claimed rights over the tactile marks. There is a shortage and less common non-traditional trademarks of recognized tactiles. There is therefore little legal authority.

d) COLOUR MARKS

The brand and trademark definitions refer only to a color combination. Therefore a color combination can be registered prima facie. Combined colors or even a single color with a word or a device can be registered statutorily. The main means of distinguishing the commercial source of the goods or services is seldom used as a single colour. However, if the proprietor uses the mark distinctively to make the public aware that it is a trade mark, they can be used like a secondary trade mark. In addition, the general public interest must be paid in respect of the fact that other traders do not unduly restrict color availability. A single color is only capable of indicating the origin of a product or service in exceptional circumstances. A single color may be registered as a mark if it is very unusual in a trade and is recognized as a badge of origin for the class of goods contained in Dyson Ltd's Trade Mark Application³². As in the Trademark application for Ty-Nant Spring Water Ltd's³³ colors per se would be free of unusual or fantaisie characteristics, given that they are considered publicly available and form part of the store of signs for all traders. There must be strong and very convincing evidence filed to support a claim of factual color distinctiveness. It must show clearly that the color mark only identifies goods or services to the consumer concerned by the applicant. There is a greater chance that the goods or services are restricted and the relevant market is specific.

³¹Also see, Hui Huang, "Comparative Study of Law on Trademark Application and Opposition in China and other Countries", available at: <http://www.ipr2.org/storage/Huang-EN932.doc> (last visited on Feb. 18, 2013).

³²2003 RPC 47.

³³(1999) ETMR 974.

A green gold color used for dry cleaning press pads, registered as a registered mark, where color has acquired distinctive character, was discovered in *Qualitex Co. v. Jacobson Products Co.*³⁴ According to a court, the 'sources-dividing capacity' of a sign allows it to serve as a mark rather than as a colour, form, fragrance, word or sign of its ontological status. In this case, green was deemed 'secondary' and was used to identify the brand with the green-gold color completely. No functional implications existed. However, a color may not be able to successfully register even with the acquired distinctiveness if the color is generally required in the commerce. In a judgment of 2012 *Christian Louboutin* was given protection for his mark of red color as used in the floors of Louboutin's shoes.

The color mark's registrability depends on the presentation and application of the colours. At the *Libertal*³⁵ Court the judgment was held that it would not be sufficiently durable to designate a color using an internationally recognized identification code (a mere sample of colour), especially on paper. A precise and stable graphic representation would constitute the designation of color using an internationally recognized identification code.

A single color per se is not inherently distinguishable. A pink color for fibrous glass residential isolation can be registered in *Re Owens-Corning Fiberglas*. In *KWS Saat*³⁶ a single orange mark application was dismissed on grounds of lack of distinctness with regard to the so-called seed and processing facilities for seeds and advisory services, as well as agriculture, horticulture and forestry products. However, if the specific color of the packaging is actually distinguished as the goods of a particular trader, the acceptance of the mark for registration must not be hindered. Many of our national trademark offices in Germany, Sweden, the UK, Norway etc. acknowledge the per-secondary registrability or distinguishability of a single color. If a color in respect of goods / services is fanciful, then it can be considered inherently distinctive and can be registered. To make up a trade mark, it must be possible to distinguish the products or services of one trader from those of other traders by colouring or a combination of colours.

According to the draft manual of the Indian Trademark Practice and Procedure, one means of showing the importance of color as a trademark is to use it as livery, i.e. as a coherent colors scheme for the designation of the commercial source in a number of products in the same general type. The use of such liveries for buses, trains and stations of vehicles is a good example of this use for services. On the other hand, evidence that an applicant uses a wide variety of color schemes in relation to goods or services of the same type tends to show that any such color scheme has a significant mark. Moreover, words made up of color names which consist exclusively of single color name do not have an inherent characteristic required unless it is unusual or unlikely to be required to be used for the goods in question by competitors. But the inherent distinctive character of fancy names such as 'pea-green' for the travel services or 'red and white' for cigarettes. Under prior use, distinctive characteristics can be established. The public interest is also justified in preventing single color marks from being registered per se because of the limited number of colors available. In the context of the matter of secondary significance certain considerations have to be considered to assess whether or not a secondary meaning was acquired. According to the international color codes, the current number is 1.800. In the case of the sale or publication of the product, the extent of third party use and consumer attention should be directed at the colour of the product.

e) TASTE OR GUSTATORY MARKS

Same trademarks in any jurisdiction, without strong proof of acquired distinctiveness, are extremely unlikely to be held inherently distinctive. In contrast to sound and odor marks, only goods and services can be tasted with taste marks. The WIPO SCT report says that a written taste description and an indication that a taste mark is concerned can fulfill the graphic representation requirement. The non-functionality test must however be passed. This is underlined by the decision of the US Board of Appeal in *In Re N.V. Organon*³⁷. In particular, antidepressants in fast-dissolving tablets and pills have not been registered for trade mark protection, since the trademark application for 'an orange flavor' for human pharmaceuticals has been denied. The Board also held that the taste of the applicant would not work as a trademark since there are numerous other orange flavored medicines. In fact "the flavor would not in any case function as a trademark." An orange aroma would not therefore be distinct from N.V for antidepressants. Product of Organon. The Board of Appeal also pointed out that flavor is the feature of the products and not the origin of the products. As the Court of Appeal has pointed out, the taste can difficultly define how taste can act as a

³⁴514 U. S. 159 (1995).

³⁵C- 104/01 [2003] E.C.R. 1-379.

³⁶C-447/02, October 21, 2004, ECJ.

³⁷79 U.S.P.Q. 2d (BNA) 16.39 (TTAB 2006).

trade mark when consumers taste only the goods after purch. It has been pointed out that it is not possible to detect the taste as a trademark.

f) HOLOGRAMS AND MOVING IMAGES

Motion marks comprise holograms, gestures, motion and moving marks that can combine colour, sound and product design aspects. They are the result of multimedia. The use of a sequence of images or drawings in this category of mark registration usually requires the functioning of the mark. A hologram is a photo sequence used to identify the commercial source of the goods / services for the trademark function. For decades holograms are used as anti-counterfeiting security devices. In recent times, holograms are used more and more as marks, although the requirement for graphical representability poses a challenge for trademark owners. A sequence portion consisting of the entire moving image could be provided such as the first or last frame, as long as the description of the mark clearly indicates the sequence as a whole. A single image may not adequately represent the mark, and a better sense of the overall sequences could be given by juxtaposing several representative frames.

Several motion marks, including a mark 'consisting of a pre-programmed rotation sequence, consisting of a plurality of high intensity light columns projected toward the sky for the purposes of finding a source at the base' of search lights for high intensity, were registried by the USPTO. On the other side of the logo, a dandelion flower was fancifully depicted. The motion feature of the mark was that, because of the wind, the individual seeds of the flour's buffalo ball were dispersed. Four different freezing frames of the motion mark were presented. At various points of movement the various frames were taken. In some jurisdictions protection was accorded as a motion mark to the Lamborghini car door motion because of its unique movement during the opening or closing of the door.

Although Article 4 of the Council Regulation of 1993 recognizes in the EU any sign that could be graphically marked, the Decision by Sieckmann limits the scope for a broad interpretation of the provision. The decision requires clear, precise and sustainable graphic representation by images, lines, or characters, solely for structured holograms. No trademark or trademark definition includes even holograms or move-like images specifically in India. However, they may not be registered as trademarks for no reason whatsoever. A USPTO registered trademark is Century Fox Film Corporation logo with floodlights trailing across the sky. In the USA, the trademark manual says that in the absence of evidence that a hologram used in different ways does not act as a trademark.

g) SHAPE MARKS

In particular, the United Kingdom Trade Marks Act of 1994 and the Indian Trade Marks Act of 1999 defined the forms as trademarks. Forms with important functional characteristics can not be recorded. The Indian Marks Act 1999 provides specifically that, provided it is solely a) in the form of goods resulting from the nature of the product itself; or (b) in the form that a product is necessary to achieve a technological result; or (c) in the shape of the goods giving substantial value to the goods itself, a mark may not be registered as trade mark.

Over the years the European Court of Justice and OHIM and the Indian judiciary outlined the inherent distinction of the three-dimensional trademarks which include the shapes of products. In the United States, the Lanham Act does not specify a trade mark form but modern practice incorporates a product's form and design into a business dress. The product form may be a trademark if it is distinguishable and not functional. In *Bongrain's Trademark Request*³⁸, because the trademark lacked character, the court rejected a three-dimensional cheese shape application. It also held that there was public interest in safeguarding signs that other traders should use to maintain freedom of action and competitiveness in relation to the same or similar goods. The perception of a sign by the public is generally extremely important and the public is not normally used to the forms that convey the value of the trademark. If it is proved that a form mark has actually gained distinctness via use it is easier to register a mark. *Coca-Cola Co. versus A.G. Barr&Co.*,³⁹ the form of the bottle was argued to be characteristic of the connection with the company.

7. GRAPHICAL REPRESENTATION VIS-A-VIS NON-CONVENTIONAL TRADEMARKS

The sine qua non of trade mark registration is graphic representation. The Global Trademark regime requires the trademark to be fixed or represented graphically, but the TRIPS Treaty does not require fixation criteria. However, under Article 15 of the Treaty on the Protection of Procedures and Trade Organizations (TRIPS), the Member States have the power to establish such a criterion by stating that'

³⁸[2004] EWCA Civ. 1690.

³⁹1961 RPC 387.

Members may require signs to be visual perceptible as a condition of registration.' An acceptable graphical representation must be submitted by the application form and capacity must be realized. For any applicant, the selection of the graphic representation is an important step since the mark is defined by the graphic representation. A definite point of reference indicates what the mark is in the graphic representation. The function of the graphic image is to visually represent the sign in question, so that it can be identified accurately.

The sign must be able to be displayed graphically in accordance with the Indian trademark law. It does not constitute a trademark unless this requirement is met. The expression "trade-mark" is defined as "a mark which is able to be represented graphically in the form of Rule 3(1)(k) of the Trademark Rules," which clarifies, among other things, that "graphical representation means the representation of a trademark in printed form for goods or services."

In addition, a mark must not be defined with absolute accuracy. The level of accuracy required depends on the mark itself and its distinguishing character. There are allowable variations in the graphical representation of each mark. It is up to the national court to determine whether a particular graphic representation in respect of an unconventional trademark is enough or not. Sieckmann Criteria are commonly acknowledged to be an emblematic decision on non-conventional trade mark graphic representation where, at the ECJ, the requirement for graphic representation is not fulfilled (i) by scientific formula; (ii) by wording, (iii) by the provision of an odour sample; or (iv) by a combination of such methods. The marks which can not be visually perceived do not include signs which can be graphically represented via images, lines or characters in which a clear, precise, self-contained, easily accessible, sustainable and objective representation is required. The Sieckmann criteria are generally known. As the TREAT case ⁴⁰suggests, "specific marks are often particularly problematic, particularly in color and appearance of the items or packaging." Such marks are rarely used as the main way of distinguishing the commercial source of the products and services. However, they can be used as secondary trademarks. The main point is usually whether the owner has distinctly used the mark to inform the public that it is a trademark.

SUGGESTIONS AND CONCLUSIONS

With the aim of harmonizing trademarks Hence, it is desirable to protect non-traditional trade Marks in light of the TRIPS Agreement and other related international trade marks. This also highlights the need to encourage both global and national investment technology. Since Madrid, the international registration system for registering marks has been in place. The application and application of traditional / conventional principles of markings pose certain difficulties. Significant issues: firstly; the harmonization of trademark criteria and the application, in analogy, of the same criteria as traditionalized harmonizing the registration procedures, in particular the corresponding representation of the sign, by an office / mark register that accepts it. These trademark registers of jurisdictions are sufficiently clarified to provide for the need for distinguishability of the trademark registry rather than more traditional marks and for graphical representation criteria, particularly in relation to non-visible marks. In the case of olfactory marks, for example, whether a chemical form and/or other means of representativeness could be accepted by the Registry? With regard to color per se marks, does this colour-coding have to be reproduced in a plain form or is the color code required, or is the trademark registry required to detail in the application form those colors as applied or as applied to the products? At least, the WIPO needs to develop uniform guidelines regarding non-traditional trademark graphic displays. In relation to representations, description and application of the principles of trademarks to non-traditional trademarks, the WIPO Standing Committee on IT (SQT) may establish proper guidance.

There is still some grey sphere in this regard: (a) the potentially economic relevance of these marks to the less developed market; (c) the possibility of overlapping protection with, for example, copyright with the patent and design of motion marks in the case of marks of form; and In order to clarify these issues, WIPO studies are needed. Such studies are useful in finding common approaches. A wise combination of practical examination techniques, basic analysis of trademarks and some policy discussions can help establish boundaries among the various rights to intellectual property.

Some registries, such as the USPTO, IPO, have developed specific examination practices for ad hoc handling, as more requests for non-traditional trademarks have been received over the years. The requirements for the graphical display of new types of signs must be harmonised. Uniform procedures for registration in respect of non-traditional trademarks must be guidelines.

⁴⁰(1997) E.T.M.R. 118.

Increasing technological development results in a deviation from conventional trademarks and international acceptance of non-traditional trademarks. There is nothing to treat non-traditional trademarks other than traditional trademarks in the legal practices of different jurisdictions. International standards on the registrability of trademarks vary by country. However, in different jurisdictions, the issues of distinction and graphic representation are more or less the same.

On the modern global market, when traders market their products internationally market their products, it is desirable to have a uniform policy on Non-traditional TRIPS Member States where the sale of products seems to be hampered by the discrepancies in the interpretation of images that exist within certain countries. A uniform policy registration and protection of non-traditional trademarks is a pressing need for the international community. The Singapore Trade Marks Treaty of 2006, which was signed in 2009, should be accepted. The various national legislation is amended to include, implicitly or explicitly, non-trademarks as it opens a completely new exploration and offers more and more branding possibilities. Harmonized trademark application and non-traditional trademark procedure and common development in international trade are the requirements for the hour.